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COMPARATIVE ANALYSIS OF EMPLOYMENT LAWS IN PROTECTING FOOD RIDERS: A PATH TO FAIRNESS AND BALANCE

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Abstract

The emergence of online platforms has led to the proliferation of the gig economy. It allows food riders the flexibility to choose when and where they work, and they are responsible for managing their own work arrangements. The freedom accorded to these riders is different from traditional full-time employment arrangements. Full-time employment status or an independent contractor is essential to determine the protection under the law. The paper poses the question of whether the amendment to the Employment Act 1955 in 2023 provides protection to food riders. To answer the question, the provisions of the Act will be analysed and as a basis of comparison the law in the UK and Australia will be referred. As such, the decision in *Franco* v *Deliveroo Australia Pty Ltd* (2021) and *Uber BV and Others* v *Aslam and Others* (2021) will be looked into. The paper's finding indicates that even with the amendment to the Employment Act 1955, the court's reliance on the traditional definitions of the employee remains crucial for obtaining legal protection. With the emergence of the gig economy, it is advisable to establish a clear provision that offers protection to these riders.

Keywords: Gig economy, Food riders, Legal, protection, interest

1. INTRODUCTION

The term 'gig' is defined in the Oxford Dictionary as "a live performance by a musician or group playing popular or jazz music". It is believed that the word 'gig' was first invented by the jazz communities in 1915 to refer to their performances or engagements (Zen, 2021). The musicians, during those times, were freelancers and moving from one gig to another. On the other hand, the gig economy refers to the definition of the labour market in which workers are engaged under short-term contracts or as independent contractors. The advancement of technology with the emergence of digital platforms facilitates the connection between gig workers and clients have sharpened the gig economy as it is today. Digital platforms such as Amazon Mechanical Turk and Airbnb were one of the pioneers that contributed significantly to the development of the gig economy. Over time, many other digital platforms began to appear and some of those platforms such as Uber, Grab, and Food Panda became synonymous with to gig economy. These platforms provide an opportunity for an individual to offer their services such as food and groceries delivery, ride-hailing, freelancing and task-based work.

The gig economy's rapid expansion draws both employees and employers companies who can benefit from the labour market's preference for flexible scheduling and the latter's need to cut expenses (Javits & Luby, 2022). In Malaysia, the COVID-19 pandemic in March 2020 has seen an increasing trend in the demand for meal delivery (Statista Market Insight, 2023). While flexibility continues to attract individuals to flock to the gig economy, concerns have been raised regarding these workers' welfare. Mohd Salleh et al., (2022) identified low pay, lack of insurance coverage, poor safety, lack of maintenance allowance, and lack of late-night allowances amongst the concerns raised by the p-hailers or food riders. In order to highlight the issue and raise public attention as well as the government's over their plight, these food riders have resorted to strikes (Adib & Kalbana, 2022; Mohd Salleh et al., 2022).

The paper argues that the legal mechanism could be used as a social tool to address the welfare of food riders. To date, there is no specific law for p-hailers and therefore they have to rely on the existing employment legislation. There are many employment legislation in Malaysia that aim to provide protection provided they are deemed to the employees. However, one of the main obstacles faced by p-hailers is the need to pass the threshold test, i.e. is p-hailer an employee of the company? The debate about whether food riders are employees and hence protected under the employment legislation is an ongoing issue in many countries including Malaysia, the UK and Australia. The aim of this paper is to examine how the courts construe the relationship between p-hailers and the company since the nature of employment of-hailers is different from traditional employment. Case law on traditional employment has established that there is a difference between those employed under a contract of service and a contract for service. As such, this paper asked a specific question whether the courts, in interpreting the contract make any distinction between p-hailers and traditional employment. Since the amendment to the Employment Act 1955 came into force in January 2023, no cases have been brought to the court to determine the employment status of p-hailers. Therefore, reference to the decision in the UK, Australia and New Zealand is made due to their persuasive nature in order to gauge how the courts in Malaysia will decide. The outcome of the case analysis will contribute to the body of knowledge and will assist the policymakers in improving the existing law or whether the introduction of specific legislation is necessary.

2. LITERATURE REVIEW

The survey on the literature is divided into three main themes. The first theme focuses on the welfare, or lack of welfare of food riders. The second theme looks at the definition of employees and their effect thereof from a legal perspective.

