LEGAL RECEPTION OF THE GIGS ECONOMY

A. INTRODUCTION

Over the years the labour markets in many countries have seen a gradual change from the traditional employment models to flexible working models. In many developed countries like America, the United Kingdom and Australia, their workforce is set to undergo major transformations. There are many factors which have caused this shift or change in the labour markets including the inception of the millennial generation into the workforce.

There is a new phenomenon known as "the gig economy" which is taking place across the world in the labour markets. Like the computers and mobile phones, this new phenomenon is set to revolutionize the labour markets in the world. In some countries the gig economy phenomenon is advancing rapidly and impacted their labour markets significantly. Others including Malaysia, the gig economy phenomenon is still relatively new and at the infant stage. It has yet to have significant effect on the labour markets of Malaysia. Nevertheless, one thing for certain, the gig economy is going to revolutionize and dominate the labour markets in time to come.

B. WHAT IS GIG ECONOMY?

There are many definitions to the term of "gig economy" but generally it can be understood as an environment or labour market characterized by the prevalence of short term contracts or freelance works as opposed to permanents jobs.

The gig economy gets its name from each piece of work being akin to an individual "gig", although such work can fall under multiple names. The word "gig" is commonly used in America to mean a piece work that one do for money especially if the person is self- employed. The gig economy is part of a shifting cultural and business environment that also includes the sharing economy, the gift economy and the barter economy. These are the direct result of macroeconomic forces such as globalization, outsourcing and technology.

In gig economy, workers are paid for each individual "gig" they do such per food delivery or a car journey as opposed to by day or by hour. Uber and Deliveroo services are an example of the gig economy. Gig economy at its core are mostly app-based platforms that dole out work in bits and pieces such as driving passengers, cleaning homes or making deliveries of foods and goods.

However, not all gig economy roles revolve around a technology platform. Freelancers in gig economy can also work for traditional companies which would like to change their hiring system to increase the fluidity of their workforce.

C. TRADITIONAL EMPLOYMENT VS THE GIG ECONOMY

No doubt that the freelance work arrangements and short term contracts jobs have long been common in certain industries such as in writing, consulting, design and accounting but in recent years these working arrangements have moved into a broader range of occupations and industries. More people are veering away from traditional employment models in favor of the freelance work. Many workers particularly the millennial are disenchanted with their 9 to 5 routine and have an increasing desire for flexible and diversified works. Others may be due to inability to secure employment in the challenging labour market especially in the recent years due to global economic slowdown, have turned to freelancing work out of necessity.

Growth of digital platforms is also one of the main factors for rapid growing of the gig economy. There are many digital platforms that allow freelancers to swiftly connect with the employers to find more assignments, market their skills, manage various clients and accept secure payments.

D. THE LEGAL PERSPECTIVE OF THE GIG ECONOMY

While the workers in the gig economy like the flexibility, they often suffer from job security and others labour protections. Most of the countries including Malaysia, the workers in the gig economy are regarded as independent contractors as opposed to employees. Freelancers or part time workers are engaged through the contract for service. Employees on the other hand are employed by their employers through the contract of service. The law makes a clear distinction between contract of service and contract for service.

In Malaysia, there are many laws on the protection of employees. The two main legislations are the Employment Act 1955 ("the EA") and the Industrial Relation Act 1967 ("the IRA"). These legislations provide protections for the employees.

The EA regulates the terms of the employment and the relationship between employee and employer. It states the rights and entitlement of the employee and employer. It also contains provisions on employment terms such as payment of salary, annual leave, sick leave, maternity leave, termination notice and other matters pertaining to employment. However, as stated above, this Act only applies to employees. *Section 2 of EA* defines "employee" to means any person or class of persons:-

(a) Included in any category in the First Schedule to the extent specified therein;

(b) In respect of whom the Minister makes an order under subsection (3) or section 2A;

The *First Schedule* provides as follows:-

1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed two thousand ringgit a month;

2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which:-

(1) he is engaged in manual labour including such labour as an artisan or apprentice:

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be

performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one half of the total time during which he is required to work in such wage period;

(2) *he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;*

(3) *he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work;*

(4) *he is engaged in any capacity in any vessel registered in Malaysia and who:-*

(a) *is not an officer certified under the Merchant Shipping Acts of the United Kingdom as amended from time to time;*

(b) *is not the holder of a local certificate as defined in Part VII of the Merchant Shipping Ordinance, 1952; or*

(c) has not entered into an agreement under Part III of the Merchant Shipping Ordinance, 1952; or

(5) he is engaged as a domestic servant.

