

Evolving Workstyles, Evolving Challenges:
A Malaysian Perspective on Gig Labour Relations

I. INTRODUCTION

The gig economy in Malaysia has experienced rapid expansion due to the substantial impact of digital platforms, leading to a transformation of traditional employment structures and posing challenges to current legal frameworks. A report by McKinsey & Company in 2016 projected that the gig economy is expected to make a contribution of USD 2.7 trillion to the global economy by 2025, which corresponds to around 2 percent of the total global economy.¹ The gig economy has been identified as a new source of economic growth and is incorporated into the 12th Malaysia Plan, as announced by Tun Dr. Mahathir Mohamad in 2019.² Data from the World Bank show that freelancers account for approximately 26 percent of Malaysia's 15.3 million workforce, and the tendency is increasing.³

The rise of gig workers in Malaysia poses significant challenges for policymakers and lawmakers, as their current legal classification denies them essential employment rights, such as collective bargaining. Classified as 'independent contractors' or 'self-employed', they lack protection under existing employment laws. Despite offering flexibility, the gig economy presents complex challenges requiring strategic solutions. This paper analyses Malaysia's employment laws and the obstacles faced by gig workers in accessing collective representation through trade unions, aiming to shed light on the complexities of gig labour relations in Malaysia.

II. CONCEPTUALISING GIG ECONOMY LANDSCAPE IN MALAYSIA

Despite the growing prevalence of gig work and the references to it in official government announcements and mainstream media,⁴ gig work lacks a legal definition in Malaysia.

Malaysia is not alone in this. Globally, there is a recognised gap in defining and measuring gig workers⁵ which is critical for effective policymaking so that regulations governing gig workers are adapted to their unique needs and vulnerabilities.⁶

¹ Manyika, J., Lund, S., Bughin, J., Robinson, K., Mischke, J., & Mahajan, D. (2016). Independent work: choice, necessity and the gig economy. *McKinsey Global Institute*. <https://apo.org.au/node/201601>

² Ahmad, N. (2021). Gig workers: the new employment form in the new economy. *Ulum Islamiyyah*, 33(S4), 131–145. <https://doi.org/10.33102/uij.vol33nos4.419>

³ Ibid.

⁴ The term 'gig worker' gained prominence in Malaysian newspaper headlines during the COVID-19 pandemic, the term gaining popularity when ride-sharing platforms like Uber and Grab entered the Malaysian market.

⁵ Harun, N., Ali, N. M., & Khan, N. L. M. A. (2020). An experimental measure of Malaysia's gig workers using labour force survey. *Statistical Journal of the IAOS*, 36(4), 969-977.

⁶ Goh, E., & Omar, N. (2020, November 20). *Not all 'Gig workers' are the same* | *The Centre*. *The Centre*. <https://www.centre.my/post/gig-workers-are-not-all-the-same>

In the absence of a legally accepted definition of gig workers in Malaysia, existing literature is referred to in an attempt to conceptualise the application of the term ‘gig workers’ in the Malaysian context.

Generally, the term ‘gig’ in the gig economy refers to the short-term arrangements used in musical events (gig work), which have parallels in the gig economy.⁷ Gig economy refers to an economic shift in which employment is becoming more temporary, unstable and patchworked.⁸ The tasks underlying the gig economy are also typically short-term, temporary, precarious and unpredictable, with access depending on good performance and reputation.⁹

Tina Brown, a journalist for The Daily Beast, first used the term “gig economy” in 2009 to refer to the trend of workers pursuing ‘a bunch of free-floating projects, consultancies and part-time bits and pieces while they transacted in a digital marketplace.’¹⁰ The phrase ‘the demand and supply of working activities are matched through online platforms or via mobile work on-demand via apps’ is frequently used to describe this phenomenon, along with the terms ‘on-demand economy,’ ‘platform economy,’ and ‘sharing economy’.¹¹

At the international level, research conducted within the International Labour Organisation (ILO) employs the concept of “digital labour platforms” which “include both web-based platforms, where work is outsourced through an open call to a geographically dispersed crowd (‘crowdwork’) and location-based applications that allocate work to individuals in a specific geographical area.”¹²

In Malaysia, gig workers are often classified as independent contractors by the Department of Statistics Malaysia (DOSM) due to their independent and often informal work nature.¹³ DOSM categorises gig workers under the umbrella term ‘own-account workers’, referring to individuals who operate their own businesses without hiring paid workers. This classification is based on data collected through the Labour Force Survey (LFS), which aims to gather information on the labour force, employment, and unemployment in Malaysia.¹⁴

⁷ Woodcock, J., & Graham, M. (2019). *The gig economy. A critical introduction. Cambridge: Polity.*

⁸ Ibid.