The advancement of technology and the rise in demand for food delivery has provided an opportunity for flexible working time for many. The demand for the service has particularly increased during the COVID-19 pandemic (Ali et al., 2021). While the gig economy provides opportunity and flexibility to workers as never before, it also presents challenges in terms of workers' rights, income stability and social protection. Many have written to highlight the food riders' predicament such as poor working conditions, lack of regulation and absence of job security (Mehta, 2020; Nguyen-Phuoc et al., 2022). P-hailers are not entitled to employee benefits such as the Employees Provident Fund (E.P.F) and benefits provided under Social Security Organisation (SOCSO), unlike traditional workers who are considered employees by the law (Mohd Salleh et al., 2022). Chaisse & Banik (2021) stated that those who consider gigs as their full-time job are not even employees of the company, so they do not receive any other benefits provided to employees, like health insurance, paid time off, family leave protection, etc. A recent study by Nguyen et al., (2023) found that the delivery sector especially during the health crisis in 2020 provides stability to the supply chain and ensures urban residents have sufficient provisions. Nevertheless, the key actors in the delivery chain have seen their working conditions deteriorating and income reduced. The study also found that the majority of Vietnamese delivery riders, especially young and less experienced ones, lack full social and health insurance. The same findings were found by Mohd Salleh et al. (2022 where the majority of these riders are young and very concerned about their income. Since they are paid by the number of delivery made, there is a tendency for them to rush and ignore the traffic law resulting in accidents. As cited by Bernama (2022) in Mohd Salleh et al., (2022), Malaysia has one of the highest motorcycle accidents, primarily p-hailing or riders carrying packages or food.

There are many benefits accorded to employees under the Employment Act 1955. The latest amendment to the Act was in 2022 which came into force in January 2023 and aims to provide greater protection and welfare for employees. The amendment was also to ensure that the labour law in Malaysia is aligned with International Standard and cater to the needs of changing nature of the workforce. Apart from Employment Act 1955, there is other legislation that provides benefits to employees. Unfortunately, none of these benefits is available to food riders because there are not by definition, an employee. The case of *Arun Kumar Bag* v *Hospital Pantai Indah Sdn Bhd* [2015] 3 ILR 580 illustrated the principle. It provides that the Industrial Court has jurisdiction over only one type of employment contract, namely the contract of service. The existence of a vast flexible workforce with very limited workplace protection poses potentially troubling consequences for economic security (Javits & Luby, 2022). Gig workers are not

covered under the standard employment contract because their payments are based on the work they undertake and complete. There is no scope of compassion for the workers should they fail to perform the job due to something such as falling sick or if a broader downturn in the economy causes a decline in business. (Chaisse & Banik. 2021).

In the case of *Tekun Concrete (M) Sdn Bhd* v *Zulkafah Norazri* [2021] MLJU 2535, defines a contract of service as "an agreement whereby one person agrees to employ another as an employee and the other agrees to serve his / her employer as an employee. The employer would need to contribute EPF and comply with relevant statutory benefits such as annual leave, sick leave and et cetera for its employees engaged under a contract of service. On the other hand, a contract for service is an agreement whereby a person is engaged as an independent contractor, such as a self-employed person or vendor engaged for a fee to carry out an assignment or a project for the company." The High Court emphasised the important distinction between a "contract of service" and a "contract for service." The judge's ruling highlighted that an individual employed under a contract for service lacks an employer-employee relationship, thus falling outside the scope of the Employment Act. This legal differentiation determines whether an individual is entitled to employment benefits and protections provided by labour law. The case underscores the importance of correctly categorising the nature of employment relationships to ensure proper legal treatment.

Due to the benefits of being deemed as an employee, many app-based riders from various countries are now fighting to be recognised as employees rather than independent contractors (Nguyen et al., 2023; Defossez, 2022; Dolber, 2020). As an employee, the worker, for example, is accorded the security of tenure, equating the right to employment with the right to property and could only be dismissed with just cause and excuse (*Hong Leong Equipment Sdn Bhd* v *Liew Fook Chuan & Anor*, [1997] 1 CLJ 665).