The emphasis on the definition of "*employee*" is that it only includes any person or class of persons who has entered into a **contract of service** with the employer. Therefore, the EA is not applicable to independent contractors such as the freelancers in the gig economy.

It is interesting to note that the Minister by virtue of *Section 2(3) of EA* has a wide discretion to declare any person or class of persons to be deemed as an employee or employees. It reads as follow:-

> *"The Minister may by order declare such provisions of this Act and any other written law as may be specified in the order to be applicable to any person or class of persons employed, engaged or contracted with to carry out work in any occupation in any agricultural or industrial undertaking, constructional work, statutory body, local government authority, trade, business or place of work, and upon the coming into force of any such order:-*

(a) any person or class of persons specified in the order shall be deemed to be an employee or employees;"

It would seem that when there is a real and urgent need for the workers in the gig economy in Malaysia to be granted the protections under the EA, the Minister has the discretion to include these freelancers under the protection of the Act. However, as stated earlier, the gig economy in Malaysia is still at the infant stage and there has yet been any serious call for labour protections to be given to this class of workers.

Likewise, the IRA which governs and regulates the relationship of workers and employers is also only applicable to workers who are engaged by the employers pursuant to contract of service. *Section 2 of IRA* defines "workman" to mean:-

"any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute."

The Federal Court of Malaysia (the apex Court in Malaysia) in the case of *Mary Colete John v. South East Asian Insurance Bhd [2010] 8 CLJ 129*, in interpreting the term "contract of employment", had this to say:

> *"It is apparent that in Malaysia, the term "contract of employment" is used interchangeably with "contract of service" as noted above in the Employment Act 1955 and the Industrial Relations Act 1977 respectively. However despite the difference in the way in which legislation has defined the term "contract of service" or "contract of employment" the essential characteristic of these definitions is that the contract must be between an employer and an employee with regard to the provision of service by the employee. It is also to be noted that by statutory definition the term "workman" is used interchangeably with the term "employee".*

Therefore, it is apparent that the IRA only caters for employees under the contract of service. Like the EA, it does not cover the freelancers in the gig economy.

The freelancers in gig economy have very little protections under the Malaysian's labour law. The freelancers have to rely on the provisions in their contract for service with the companies that engage their services.

Their rights and liabilities are within the four corners of their contract for service. They depend on the principles of the law of contract for protections.

Unlike an employee, the freelancers do not have the benefits of statutory vested rights and entitlement such as sick leave, superannuation, etc. They will have to negotiate with the companies that engage their services for such benefits and entitlements.

The EA and IRA, aside from governing the relationships between the employee and employer also provide a forum for the resolution of disputes between them. The IRA is a piece of social legislation and the Industrial Court of Malaysia is a creature of the IRA. *Section 30(5) of the IRA* provides as follow:-

> *"The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form."*

The Industrial Court of Malaysia is a court of equity and it has the exclusive power to order reinstatement of the worker who has been unfairly dismissed. The freelancers or part time workers in the gig economy do not have the benefits and privileges provided by the IRA.

The employees in Malaysia are entitled to social security protections under the *Employees' Social Security Act 1969 ("the ESSA")*. It is mandatory for all the employees and employers to make contributions toward this social security fund known as *SOCSO*. Any employee who has suffered personal injury due to an accident or occupational disease arising out of and in the course of his self-employment activity shall be entitled to claim disability benefits under the *ESSA*. For the independent contractors, it is not mandatory for this class of workers to make contributions toward this social security fund. More often than not, no contribution is made for these workers and as such they were deprived of the protections under the *ESSA*.

Superannuation in Malaysia is also compulsory pursuant to the *Employees' Provident Fund Act 1991*. It is mandatory for all employees and employees to make monthly contributions toward this fund. Like the *SOCSO*, it is not mandatory for the workers and the companies to make contributions for this class of workers.

