

PROTECTING GIG WORKERS' INTERESTS IN MALAYSIA THROUGH REGISTERED ASSOCIATION UNDER SOCIETIES ACT 1966*

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ABSTRACT

The gig economy model has had a significant impact on global economic growth. Through contracts for services, job seekers or gig workers will have opportunities to work in many sectors with limited advantages and benefits. This gig economy model has posed challenges to employment and industrial relations due to the gig workers' status as independent contractors. In the absence of trade unions to speak on their behalf, the service providers may neglect and manipulate their rights and interests. This paper aims to explore the alternative body to protect the interest of the gig workers and to be the main stakeholders in the gig economy. This article uses doctrinal legal research to analyse the best platform for gig

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workers to unionise. This article analysed legal documents, namely legal provisions from various legislations and case law using the content analysis approach, and thereafter proposed the best legal structure to protect gig workers' rights to unionise. This article found that the registered society structured under the Societies Act 1966 is the most suitable platform which can play an important role similar to trade unions in its functions to represent gig workers' interest in Malaysia.

Keywords: Trade Union Act 1959, Societies Act 1966, Interest, Gig Workers.

MELINDUNGI KEPENTINGAN PEKERJA GIG DI MALAYSIA MELALUI PERSATUAN BERDAFTAR DI BAWAH AKTA PERSATUAN 1966

ABSTRAK

Model ekonomi gig telah memberi kesan yang besar kepada pertumbuhan ekonomi dunia. Melalui kontrak untuk perkhidmatan, pencari pekerjaan atau pekerja gig mempunyai peluang untuk bekerja di pelbagai sector dengan kelebihan dan faedah yang terhad. Model ekonomi gig ini telah memberi cabaran baharu terhadap hubungan pekerjaan dan industri kerana status mereka sebagai kontraktor bebas. Ketiadaan kesatuan sekerja untuk mewakili pekerja gig menyebabkan hak dan kepentingan mereka sering diabaikan dan dimanipulasi oleh penyedia perkhidmatan. Oleh itu, tujuan artikel ini adalah untuk meneroka badan alternatif yang boleh mewakili kepentingan pekerja gig dan terlibat secara aktif sebagai pemegang taruh dalam ekonomi gig ini. Kajian ini menggunakan pendekatan kajian perundangan bagi menganalisis struktur perundangan terbaik bagi memelihara hak pekerja gig untuk berpersatuan. Artikel ini menganalisa peruntukan undang-undang dan kes mahkamah menggunakan analisis kandungan bagi mencadangkan struktur terbaik yang boleh melindungi hak pekerja gig untuk berpersatuan. Kajian ini mendapati bahawa persatuan berdaftar di bawah Akta Pertubuhan 1966 adalah platform yang paling sesuai yang boleh memainkan fungsi kesatuan sekerja dalam memelihara kepentingan pekerja gig di Malaysia.

Kata kunci: Akta Kesatuan Sekerja 1959, Akta Pertubuhan 1966, Kepentingan, Pekerja Gig.

INTRODUCTION

A new digital economy has emerged alongside the advancement in information technology, thus reshaping how people execute their routine activities. Most activities utilised digital applications and transactions are completed on the spot. The sharing economy and gig economy are two new economic models that fully utilise digital platforms. The usage of online platforms has unquestionably generated a positive impact on our economy. The sharing economy is a term to denote various economic practices, including the collaborative economy and gig economy.¹ Even though the sharing economy and gig economy are interrelated, sharing economy is most often associated with assets while the gig economy relates to services.² In addition to sharing assets, improving efficiency, lowering prices, and enhancing services, the sharing economy also introduces new opportunities to broaden efficiency, reduce costs, and improve customer service. The benefits of the gig economy are being highly supply, providing good opportunities, and safety backup.³

The gig economy is a free market, with temporary positions being the norm for corporations and independent workers having jobs that last for a minimal time.⁴ Through this new type of economy, customers now have better and more effective services, such as Grab and Maxim Car, Grab Food, and Food Panda. The nature of jobs under the gig economy is a form of temporary employment with flexible hours. Companies or service providers will generally use these independent contractors and freelancers to perform the job. However, they are not considered as employees either in a full-time or part-time capacity.

¹ Acquier Aurélien, Thibault Daudigeos, and Jonatan Pinkse. “Promises and paradoxes of the sharing economy: An organizing framework.” *Technological Forecasting and Social Change* 125 (2017): 1-10.

² OECD. *The Sharing and Gig Economy: Effective Taxation of Platform Sellers: Forum on Tax Administration*, OECD, 2019. Paris. <https://doi.org/10.1787/574b61f8-en>.