3. METHODOLOGY

The paper adopts doctrinal legal research which analyses and interprets legal principles, rules and case law on Employment law. As such, a comprehensive examination involving Employment and other related statutes; decided cases in Malaysia and other Commonwealth countries such as the UK and Australia as well as other legal sources to understand the law. This method will only focus on the law itself and not on the application of the law. The epistemological analysis of common law doctrinal legal methodology seeks to address the fundamental question in employment law, i.e. who is an employee? The answer to this is important because it will determine whether a food rider is entitled to the protection accorded by the Employment legislation. The method delves into the way judges decide cases and is bound by official legal texts. Any uncertainties in the legislation and legal texts are resolved by the courts whose utterances will become official legal texts. Knowledge and reality of employment law could be used as a social construct to improve the plight of food riders in Malaysia.

4. RESULTS AND DISCUSSION

There is still uncertainty in the law as to whether food riders fall under the interpretation of a contract of service and contract for service. Though the general consensus is that they do not, courts in different jurisdictions have come to different conclusions. In the appeal decision of the UK case of *Uber BV & Others* v *Aslam & Others* [2021] UKSC 5, the Supreme Court had to consider the main question of whether an Uber driver is a "worker" for the purposes of employment legislation which gives "workers" rights to be paid at least the national minimum wage, to receive annual paid leave and to benefit from certain other protections. In reaching the decision in the affirmative, that the drivers were working and under the contract with UBER, the court looked at five important aspects such as:

a) Uber set the fare and the drivers were not allowed to be charged more than calculated by the app
b) the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them

c) once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber
d) Uber also exercises significant control over the way in which drivers deliver their services. (using the rating system)
e) Uber restricts communications between passengers and drivers to the minimum necessary to perform the particular trip and takes.

Lord Clarke acknowledged the difference in the nature between employment contracts and other ordinary commercial contracts is that in the latter, parties are often of equal bargaining power. As such, a purposive approach in interpreting the contracts to determine the reality of the situation and reliance should not be placed solely on the written agreement. This case, however, does not represent the position of the food riders.

In contrast, the Court of Appeal in *The Independent Workers Union of Great Britain* v *Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952*,* the case concerning the rights of food riders to form a Union, concluded that the food riders were not in an employment relationship with Deliveroo. The decision was based on the findings of the court that the riders are genuinely not under an obligation to provide their services personally and have unlimited rights of substitution. The riders' ability to substitute themselves during work was incompatible in the opinion of the Court with the obligation to provide personal service, the necessary requirement for them to fall within the purview of the Trade Union and Labour Relations Act 1992. It seemed that the Court of Appeal was of the view that this was the material factor to determine employment status. It should be noted that both cases involved different types of legislation in respect of different rights.

In the Australian case of Diego *Franco* v *Deliveroo Australia Pty Ltd* [2021] FWCFB 5015, a case where a food rider claimed for unfair dismissal remedy under the Fair Work Act 2009. The court considered both decisions of the UK cases and concluded that the decisions were made in respect of particular statutory provisions which are quite distinct from the Australian common law position. The court found that the dichotomy of the common law principle has produced ambiguity, inconsistency and contradiction to the ordinary meaning of employee. The Fair Work Commission has found that a food delivery worker riding a bicycle was an employee and entitled to the unfair dismissal remedy while dismissing a similar claim from a food delivery worker driving a motor vehicle on the basis that he was an independent contractor (Barbaschow, 2018).

In *Franco*, the High Court decided that the question of the employment status of a person should be addressed by adopting the multifactorial approach which involves consideration of various factors with no single factor in particular being decisive. The judge further commented in para [102]:

"*Further, the multilateral approach has been identified to not involve any "universally accepted understanding of how many indicia, or what combination of indicia must point towards a contract of service, the balancing exercise is necessarily impressionistic. Further, it has been described as a smell test or a level of intuition. In addition, the appreciation of the totality of the picture that is presented includes an element of practical reality, and it must also avoid the formation of a view derived from any notion that it would be appropriate or desirable for the person to be classified as an employee, as opposed to a determination that the individual is an employee"*

The indicators used by the court in *Franco* were:
a) Control- the indicium which the court considered important where it involves not just actual control but the capacity to exercise control. The Court concluded that Deliveroo, in the economic reality of the situation would compel a rider to undertake delivery work despite there being no requirement that requires a rider to work for a particular length of time or even to accept the delivery work once they logged in.