⁹ Ibid.

¹⁰ Gani, H. (2020). Article: The Gig Economy: Platformisation and Fragmentation of Work - Institute for Labour Market Information and Analysis (ILMIA). <https://www.ilmia.gov.my/index.php/en/component/zoo/item/article-the-gig-economy-platformisation-and-fragmentation-of-work>

¹¹ De Stefano, V. (2015). The rise of the just-in-time workforce: On-demand work, crowdwork, and labor protection in the gig-economy. *Comp. Lab. L. & Pol’y J.*, 37, 471.

¹² Valerio, D. S. (2021). Platform work and the employment relationship. <http://hdl.handle.net/10419/263093>

¹³ Department of Statistics Malaysia. (2020). Gig Workers in Malaysia: A Review of Definitions & Estimation. DOSM’s Newsletter 2020/. https://v1.dosm.gov.my/v1/uploads/files/6_Newsletter/Newsletter%202020/DOSM_MBLS_1-2020_Series-8.pdf

¹⁴ Department of Statistics Malaysia. (2019). Labour Force Survey Report 2018. In <https://newss.statistics.gov.my/>.

Regardless of the lack of a unified definition for gig workers, the paper will focus on the term ‘gig economy’ in the context of labour markets characterised by independent contracting that occurs through, via, and on digital platforms, and participants in the gig economy as ‘gig workers’ in accordance with ILO classification. In this context, the wide range of activities that are executed through ‘online platforms’ and ‘work on-demand via apps’ can be categorised into two task-oriented platforms:

- (a) **Crowdwork** or **cloudwork**¹⁵ is web-based, on-demand labour, where tasks are completed behind a computer anywhere. Some of the examples are copywriting, translating and coding work.
- (b) **Gig work** or **geographically tethered work**¹⁶ is platform-mediated, location-based labour, where selected individuals are connected to tasks by a platform or work-on-demand app, and the work is completed offline. For instance, e-hailing, food delivery and household services.

Despite efforts to categorise gig workers, challenges persist in quantifying their numbers accurately,¹⁷ even in Malaysia. Data from Malaysia Digital Economy Corporation (MDEC)¹⁸ primarily covers registered formal establishments operating digital platforms, potentially underrepresenting self-employed workers operating informally on digital platforms.¹⁹

According to DOSM statistics for 2018, 2,859.2 thousand people were self-employed or own-account workers, making up 19.6% of Malaysia's 14.8 million employed people.²⁰ Approximately 4 million freelancers, or 26 percent of Malaysia's total labour force of 15.3 million, are employed in the gig economy²¹ primarily through online-to-offline on-demand apps like ride-hailing and food delivery.²² According to reports from 2019, there are over 160,000 e-hailing drivers working in Malaysia's gig economy, and there are 13,000 Foodpanda and 10,000 Grab Food riders in the Klang Valley alone.²³

In order to try to establish an experimental measure to quantify gig workers in Malaysia, a study utilised data from LFS to cover all types of gig employment,²⁴ where the study

¹⁵ Ibid.

¹⁶ Woodcock, J., & Graham, M. (2019). *The gig economy. A critical introduction*. Cambridge: Polity.

¹⁷ Harun, N., Ali, N. M., & Khan, N. L. M. A. (2020). An experimental measure of Malaysia's gig workers using labour force survey. *Statistical Journal of the IAOS*, 36(4), 969-977

¹⁸ MDEC is Malaysia's key agency for digital transformation.

¹⁹ Ibid.

²⁰ Department of Statistics Malaysia. (2020). Gig Workers in Malaysia: A Review of Definitions & Estimation. DOSM's Newsletter 2020/. https://v1.dosm.gov.my/v1/uploads/files/6_Newsletter/Newsletter%202020/DOSM_MBL5_1-2020_Series-8.pdf

²¹ Ibid.

