LHAG Insights

Employment & Industrial Relations

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Gig Workers: Where Do They Stand?

Gig economy workers are independent contractors or freelance workers who typically do short-term work for different clients. This includes ride-hailing apps, food delivery apps, holiday rental apps, and so on. The gig economy was defined in Malaysia's 2021 Economic Outlook review as:

> "*… a free market system, characterised by temporary job positions where corporations tend to engage independent workers for short-term durations. Unlike the traditional economy, the gig economy is characterised by flexible, temporary, or freelance jobs with irregular income and working hours*".[1]

The number of gig workers has grown, especially since the COVID-19 pandemic. Many people lost their full-time/traditional jobs as a result and are in need of a new source of income or a more flexible working arrangement. It was reported that Malaysia has around four million freelance workers, and the number is anticipated to grow continuously given the rise of such digital platforms.

How are employment statuses determined?

Workers in the gig economy are often seen as self-employed or independent contractors due to the flexibility in terms of working hours, place of work and the method in which the job is done. This is obviously very different from employees in the traditional sense, as the latter are controlled by their employers and bound by their employment contracts.

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[1] Malaysia's Economic Outlook 2021
https://belanjawan2021.treasury.gov.my/pdf/economy/2021/economic-outlook-2021.pdf

A person will only be considered an "employee" or "workman" for the purposes of the Employment Act 1955 (**EA 1955**) and Industrial Relations Act 1967 (**IRA 1967**) if he or she is under a contract of service[2] or contract of employment.[3] Generally, when determining whether there was an "employer-employee" relationship in any given case, the courts will apply the "control test" as laid down in *Hoh Kiang Ngan*.[4]

The Federal Court in *Hoh Kiang Ngan* expressed that:

> "*… In all cases where it becomes necessary to determine whether a contract is one of service or one for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion…*".

In order to ascertain whether a person is an employee, the courts will look at the amount of control in which the employer has over the particular employee. A person who is engaged under a contract for services, however, is an independent contractor and does not fall under the definitions of either "employee" or "workman". The Industrial Court in *Bu Yoon Lian*[5] referred to the English case of *Ready Mixed Concrete*,[6] where the conditions to determine a contract of service were identified:

(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master;

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subjected to the other's control in a sufficient degree to make that other master;

(iii) The other provisions of the contract are consistent with it being a contract of service.

This goes to show that the courts will also look beyond the written agreement between the parties, i.e. whether the label given to a contract reflects the reality of the facts in any given case. For example, an employer cannot claim that an employee is an "independent contractor" merely because their contract was labelled as such, if the reality of the facts is that the relationship between the parties was akin to an "employer-employee" relationship.

Recent decision on status of Grab drivers

Grab drivers provide services to end users as part of Grab's

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2 Employment Act 1955 [*Act 265*], ss 2, First Schedule
3 Industrial Relations Act 1967 [*Act 177*], s 2
4 *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 [*391*].
5 *Bu Yoon Lian v Meng Sin Corner* (Award No 1183 of 2021: http://www.mp.gov.my/eicpp/MainServlet?action=cmgtView&caseId=28642)
6 *Ready Mixed Concrete (Southeast) Ltd v Minister of Pensions* [1968] 1 WLR 439

business, i.e. driving customers who book rides with the Grab app. Even though gig economy workers enjoy the freedom to decide when and how long they work, the downside to it would be that they are unprotected in the event of termination of a contract. This was confirmed by the High Court in July 2021,[7] when it ruled that Grab drivers fall outside the ambit of "employees" and "workman" for the purposes of the EA 1955 and IRA 1967, and thus not entitled to claim for unfair dismissal. It was held that the relationship between Grab and its drivers was purely built on a commercial contract basis.

A similar case was decided rather differently by the UK Supreme Court where Uber drivers were found to be "dependent contractors" who are registered as self-employed but provide a service as part of someone else's business,[8] given the degree of control that Uber has over its drivers.[9] This decision effectively allowed Uber drivers to enjoy limited statutory protection such as the national minimum wage and holiday pay.

However, Grab drivers in Malaysia do not enjoy the same privileges, since they fall outside the ambit of the EA 1955 and IRA 1967 and they will not be entitled to the basic benefits provided under Malaysian employment law such as minimum wage, rest days, sick leave and maternity benefits.

As gig workers in Malaysia do not fall within the ambit of the EA 1955, they are similarly not covered under the Minimum Wage Order 2020.[10] It was reported in the news recently that Amazon Flex gig-style drivers have been granted enforceable minimum pay rates for the first time in the world following a landmark decision by the New South Wales (**NSW**) industrial relations tribunal.[11] The historic ruling, which Amazon was not involved in, will see NSW couriers who use their cars to transport customers' orders earn at least AUD37.80 an hour by 1 July 2025, about a 40 per cent increase from the online giant's current pay. This was a decision hailed by unions and making it the world's first jurisdiction to compel the retailer to follow laws on such payments,[12] despite the status of the drivers as being akin to independent contractors.