b) Work performed for competitor-despite express permission for a rider to work for any of its competitors, the court compared the proposition similar situation where casual or part-time employees might work for multiple employers. Nevertheless, the court acknowledged the phenomenon of change that makes it possible for an employee to multi-apping due to technological advancement which allows them to be simultaneously present in two different workplaces.
c) The terms and terminology of the Supply/Supplier Agreements- another important factor but need to be read cautiously due to the inequality of bargaining power of the parties.
d) Provision of equipment- Capital Outlay and expertise. The rider provided his own vehicle and did not have a substantial investment in the capital equipment. There was no high degree of skill or training required to use or operate the vehicle in performing the delivery service. The delegation or subcontracting to another person while an indicator of an independent contractor, the court looked at the reality that a casual employee may need to find a replacement if he could not work at a predetermined engagement.
e) Presentation as part of the business-the rider wearing Deliveroo attire and used the equipment displaying the Deliveroo brand logo indicated the company encouraged the riders to present themselves as part of the business.
f) Other factors including mode of remuneration, taxation, holiday and sick leave, distinct profession or trade and potential goodwill.

In Malaysia, the amendment to the Employment Act 1955 by inserting the new section 101C which was thought to provide a silver lining to the food riders. The section provides a rebuttable presumption in the absence of a written contract of service that a person is an employee if any of the following factors exist:
a) where his manner of work is subject to the control or direction of another person;
b) where his hours of work are subject to the control or direction of another person;
c) where he is provided with tools, materials or equipments by another person to execute work;
d) where his work constitutes an integral part of another person's business;
e) where his work is performed solely for the benefit of another person; or
f) where payment is made to him in return for work done by him at regular intervals and such payment constitutes the majority of his income.

Section 101C establishes guidelines for determining employment status, particularly for riders or workers engaged in gig economy platforms. It states that the section only comes into play when there is no written agreement between the parties. In cases where there is a written agreement, section 101C does not apply, and the terms of the agreement will govern the employment relationship. In the circumstance where there is a written contract, the p-hailer's employment status would depend on the court's interpretation of the terms of the contract. As noted by the judge in *Uber BV & Others* v *Aslam & Others* [2021] UKSC 5, due to the unequal bargaining position in an employment relationship, the interpretation of the employment contract is not to be determined by the ordinary principle of contract law. Courts need to be mindful of the unequal bargaining position between gig workers and the platforms they work for and adopt a purposive approach to protect the workers; rights effectively. In addition, the factors listed in section 101C bear similarities to common law considerations used by the courts to determine employment status. As such, when faced with disputes or cases involving gig economy workers, the courts will carefully examine the factual circumstances of each case to determine whether an individual should be classified as an employee or not.

One notable benefit of section 101C is that it presumes the workers to be employees unless proven otherwise. This presumption lessens the burden on riders or gig workers to demonstrate that they should be considered employees rather than independent contractors. It is a positive step to protect the rights of workers and ensure they receive appropriate employment benefits and protection. It needs to be emphasised, however, that until and unless a case is brought before the court, there is no precedent by the Malaysian courts. Thus, as it is, the employment status of p-hailers in Malaysia remains unclear. From the analysis of cases, it can be concluded that the courts in determining whether a p-hailer is an employee scrutinised the facts of each case and one of the main factors used by the courts was the element of control exercised by the company on p-hailers The courts also acknowledged that there is the need to take into

account the reality of the working relationship and the potential for exploitation by the company in gig economy arrangements. In addition, the courts acknowledged that the nature of the work arrangement in the gig economy is different from traditional employment.

5. CONCLUSION

While section 101C provides some clarity on the status of gig workers as employees in the absence of a written agreement, the extent of its implications will largely depend on how courts interpret and apply the provision. The decisions by the courts have shown inconsistencies in the status of employment of workers in the gig economy; an Uber driver has been accorded an employee status by the court in the UK while a food rider is denied the status as an employee. Meanwhile, in Australia, a food rider is regarded as an employee and could claim remedies for unfair dismissal. Since the cases highlighted that there is a thin-line distinction between employees and freelancers, there is a need for legislators to enact specific legislation on p-hailers that offer benefits to food riders or gig economy workers without requiring them, to prove their employee status explicitly. Research on the need to have specific legislation could be a topic to be explored in the future. The enactment of a specific legislation could further strengthen workers' rights and provide greater protection in the evolving landscape of employment relationships.

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