²² Uchiyama, Y. (2023). *Exploited and unprotected: Life as a gig worker*. <https://doi.org/10.54377/4075-297b>

²³ Buang, S. (2019, November 5). Regulating the Gig economy. *NST Online*. https://www.nst.com.my/opinion/columnists/2019/11/534683/regulating-gig-economy#google_vignette

²⁴ Harun, N., Ali, N. M., & Khan, N. L. M. A. (2020). An experimental measure of Malaysia's gig workers using labour force survey. *Statistical Journal of the IAOS*, 36(4), 969-977. This includes part-timers

calculated that gig workers accounted for 18.4% of the total of 3,043.3 thousand of own-account or private part-time workers, or 559.9 thousand people.²⁵ According to a 2020 study by Zurich Insurance Group and the Smith School of Enterprise and the Environment at the University of Oxford, 38% of respondents in Malaysia who are currently employed full-time plan to join the gig economy within the next 12 months.²⁶

The gig economy has fundamentally transformed the employment landscape, offering flexibility but also leading to negative outcomes such as low pay, precarity, and a lack of employment protections for workers resulting in a 'raw deal' for workers.²⁷

Despite the growing number of workers finding employment through digital platforms and the introduction of various schemes to address the immediate lack of social protection for gig workers in Malaysia, gig workers still do not have a strong collective voice, raising significant concerns about their capacity to organise and bargain collectively with the digital platforms²⁸ to adequately address the nature of gig work revolving around delivery fares, payment schedules, rating systems and general issues on social protection.²⁹

This highlights the need for legislative reforms to address the challenges faced by gig workers and ensure their rights and well-being are protected in Malaysia's evolving labour market.

III. LEGAL AND REGULATORY FRAMEWORK IN MALAYSIA & CHALLENGES FACED BY GIG WORKERS IN MALAYSIA

Pre-Amendment of Employment Act 1955: Status of Gig Workers in Malaysia and the case of *Loh Guet Ching v Menteri Sumber Manusia & Ors*³⁰

An employee's employment status dictates their access to existing employment, labour and social protection in many jurisdictions³¹ including Malaysia. Aside from case laws, employment relationships and industrial relations in Malaysia are mainly governed by

working fewer than thirty hours per week, freelancers like tutors, tuition teachers, photographers, videographers, tour guides, and technology-based jobs like web designers, software developers, drivers (Grab, MyCar, etc.), and delivery riders (GrabFood, Foodpanda)

²⁵ Ibid.

²⁶ Zurich. (2020, January 16). *Zurich-University of Oxford Agile Workforce Study: Gig Economy Rises in Malaysia, Income Protection Lags*. Retrieved January 29, 2024, from <https://www.zurich.com.my/en/about-zurich/zurich-in-the-news/2020/2020-01-16>

²⁷ Woodcock, J., & Graham, M. (2019). *The gig economy. A critical introduction*. Cambridge: Polity.

²⁸ Woodcock, J., & Graham, M. (2019). *The gig economy. A critical introduction*. Cambridge: Polity.

²⁹ Mail, M. (2022, August 29). Responses to delivery riders missing the bigger picture — Edwin Goh. *Malay Mail*. <https://www.malaymail.com/news/what-you-think/2022/08/29/responses-to-delivery-riders-missing-the-bigger-picture-edwin-goh/25316>

³⁰ The High Court decision can be found at [2022] CLJU 2388. As at 23 November 2023, the Court of Appeal has reaffirmed the decision of the High Court but at the point of writing, the grounds of judgment is not available to the public as yet.

³¹ Valerio, D. S. (2021). Platform work and the employment relationship. <http://hdl.handle.net/10419/263093>

three main legislations: Employment Act 1955 (“EA 1955”), Trade Unions Act 1959 (“TUA 1959”) and Industrial Relations Act 1967 (“IRA 1967”).

Under EA 1955 and IRA 1967, a person will be considered an employee or a workman if he or she is under a contract of service or contract of employment.³² An employee or a workman enjoys certain statutory rights and benefits such as the right against unfair dismissal under IRA 1967,³³ the right to collective bargaining under TUA 1959³⁴ and IRA 1967, entitlement to minimum terms and conditions of employment under EA 1955,³⁵ entitlement to minimum wages, retirement fund,³⁶ social security protections,³⁷ minimum retirement age under various social legislation.³⁸

The issue of whether a person is an employee or an independent contractor is a question of both fact and law.³⁹ It is determined by the conduct of the contract’s parties and the inferences drawn from them, as well as the terms contained in the contract in question.⁴⁰ The Privy Council in *Lee Ting Sang v. Chung Chi Keung* [1990] 2 AC 382⁴¹ had to determine the test to apply to answer the question and cited *Market Investigations Ltd v. Minister of Social Security* [1969] 2 QB 173 in support:

“The fundamental test to be applied is this: ‘Is the person who has engaged himself to perform these services performing them as a person in business on his own account?’ If the answer to that question is ‘yes’, then the contract is a contract for services. If the answer is ‘no’, then the contract is a contract of service. No exhaustive list has been compiled

³² Schedule 1 of Employment Act 1955 and Section 2 of Industrial Relations Act 1967.