³ Manisha Goswami. “The gig economy: An impact to employee employer relationship.” *International Journal of Advanced Science and Technology* 29 no 5 (2020): 12126-12131.

⁴ Roy Gobinda, and Shrivastawa Avinash K. “Future of gig economy: Opportunities and challenges.” *IMI Konnect* 9 no 1 (2020): 14-25.

The gig economy has had a dramatic effect on employees' existence. On-demand independent contractors have challenged the conventional full-time model and secured individual jobs. The gig economy effectively uses an economic model where temporary and flexible employment is the norm for businesses to employ on-demand contractors. However, the workers in the gig economy are not compensated with similar safeguards and benefits those conventional employees receive.⁵ Gig workers usually do not earn benefits as regular employees. As far as wages are concerned, these workers will be paid based on the services or 'gigs' they have completed in accordance with their agreement with the service providers.⁶ This payment method is contrasted with that of the conventional employees wherein a contract of service connects an employee with his or her employer. Thus, such an employee's rights and obligations that arise are based on this contract of service.

The COVID-19 pandemic had significantly affected the employment sector, stock markets, and the economy.⁷ Due to the pandemic, the unemployment rate has increased as many citizens lose their jobs due to the movement control orders implemented by the government in curbing the pandemic. Consequently, some of these workers who had lost their job have joined a gig business as a new mechanism to survive. Similar to other developed countries, Malaysia also embraces the gig economy business model. Nowadays, this model is preferred in many sectors such as transport, food and beverage, accommodation, retail, manufacturing, construction, and agriculture.⁸

The emergence of this new business trend has affected Malaysia's conventional employment and employment regulations

⁵ Stewart Andrew and Jim Stanford. "Regulating work in the gig economy: What are the options?" *The Economic and Labour Relations Review* 28, no. 3 (2017): 420-437.

⁶ Bajwa Uttam, Denise Gastaldo, Erica Di Ruggiero, and Lilian Knorr. "The health of workers in the global gig economy." *Globalization and health* 14, no. 1 (2018): 1-4.

⁷ Umar Muhammad, Yan Xu, and Sultan Sikandar Mirza. "The impact of Covid-19 on gig economy." *Economic Research-Ekonomika Istrazivanja* 34 no 1, (2021): 2284-2296.

⁸ NCER, "Gig economy rides out Covid storm," accessed September 24, 2021 <https://www.ncer.com.my/media-centre/news/gig-economy-rides-out-covid-19-storm/>.

models. Despite the emergence of the gig economy system, there is currently no specific organisation established in Malaysia to represent gig workers in dealing with the service providers on their contract for service or to be the spokesperson in voicing out their interest to attract the government's attention. It is argued that the main reason behind this is the status of independent contractors, who are not covered under the Employment Act 1955. These independent contractors or freelancers are denied from establishing trade unions under the Trade Union Act 1959 as compared to traditional employees.

Moreover, many gig economy players may not seek support from trade unions because they consider themselves as entrepreneurs or independent service providers.⁹ However, the lack of any trade unions may affect the gig workers' rights to be represented when they face conflicts or disputes with the service providers.

The purpose of this article is to investigate any alternative platform for gig workers within the ambit of Malaysia's employment law that will protect their interests and preserve industrial harmony within the sharing economy industry.

RESEARCH METHODOLOGY

This article applies doctrinal legal research and adopts a qualitative study using the content analysis approach. The primary data are mainly from case law and legal provisions from employment-related statutes such as the Employment Act 1955, Industrial Relations Act 1967, Occupational Safety Act 1991, Trade Union Act 1959, and Societies Act 1966. The secondary data is gathered from textbooks and articles from various journals. These materials are analysed to highlight the position of gig workers in the employment sector and to suggest the best platform to enable them to form their association.

LITERATURE REVIEW

The emergence of the gig economy has significantly impacted economic growth and benefited many people. Being the vital player in

⁹ Ahsan Mujtaba. "Entrepreneurship and ethics in the sharing economy: A critical perspective." *Journal of Business Ethics* 161, no. 1 (2020): 19-33.

the gig economy, the position of gig workers has received significant attention from many researchers. Despite the gig economy's opportunity for the gig workers and the service providers, research revealed that the position of gig workers in employment is not secured.¹⁰