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7 *Loh Guet Ching v Menteri Sumber Manusia & Ors* (Judicial Review Application No WA-25-296-10/2020)

8 *Uber BV and others (Appellants) v Aslam and Others (Respondents)* [2021] UKSC 5

9 Employment Rights Act 1996 (England and Wales), s 230(3)(b)

10 Malay Mail, 'Gig economy workers not included under definition of workers, says deputy minister' (*Malay Mail,* 8 November 2021) https://www.malaymail.com/news/malaysia/2021/11/08/gig-economy-workers-not-included-under-definition-of-workers-says-deputy-mi/2019292#:~:text=with%20their%20employers.-,Gig%20economy%20workers%20are%20individuals%20who%20are%20self%2Demployed%20and,the%20payment%20already%20agreed%20upon

11 https://www.caselaw.nsw.gov.au/decision/17f0ac9ebc84a010c6fc924b#

12 Byron Kaye, 'Australian state sets minimum pay for Amazon contractors in landmark step' (Reuters, 18 February 2022) https://www.reuters.com/business/retail-consumer/australian-state-sets-minimum-pay-amazon-contractors-landmark-step-2022-02-18/

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Protection of gig workers' rights

Given their exclusion from the EA 1955, IRA 1967 and Minimum Wage Order 2020, workers in the gig economy are often bereft of any protection in the event they lose their source of income or are unable to work due to illness or even pregnancies. The COVID-19 pandemic also revealed the most obvious example: if a Grab driver tests positive for the virus and is required to serve his mandatory quarantine, the danger then lies with these workers being left unprotected with no income during the quarantine period.

Having said that, gig workers are not completely without legal protection. At present, they are covered under the protection of Self-Employment Social Security Act 2017,[13] which allows them to make contributions to SOCSO or any self-employment social security agent. However, as highlighted, the protection afforded to them is significantly lesser than employees in the traditional sense.

Recent proposed amendments to the EA 1955

The lack of protection for gig workers has always been a major source of debate among the gig workforce, given the surge in demand for these types of workers yet the job security offered to them remains worryingly low.[14] Therefore, the pressure on the government to implement effective provisions to safeguard the welfare of these workers has been higher than ever.[15]

The Deputy Minister of Human Resources recently announced the government's intention to amend the EA 1955 to include a new section **101C**,[16] which aims to classify e-hailing drivers (i.e. Grab drivers) as "employees".[17] This may mean that gig economy workers would now be protected under certain statutory rights such as paid leave, rest days, working hours, break hours, etc.

However, on closer inspection of the Employment (Amendment) Bill 2021,[18] it provides that in any proceeding for an offence under the EA 1955, in the absence of a written contract of service relating to any category of employee under the First

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13 Self-Employment Social Security Act 2017 [*Act 789*], First Schedule, s 2

14 Samuel Chua, 'More people taking low-paid work, says economist' (*Free Malaysia Today,* 15 January 2021) https://www.freemalaysiatoday.com/category/nation/2022/01/15/more-people-taking-lowly-paid-work-says-economist/

15 Putra, 'Gig Workers' Rights: Safeguarding The backbone of Our Gig Economy' (24 July 2021) https://putra.org.my/2021/07/24/gig-workers-rights-safeguarding-the-backbone-of-our-gig-economy/

16 Priya Sunil, 'Malaysia's HR ministry is looking to get gig workers covered under the Employment Act' (*Human Resources Online*, 3 December 2021) https://www.humanresourcesonline.net/malaysia-s-hr-ministry-is-looking-to-get-gig-workers-covered-under-the-employment-act

17 FMT Reporters, 'Employment Act to be amended to cover e-hailing drivers' (*Free Malaysia Today,* 2 December 2021) https://www.freemalaysiatoday.com/category/nation/2021/12/02/employment-act-to-be-amended-to-cover-e-hailing-drivers/

18 https://www.parlimen.gov.my/bills-dewan-rakyat.html?uweb=dr&#

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Schedule, it shall be presumed that a person is an employee if certain factors are present.[19] The factors giving rise to a presumption of employment are also wide enough to cover gig work such as e-hailing drivers, and leaves room for uncertainty as to whether some contracts for service (independent contractors) may be deemed employment through operation of law. However, no amendment has been proposed to the First Schedule of the EA 1955 which states the scope of the applicability of the Act. Without this, there is uncertainty on how this amendment would be applied in practice, to determine who is considered an employee. If the status of gig workers in Malaysia is elevated to that of employees as defined in the EA 1955 and IRA 1967, this may mean that they would automatically be entitled to minimum wages and other protections under the law.

The deputy minister had further proposed that the government work with service providers and industry players in the gig economy on the possibilities of creating a specific law for e-hailing riders with the aim of providing similar protections as traditional employees. However, it is still unclear as to what such protections are and whether they may even include affording minimum wages to gig workers. It would then beg the question, who would bear the extra costs? Would the companies absorb the additional costs, or would it be passed down to consumers? While it is still too early to see how such a proposal would affect the gig economy at large and whether there would be adverse consequences in the long run, nevertheless this is a welcome development, as there would be more certainty in the interests, welfare and legal status of all gig workers.

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[19] Employment (Amendment) Bill 2021, Clause 44