³³ Section 20 of Industrial Relations Act 1967 (Act 177) provides where an employee considers he has been dismissed without just cause or excuse by his employer he may make representations in writing to the Digital General (DG) to be reinstated in his former employment within 60 days of the date of dismissal. In the event the representations referred is not settled, the DG shall refer the representations to the Industrial Court for an award.

³⁴ Trade Unions Act 1959 (Act 262)

³⁵ Employment Act 1955 (Act 265)

³⁶ i-Saraan: Securing Retirement with Voluntary Contribution. (2024, January 17). KWSP.

<https://www.kwsp.gov.my/en/member/contribution/i-saraan> | Gig workers have the option to contribute to their retirement savings through the i-Saraan initiative under the Employee Provident Fund (EPF).

³⁷ *Self-Employment Social Security Scheme*. (n.d.). <https://www.perkeso.gov.my/uncategorised/51-social-security-protection/818-self-employment-social-security-scheme.html> | Currently, self-employed individuals including gig workers, are mandatorily covered by the Self-Employment Social Security Scheme administered by the Social Security Organisation (SOCSO)

³⁸ Minimum Wages Order 2022 (PU(A) 140/2022) provides for minimum wage of RM1,500 (USD315.00); Employees Provident Fund 1991 (Act 452) provides for employees' retirement funds, Employees' Social Security Act 1969 (Act 4) provides for social security protection for employees and Minimum Retirement Age Act 2012 (Act 753) provides for minimum retirement age upon attaining the age of sixty years.

³⁹ *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687

⁴⁰ The Federal Court in *Hoh Kiang Ngan v. Industrial Court* [1996] 4 CLJ 687 affirmed the Federal Court position in *Assunta Hospital v Dr A Dutt* [1981] 1 LNS 5 which held that: “The correct test to be applied in determining whether a person is a workman under the Industrial Relation Act is that enunciated by Chang Ming Tat FJ in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304 (Federal Court). We are accordingly of the view that a "workman" under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for service is not a workman under the Act.”

⁴¹ [1990] 2 AC 382 PC.

and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provided his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.”

In the “*Industrial Relation in Malaysia Law and Practice*” 3rd Edition,⁴² Dunston Ayadurai outlines three tests for discerning the contract of employment/contract of service.⁴³

- (a) the ‘traditional’ or ‘control’ test;
- (b) the ‘organisation’ or ‘integration’ test; and
- (c) the ‘mixed’ or ‘multiple’ test.

Even before the ambiguity surrounding gig workers come into question, Malaysian courts have a long history of dealing with businesses evading their obligations as employers leading to the creation of the tests listed above to determine the true nature of the relationship between the parties.

Out of the tests highlighted above, the application of the “control test” as laid down by the apex court of Malaysia, in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687⁴⁴ is an important indicator of an employment contract as follows:

*“... 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...”*

The courts will identify the amount of control in which the employer has over the particular employee in order to ascertain whether a person is an employee or an

⁴² Ayadurai, D. (1992). *Industrial relations in Malaysia : law and practice* (3rd Edition). Butterworths Asia.

⁴³ While the traditional and organisation tests have limitations in modern industrial relationships, the ‘multiple’ or ‘mixed’ test, grounded in economic reality, is preferred by courts. This test evaluates whether the contract provisions align with entrepreneurship rather than employment. Ayadurai stresses that no single test is conclusive, and courts consider various elements such as the employer’s control, integration of the employee into the business, chance of profit, and risk of loss. Additionally, factors like ownership of tools, entitlement to exclusive service, payment structure, and power dynamics influence the determination of the employment relationship. Ayadurai emphasises that parties’ intentions and agreements are pivotal in cases of doubt or ambiguity regarding the nature of the relationship.