Position of Gig Workers in Employment

The English common law stipulates the basis of a contract in employment as a contract between master and servant, which provides rights and responsibilities of an employer and an employee. As far as Malaysia's employment laws are concerned, the Employment Act 1955 and the Industrial Relations Act 1967 prescribed that the relationship between an employer and an employee is based on a contract of service or contract of employment as stipulated under the common law. Generally, two types of employment agreements specify their rights and obligations, namely a contract of service and a contract for service. The distinction between these two types of contracts is not clear in every situation. In cases of dispute, the courts will consider several relevant factors, including the circumstances and the facts of the case, to determine the nature of the employment relationship between the parties. In Malaysia, employees under a contract of service enjoy certain rights and benefits as provided in the Employment Act 1955. These benefits are not given to those who entered into a contract for service.¹¹ The Employment Act 1955 defines a contract of service as "*any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract*".¹²

This contract can be made orally or in writing and either in the form of an express or implied contract. In the case of *Melaka Farm Resorts (M) Sdn. Bhd. v Hong Wei Seng*,¹³ it is stated:

¹⁰ Roy Gobinda, and Shrivastawa Avinash K. "Future of gig economy: Opportunities and challenges." *IMI Konnect* 9 no 1 (2020): 14-25.

¹¹ Maimunah Aminudin. *Malaysian industrial relations and employment law*. (Kuala Lumpur: McGraw-Hill, 2013) 43.

¹² Section 2 Employment Act 1955.

¹³ [2004] 6 MLJ 506.

a contract of service may be orally entered into, as in here, where the defendant's executive director testified that the Plaintiff monthly salary was RM2,000. Further a contract of service could also be implied by the conduct of the parties i.e when the defendant allowed the Plaintiff to work in the Defendant's place of employment and subsequently paying him RM 4000 as salary for two months...

In *Mashyur Mutiara Sdn Bhd v. Abdul Samat Ishak & Ors and another appeal*,¹⁴ the court highlighted the importance of determining the employer-employee relationship. It was not necessary that the employer personally execute the contract of service as it can be done via appointed agents. In this case, the respondents' (workers) employment was terminated by a hotel (Sheraton Langkawi Beach Resort) owned by the appellant (Mashyur Mutiara) due to the hotel's closure. The appellant had appointed Sheraton Overseas Management Corp. to manage the hotel. The workers filed a case with the Labour Court, alleging that the appellant had failed to pay them wages. The Labour Court ruled in workers' favor. As a result, the appellant appealed against the decision of the Labour Court. To support the appeals, the appellant contended that it had been wrongfully sued because it was not the employer to the workers. The appellant further argued that the hotel was managed by the company (Sheraton Overseas); thus, the company was the one that should be sued, not the appellant. The evidence showed that the company had hired the workers and completed the service contracts with them. There was a contract between the hotel and the management, authorising the company to hire, supervise and terminate the workers. Chan Jit JC said:

A contract of service is crucial in determining an employer-employee relationship. However, it is not necessary that the employer personally executed the contract of service. The phrase '... agent, manager or factor of such first mentioned person ...', in s. 2 of the Act, clearly envisages and provides for an indirect appointment. The effect of this is that a person (entity) remains the employer even if he did not execute the contract of service as long as the party executing the contract with the worker is his duly appointed agent, manager or factor appointed.

In dismissing the appeal by the appellant, the court held that under section 2 of the Employment Act 1955, Mashyur Mutiara was the

¹⁴ [2020] 4 MLJ 785.

principal to Sheraton Overseas Management Corp., therefore it should be liable for the actions of its agent.

Under a contract of service, the employer will provide all the pecuniary and non-pecuniary benefits and protections to an employee. Those benefits include wages, annual leave, sick leave, maternity leave and other benefits. These statutory protections are provided under the Employment Act 1955 and other statutes such as the Industrial Relations Act 1967, Social Security Act 1969, Employees Provident Fund Act 1991, Occupational Safety and Health Act 1994, and many others, express or implied.¹⁵ The implied terms in the contract of service between the employer and employees can be seen in the Occupational Safety and Health Act 1994 where it states:

It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees.¹⁶

An employer's duty to provide and protect his employee is also established through common law principles. In *Abdul Rahim B Mohamed v Kejuruteraan Besi dan Pembinaan Zaman Kini*,¹⁷ Ariffin Zakaria J. emphasised on this point. He stated that "*at common law a master is under duty, arising out of the relationship of master and servant, to take a reasonable care for the safety of his workplace in all circumstances of the case so as not to expose them to unnecessary risk.*"

On the other hand, a contract for service refers to an agreement between an employer and an independent contractor hired to complete a specified task or project for the former for an agreed sum. An independent contractor can simultaneously engage in double employment with another employer as they are not bound by terms and conditions under the employment laws.¹⁸ The Employment Act 1955 does not provide protections to an independent contractor. In other words, there is no employer-employee relationship between an

¹⁵ Asiah Bidin et. al. "Legal protections of gig workers in employment" in *Law, politics and society: The unravelling of Malaysia and Indonesia*, ed. Suyatno Ladiqi, SupartoWijoyo, Aminuddin Mustaffa, and Prawitra Thalib (Surabaya: Airlangga University Press, 2021), 103-109.