D. SETTING THE COURSE OF THE GIG ECONOMY

As the gig economy continues to gain momentum in many countries, unions have raised concerns about the welfare of these workers, including the loss protections such as sick leave, insurance, superannuation and unfair dismissal. With the current system geared towards permanent

employees, there is a real and urgent need around the world to clarify how these workers will be treated under the law.

The current Malaysian's labour law does not extend to the workers in the gig economy and afford very little protections to them. There have been many recommendations on the protections to be afforded for this category of workers in various jurisdictions which are currently experiencing rapid growth in the gig economy.

The simplest and direct method is to regard this category of workers as employee within the definition of the relevant Acts. As stated above, under the *Employment Act 1955*, the Minister has the power to make any order for any person or class of persons to be deemed as an employee. This indeed would be a convenient method of extending the protections under the *EA* to this category of workers.

With the rapid growth of the gig economy, there has been an increasing awareness on the needs to have better protections for the workers in this category as they have become an essential and significant part of the workforce.

The courts and labour tribunals are beginning to adopt a purposive approach when interpreting the term "employee" to include this category of

workers as part of permanent employee, entitling them to the protections under their existing labour laws.

In October 2016, Uber drivers in the United Kingdom won the right to be classed as workers rather than independent contractors. The ruling by a London employment tribunal meant drivers for the ride-hailing app would be entitled to holidays pay, paid rest breaks and the national minimum wage. It was a "monumental victory" for some 40,000 drivers in England and Wales. Be that as it may, the company has been granted an appeal which will be heard at the Employment Appeal Tribunal in London on 27 & 28 September 2017.

And in January 2017, an employment tribunal in the United Kingdom found that Maggie Dewhurst, a courier with logistics firm City Sprint should be classed as a worker rather than independent contractor, entitling her to basic rights.

Alternative, new legislations can be enacted specifically to protect this category of the workers. Recently in Malaysia, the government passed a law known as the *Self-Employed Social Security Act 2017 ("the SESSA")* extending the social security protections previously only available to employee to self-employed person. By virtue of the *SESSA*, a self-employed person who has suffered personal injury due to an accident or occupational

disease arising out of and in the course of his self-employment activity shall be entitled to claim disability benefits. However, this Act only covers the registered taxi drivers in the country. The Government of Malaysia has expressed its intention to extend the scope of *SESSA* to self-employed person in other sectors. This is a step forward taken by the Government to protect the self-employed person in the country.

Another method of ensuring this category of workers is being given adequate protections is to unionize them under one single union for all the informal workers. The union would be able to regulate and look after the welfare of these informal workers. Many of the freelancers are not well versed in the labour laws and may not know their rights. The union is able to provide them with the necessary information and to educate them.

Also, to set the course of the gig economy in the right direction, companies should be encouraged to provide cultural and financial incentives to this class of workers on their own accord. By doing so, not only it can attract more people to participate in the gig economy, the companies would also be able to get and retain the best and brightest talents.

In the United Kingdom, a review was recently conducted on the Uber style employment, headed by Matthew Taylor. The followings are some of the recommendations made to better protect this class of workers:-

(a) Employees should be given the rights to request fixed hours or permanent contracts;

(b) The Loy Pay Commission should look at asking companies to pay workers a higher minimum wage when they refuse to give them guaranteed hours – known as a "zero hours surcharge";

(c) Sick pay should be given to casual workers;

(d) All casual workers must be given a full list of their rights, written in plain English, on day 1 of their new job to stop bosses pulling the wool over their eye;

(e) Calls for companies to disclose how they deal with complaints from workers; and

(f) Companies will have to pay millions of pounds in national insurance contributions.

The Taylor's review has so far received mixed reaction from the industries bodies and the Government of United Kingdom is currently looking

into the recommendations as to implement the changes will require an overhaul of employment law in many areas.

E. CONCLUSION

With the rapid growth of the gig economy spurred by the rise of digital talent marketplaces, the labour markets in many countries are set to undergo major transformations and there is a real need now for policies around the world to clarify how this class of workers will be treated under the law.

In Malaysia, the current system is geared toward permanent employees and freelancers have very little protections. Many people are still in favor of the traditional employment system which provides security of tenure. Currently, the gig economy only forms a relative small part of the labour markets in Malaysia and there is yet a need to change the existing employment law.

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