⁴⁴ [1996] 4 CLJ 687 FC.

independent contractor.⁴⁵ No test is conclusive and the weight attached to the same varies from case to case.⁴⁶

Where gig workers are concerned however, the case of Ms. Loh Guet Ching is the first of its kind in Malaysia against a digital platform, Grab⁴⁷ (“Grab”). In 2021, the High Court⁴⁸ held that e-hailing drivers are not employees or workmen within the strict parameters of the IRA 1967 and therefore the Industrial Court rightfully did not have the jurisdiction to entertain her claim for unfair dismissal under Section 20(1) of IRA 1967 and so, the Malaysian Minister of Human Resources (MOHR) had correctly declined to refer the claim for hearing⁴⁹ at the Industrial Court.⁵⁰

For context, Loh filed a complaint against Grab with the Malaysian Industrial Relations Department under Section 20(1) of IRA 1967, alleging unfair termination from the platform. She claimed she was barred from driving for Grab following a disagreement with passengers at Senai International Airport in Johor in November 2018.⁵¹ Subsequently, the passengers expressed their displeasure and publicised the issue on social media. Grab then suspended her account, ultimately terminating it on 5.11.2019.⁵²

The High Court's judgment considered several key points to establish the absence of an employer-employee relationship between Loh and Grab:

- (a) There is no employment contract signed between Loh and Grab;
- (b) She did not receive a salary but instead Grab received a commission cut of 20% from Loh based on the profit she earned from driving passengers via the digital platform provided by Grab;
- (c) Grab did not contribute to her retirement fund, Employment Injury Scheme and Invalidity Scheme under SOCSO and Employment insurance Scheme (EIS);
- (d) Grab did not provide her with an income tax statement for purpose of Loh's income tax;

⁴⁵ [1996] 4 CLJ 687 FC.

⁴⁶ *Tandiko Dalusin v Elovest Furniture & Woodwork Sdn Bhd* [2010] ILRU 0811 (Industrial Court).

⁴⁷ Buckley, J. (2023, February 27). *A Brief History of Grab in Southeast Asia: transnationality, dominance and resistance*. Asian Labour Review. <https://labourreview.org/grab-in-southeast-asia/>

⁴⁸ *Loh Guet Ching v Minister of Human Resource & Ors* [2022] CLJU 2388, High Court

⁴⁹ FMT. (2021, December 2). Employment Act to be amended to cover e-hailing drivers. 2024. <https://www.dailyexpress.com.my/news/182681/employment-act-to-be-amended-to-cover-e-hailing-drivers/>

⁵⁰ The employment tribunal in Malaysia pursuant to IRA 1967 which hears matters relating to, among others, unfair dismissal of a workman or trade disputes.

⁵¹ She said the passenger booked two vehicles on the Just Grab tier, the cheapest on the platform, although there were seven of them altogether, each with a bag. She told them she could only take three passengers with their three pieces of luggage; anything else would be an overload, but they were upset because they wanted a fourth family member to also hop into her car. The other Grab driver had apparently told the fourth passenger to ride in her vehicle because his car was smaller than hers, but she refused.

⁵² Anbalagan, V. (2023, November 27). *E-hailing drivers not employees, court reaffirms*. Free Malaysia Today (FMT). <https://www.freemalaysiatoday.com/category/nation/2023/11/27/court-of-appeal-affirms-that-e-hailing-drivers-are-not-employees/>

- (e) Grab did not control Loh, instead, she was free to use the digital platform provided at her convenience and she was not prevented from using other digital platforms;
- (f) Grab only provided a platform for its independent contractor / driver which they termed as “Grab-Driver Partner” where they are contracted to engage and drive passengers/customers via its digital platform; and
- (g) In her own affidavit filed to the High Court, she referred herself as Grab-Driver Partner.

When the High Court was invited to consider the trend of cases decided in other countries including the United Kingdom and Europe that recognised the status of e-hailing drivers as employees of the e-hailing companies, the Court, having regard to the existing written law in Malaysia held that there are no legal provisions in Malaysia that recognised e-hailing drivers as an employee and therefore, an employment relationship between Grab and Loh does not exist.