¹⁶ Section 15 Occupational Safety and Health Act 1994.

¹⁷ [1999] 5 CLJ 85

¹⁸ Asiah, Bidin. et. al. "Legal position of double employment in Malaysia." *Psychology and Education Journal* 58, no. 2 (2021): 1611-1617.

employer and an independent contractor.¹⁹ In the case of *Hoh Kiang Ngan v Industrial Court*,²⁰ the court held "*the 'workman' under the Industrial Relations Act 1967 is who is engaged under a contract of service and an independent contractor who is engaged under a contract for service is not a 'workman' under the Act.*" Likewise, in the case of *David Vanniasingham Ramanathan v Subang Jaya Medical Centre Sdn Bhd*,²¹ the court ruled that someone who is engaged under a contract for service is not a worker under the Industrial Relations Act 1967.

Awang Armadajaya Awang Mahmud JC stated in the case of *Tan Saw Kheng v Chen Boon Kwee & Ors*²² that "*a contract for service is an Agreement whereby a person is engaged as an independent contractor. There is no employer-employee relationship, and the employee is not covered by the Employment Act.*"

As the discerning line between these two types of contracts is very fine, in case of dispute, the court will apply several tests to determine whether a relationship between an employer and an employee exists. Among the tests are the control test and organisational test. The control test application can be seen in the case of *Yewens v Noaked*²³ where the court found that the employee was subject to the instructions or command of his master on how he exercised his duty. According to this test, if an employee is under the control of his employer regarding the work he is employed for, he is in a contract of service. In Malaysia, the control test application can be seen in *Mandong Transportation & Trading Sdn Bhd v Pertubuhan Keselamatan Sosial*²⁴ where the court held that "*the traditional test refers to how much control is being exercised over the worker by the employer. The more control is being exercised, the more likely it is that the worker is an employee regardless of what the contract says.*"

¹⁹ Nik Ahmad Kamal and Altaf Ahmad Mir. "*Employment law in Malaysia.*" (International Law Book Services, 2013), 54.

²⁰ [1996] 4 CLJ 68.

²¹ [2013] 2 ILJ 451.

²² *Tan Saw Kheng v Chen Boon Kwee&Ors* [2021] MLJU 664.

²³ (1880) 6 QBD 530.

²⁴ [2020] MLJU 912.

The court introduced the organisational or integration test to cope with the *lacuna* in the control test.²⁵ The control test could not be generalised as many employees could work independently in their workplace without much supervision. The organisational test considers the degree of integration of an employee into the workplace organisation before deciding whether he is working under a contract of service. The court in the case of *Mandong Transportation & Trading Sdn Bhd v Pertubuhan Keselamatan Sosial*²⁶ explained the organisational test as to whether the worker has the independence to decide what and how to do his or her work. However, a more comprehensive test is needed due to the current diversity and complexity of employment relationships. The court should not rely on a single test.

Consequently, the court adopted mixed or multiple tests²⁷ to determine if the employment is entered into based on a contract of service or a contract for service. By using this test, the court considers the criteria of the control test in conjunction with the integration test. Thus, the court will look into the employer's power to control the employee with respect to means and methods, and consider the essential economic realities²⁸ of the relationship.

As far as employment is concerned, determining the type of employment contract is crucial to identify whether the person employed is an employee or an independent contractor. Other than the protections enjoyed by the employees, there are other benefits that do not apply to independent contractors. These are rights to make the employer liable for any tortious wrong and rights to be represented by a trade union in case of a dispute.

Employment Status of Gig Workers

The issue of gig workers' employment status has been addressed on many platforms. It is essential to ascertain the legal status of gig workers as most employment legislations protect only employees and not independent contractors. As mentioned above, the employees are

²⁵ Cassidy v Ministry of Health [1951] 2 KB 343.

²⁶ [2020] MLJU 912.

²⁷ See Morren v Swinton Pendlebury Borough Council (1965) 1 WLR 576.