In November last year, the Court of Appeal reaffirmed the decision of the High Court.⁵³ At the point of writing, the grounds of judgment from the Court of Appeal are yet to be released.⁵⁴

Section 103C of the Employment (Amendment) Act 2020⁵⁵

With the passing of the recent amendments to EA 1955,⁵⁶ the control test above has been formally codified and provided under Section 103C of EA 1955 as follows:

(1) In any proceeding for an offence under this Act, in the absence of a written contract of service relating to any category of employee under the First Schedule, it shall be presumed until the contrary is proved that a person is an employee-

(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;

⁵³ Anbalagan, V. (2023, November 27). E-hailing drivers not employees, court reaffirms. Free Malaysia Today (FMT). <https://www.freemalaysiatoday.com/category/nation/2023/11/27/court-of-appeal-affirms-that-e-hailing-drivers-are-not-employees/>

⁵⁴ Loh still has yet to exhaust her legal recourse yet as she could still seek for leave to appeal to the highest court in Malaysia, which is Federal Court.

⁵⁵ Act A1651.

⁵⁶ Employment (Amendment) Act 2020 (Act A1651).

*(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.

(2) For the purpose of subsection (1), it shall be presumed until the contrary is proved that a person is an employer-

(a) where he controls or directs the manner of work of another person;

(b) where he controls or directs the hours of work of another person;

(c) where he provides tools, materials or equipments to another person to execute work;

(d) where the work of another person constitutes an integral part of his business;

(e) where another person performs work solely for his benefit; or

(f) whether or not payment is made by him in return for work done for him by another person.

(3) The first-mentioned person in subsection (2) includes the agent, manager or factor of such first-mentioned person.

The decision of the Court of Appeal in *Loh's* case is concerning, particularly because the Malaysian Deputy Human Resources indicated in the parliamentary session on 2 December 2021 that the codification of the control test under Section 103C of EA 1955 was intended to include gig workers in the definition of “employees” under the Act.⁵⁷

Although an argument could be made that *Loh's* case⁵⁸ was lodged pre-amendment and therefore would not be a true reflection of the application of the newly introduced Section 103C of EA 1955.⁵⁹ As the amendments to the EA 1955 are still in their embryonic stages, it remains to be seen whether the Malaysian courts will adopt the legislative intent in their interpretation of the Section 103C of the EA 1955 to classify gig workers as employees.⁶⁰

⁵⁷ Dewan Rakyat. (2021, December 2). *Penyata Rasmi Parlimen Dewan Rakyat* [Hansard]. (Vol. 41). <https://www.parlimen.gov.my/files/hindex/pdf/DR-02122021.pdf#page=27&zoom=100&search=akta%20kerja>

⁵⁸ *Loh Guet Ching v Minister of Human Resource & Ors* [2022] CLJU 2388, High Court

⁵⁹ Section 35(1) of Industrial Relations (Amendment) Act 2020 (Act A1615) is a savings and transitional provision which provides, among others, for representations for reinstatement under Section 20 of IRA 1967 and proceedings that have commenced by the Industrial Court of awards made before the Industrial Court in relation to a reference by the Minister of Human Resources (MOHR), these matters shall proceed and have effect as if the IRA had not been amended by the Industrial Relations (Amendment) Act 2020.

⁶⁰ In Malaysia, the courts utilised several methods of judicial interpretation in interpretation of statutes such as literal rule, mischief rule, golden rule and lastly, purposive rule by reference to the purpose underlying the legislation.

IV. GIG WORKERS' ACCESS TO COLLECTIVE BARGAINING IN MALAYSIA

Freedom of association is a fundamental right enshrined under the Malaysian Federal Constitution⁶¹ and internationally recognised under the ILO. Unions play a vital role in improving workers' rights, pay, working conditions and provide them the right to express work-related grievances⁶² through the recognisable right of trade unions to collective bargaining.⁶³

Employment laws in Malaysia not only provide for minimum rights to employees, but the laws also recognise the right of those employees to collectively negotiate or bargain an agreement with their employer on the terms and conditions of their employment.⁶⁴

As highlighted above, access to these rights is dependent on their employment status – if they are an employee, then they are entitled to those rights. As the employment status of gig workers remains uncertain in light of the Court of Appeal position in *Loh Guet Ching*⁶⁵ above, gig workers are arguably still prevented from establishing and joining a trade union to collectively bargain with the digital platforms in Malaysia.

Section 8 of the EA 1955 provides that nothing in any contract of service shall in any manner restrict the right of any employee who is a party to such contract to (a) join a registered trade union (b) to participate in the activities of a registered trade union, whether as an officer of such union or otherwise or (c) to associate with any other persons for the purpose of organising a trade union in accordance with the TUA 1959.

The recognition of an employee's right to establish and participate in trade union activities, however, is not without its restrictions. In light of Malaysia's bloody association of trade unions with communist activities in the past, restrictions have been imposed on the trade union movement in Malaysia in the succeeding years, which has long been noted to result in the dwindling union membership as, among others, the complicated process for recognition impeded the trade union's right to collective bargaining.

At present, Malaysia's unionisation rate has been declining over the last four decades. According to the most recent data from the Department of Trade Union Affairs, there

⁶¹ Article 10 of Federal Constitution of Malaysia.

⁶² Amin, N. S. M. (2023). BALANCING THE RIGHT OF GIG ECONOMY WORKERS IN THE CONTEXT OF COLLECTIVE BARGAINING. *IJUM Law Journal*, 31(1), 169-202. <https://doi.org/10.31436/iiumlj.v31i1.834>

⁶³ Section 13 of IRA 1967 provides for the right of trade union to collective bargaining.

⁶⁴ Section 8 of EA 1955.

⁶⁵ *Loh Guet Ching v Minister of Human Resource & Ors* [2022] CLJU 2388, High Court

were 767 trade unions in 2022, representing only 5.8% of the Malaysian workforce, with less than 2% of all employees covered by collective agreements.⁶⁶

In 2023, Trade Unions (Amendment) Bill 2023 (the “Amendment”) has been passed⁶⁷. The Amendment, although gazetted, have yet to come into force.⁶⁸ One of the key amendments to the TUA 1959 is the removal of the restrictions on the formation of trade unions based on specific establishments or similarity in trade, occupations or industries⁶⁹ to allow and encourage formation of multiple trade unions in any establishment, trade, occupation or industry.⁷⁰

In line with the objectives of the Amendment, union membership has been expanded to allow a workman (including any workman who has been dismissed, discharged, retrenched or retired) to be a member of any trade union, provided that the rules of the particular trade union allow for it, regardless of the establishment, trade, occupation or industry in respect of which the trade union is registered.⁷¹

Premised on the above, the right to establish and participate in a trade union remains exclusive to those who meet the definition of a “workman” under the employment laws in Malaysia.

As it stands today, the law remains uncertain as far as the status of gig workers is concerned. Despite the amendments to the main employment legislation in Malaysia, the inadequacy of existing legal and regulatory parameters curtailed their access to statutory rights provided for those who fall under the status of employees in Malaysia, particularly the freedom of association through trade unions and the associated right to collective bargaining.

Their relative lack of collective voice for gig workers hinders their ability⁷² to adequately address the nature of gig work revolving around delivery fares, payment schedules, rating systems and general issues of social protection, which remain lacking.⁷³

An important lesson can also be drawn from *Loh*’s case above. The exclusion of gig workers from the category of employee results in them having no available grievance mechanism under the existing employment jurisprudence that would allow them the

⁶⁶ Goh, E., Ooi, K. H., & Ahmad, K. (2023, May 26). *What you need to know about unionisation in Malaysia | The Centre*. The Centre. <https://www.centre.my/post/what-you-need-to-know-about-unionisation-in-malaysia>

⁶⁷ Trade Unions (Amendment) Act 2024 (Act A1700)

⁶⁸ Ibid.

⁶⁹ Section 2 of Trade Unions (Amendment) Act 2024 (Act A1700)

⁷⁰ Ragu, D. (2023, October 10). Dewan Rakyat passes controversial amendment to Trade Unions Act. *Free Malaysia Today (FMT)*. <https://www.freemalaysiatoday.com/category/nation/2023/10/10/dewan-rakyat-passes-controversial-amendment-to-trade-unions-act/>

⁷¹ Amendment to Section 26 of TUA 1959.

⁷² Woodcock, J., & Graham, M. (2019). *The gig economy. A critical introduction*. Cambridge: Polity.

⁷³ Mail, M. (2022, August 29). Responses to delivery riders missing the bigger picture — Edwin Goh. *Malay Mail*. <https://www.malaymail.com/news/what-you-think/2022/08/29/responses-to-delivery-riders-missing-the-bigger-picture-edwin-goh/25316>

room to challenge any decision of the digital platforms including terminating them from the digital platforms in question.

V. CONCLUSION

When the gig economy through digital platforms was first recognised as a growing phenomenon, many remarked that traditional forms of worker representation would no longer be appropriate or adequate to protect these workers. The widespread use by platforms of self-employed independent contractor status not only creates the condition of low pay and precarious working conditions, but it also creates significant barriers to traditional forms of trade unionism.⁷⁴

As highlighted above, the existing legal and regulatory framework remains ambiguous in relation to gig workers, and the newly introduced amendments are still in their infancy, so their impact on the development of better legislative and regulatory protections for gig workers will require further observation.

Despite legal limitations barring gig workers from collectively voicing through conventional trade unions, new forms of worker organisation exist that allow them to collectively demand better working conditions. Irrespective of whether gig workers can participate in trade unions, it is important for them to have a collective voice, allowing them to raise concerns and negotiate collectively rather than individually.⁷⁵

The usage of digital platforms in the gig economy makes many jobs falling under the category increasingly invincible. In the absence of a collective voice, digital platforms are more likely to act unilaterally without the checks of collective bargaining or negotiation.

In new forms of work like digital labour, innovations are required to successfully organise, finding new weaknesses in the control of work.⁷⁶ There are emerging models of unionisation that are specifically designed to support gig workers.

In Malaysia, there are emerging efforts to organise and support gig workers such as the Malaysian P-Hailing Riders' Association (Penghantar) to advocate for the rights of gig workers and promote greater social protections and benefits. In fact, there are recommendations to push for an alternative body to protect the interests of gig workers and to act as the main stakeholders in the gig economy.⁷⁷

In addition to current policies concerning gig workers in Malaysia, the government is set to deliberate on the proposal of establishing a Gig Economy Commission with the aim to address issues within the informal work sector and develop initiatives to

⁷⁴ Woodcock, J., & Graham, M. (2019). *The gig economy. A critical introduction*. Cambridge: Polity.

⁷⁵ Uchiyama, Y. (2023). *Exploited and unprotected: Life as a gig worker*. <https://doi.org/10.54377/4075-297b>

⁷⁶ Ibid.

⁷⁷ Radzi, M. S. N. M., Bidin, A., Musa, M. K., & Hamid, N. A. (2022). Protecting Gig Workers' Interests in Malaysia through Registered Association under Societies Act 1966. *IIUMLJ*, 30, 157.

safeguard the welfare of various stakeholders, including consumers, vendors, traders, workers, and service platform providers.⁷⁸

Given the above, rather than solely focusing on new labour laws for the gig economy, the International Labour Organisation (ILO) proposes two universal labour guarantees for all workers:

- (a) Fundamental workers' rights: freedom of association and the effective recognition of the right to collective bargaining and freedom from forced labour, child labour and discrimination; and
- (b) A set of basic working conditions: (i) adequate living wage (ii) limits on hours of work and (iii) safe and healthy workplaces.

This approach ensures equal labour protection for all workers, regardless of their employment status, without the need for specific laws tailored to the gig economy.⁷⁹

Edwin Goh at The Centre advocates for a Fair Work Act⁸⁰ that encompasses gig workers alongside traditional employees, aiming to safeguard the rights and well-being of all workers. He emphasises the need to clarify employment classification to reflect the evolving dynamics of employment in Malaysia.⁸¹ Through the implementation of a holistic strategy with a view of establishing a sustainable labour market, it would enable gig workers to express their grievances, negotiate improved terms, and contribute to sustainable economic development.

It is imperative to adopt a comprehensive approach encompassing legal reforms, innovative organisational structures, and unified advocacy efforts, ultimately aiming to prioritise the rights and well-being of all workers and thereby fostering an inclusive and equitable labour market to resolve the challenges encountered by gig workers in Malaysia.

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⁷⁸ Ibrahim, J. (2024, January 22). DPM: We'll look after gig workers. *The Star*.

<https://www.thestar.com.my/news/nation/2024/01/22/dpm-well-look-after-gig-workers>

⁷⁹ International Labour Organization. (2019). Global commission on the future of work—Work for a brighter future. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf

⁸⁰ Goh, E., & Omar, N. (2021, April 15). The Case for a Fair Work Act, Part 1 | The Centre. The Centre. <https://www.centre.my/post/the-case-for-a-fair-work-act-part-1>

⁸¹ In some cases, having overly broad definitions for 'gig worker' resulted in unanticipated consequences; for example, in California, many freelancers lost their jobs after the passage of AB 5, as their 'employers' could not afford to reclassify them as employees as mandated by the new law (which was later overturned).