²⁸ [1996] 4 CLJ 68.

vested with significant rights, including calculation of working hours, minimum wage payment, rights to join a union, and other monetary benefits. The previous literature²⁹ has demonstrated that gig workers are not considered employees. Stewart and Stanford stated that the legal status of gig workers in Australia is still uncertain. Most legislations that provide provisions relating to minimum wages, hours of work, entitlement to leave, and the right to bargaining power apply to employees only.³⁰ Gig workers seem to lack employment protections.³¹ Workers on online gig platforms such as Uber are classified as contractors. In *Kaseris v Raiser Pacific V.O. F*³² and *Pallage v Raiser Pacific Pty Ltd*,³³ the court dismissed the applicants' application for unfair dismissal due to the applicants' failure to establish that they were employees.

A similar situation also exists in the United States. Sir Terence Etherton stated in *Pimlico Plumbers v Smith*³⁴ that the employment tribunal was correct to reject Pimlico Plumbers argument that Smith had an unrestricted right of substitution and to conclude that "the degree of control exercised by Pimlico Plumbers over Mr Smith was also inconsistent with Pimlico Plumbers being a customer or client of a business run by Mr Smith".

In the United States, most gig-platform workers in the transport services are classified as autonomous independent contractors.³⁵

²⁹ See examples, Malik, Radosław, Anna Visvizi, and Małgorzata Skrzek-Lubasińska. "The gig economy: Current issues, the debate, and the new avenues of research." *Sustainability* 13, no. 9 (2021): 5023.

³⁰ Stewart Andrew and Jim Stanford. "Regulating work in the gig economy: What are the options?" *The Economic and Labour Relations Review* 28, no. 3 (2017): 420-437.

³¹ Cherry Miriam A. "Employment status for "essential workers": The Case for Gig Worker Parity." *Loyola of Los Angeles Law Review, Forthcoming* 55, no. 2 (2022): 2021-17.

³² [2017] FWC 6610.

³³ [2018] FWC 2579.

³⁴ [2017] EWCA Civ 51.

³⁵ Pasternak Danial. California Federal Court finds that "gig economy workers are independent contractors, not employees" accessed September 20, 2020 <https://www.employmentlawworldview.com/california-federal-court-finds-that-gig-economy-workers-are-independent-contractors-not-employees-us/>.

The Fair Labor Standards Act (FLSA) is the federal statute that promotes fair labour conditions and protects workers from any mistreatment in employment. The Act does not apply to independent contractors. It requires all covered employers to pay non-exempt employees at least the federal minimum wage for every hour worked in a non-overtime workweek.³⁶ Many legal attempts have been made to reclassify them as employees. The U.S. Department of Labor had attempted to review its interpretation of independent contractor status under the Act, among others, to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy. In January 2021, the Independent Contractor Rule was introduced based on the economic reality test, which provided that independent contractors are in business for themselves. However, through the Federal Register on May 2021, the independent contractor status was withdrawn, thus classifying gig workers as employees.³⁷

The discussion on the legal status of gig workers also has been widely discussed in the United Kingdom. Nevertheless, in contrast to other jurisdictions, the Supreme Court of the United Kingdom upheld the employment tribunal's decision that Uber drivers were employees in the case of *Uber BV v Aslam*.³⁸

In Indonesia, Ojek riders are classified as informal sector workers or self-employed.³⁹ Similarly, in Malaysia, gig workers are still classified as independent contractors.⁴⁰ The majority of Malaysian

³⁶ Federal Register. "Independent contractor status under the Fair Labor Standards Act (FLSA): Withdrawal". (2021) accessed August 1, 2021 <https://www.federalregister.gov/documents/2021/05/06/2021-09518/independent-contractor-status-under-the-fair-labor-standards-act-flsa-withdrawal#footnote-15-p24303>. See also U.S Department of Labor. "Handy Reference Guide to the Fair Labor Standards Act", accessed August 1, 2021 <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa#2>.

³⁷ JD Supra. "Fair Labor Standards Act: Gig economy" accessed August 2, 2021 <https://www.jdsupra.com/topics/flsa/gig-economy/>.

³⁸ [2021] UKSC 5.

³⁹ De Ruyter Alex, and Riani Rachmawati. "Understanding the working conditions of gig workers and decent work: Evidence from Indonesia's online Ojek Riders." *sozialpolitik. ch* 2, no. 4 (2020): 2-4.

⁴⁰ Bernama "Provide more protection for gig workers, says lawyer", Astro Awani, accessed June 1, 2021. <https://www.astroawani.com/berita-malaysia/provide-more-protection-gig-workers-says-lawyer-289535>.

statutes exclude gig workers as employees. They are not covered by the Employees' Social Security Act 1969. Instead, they are covered by the Self-Employment Social Security Act 2017 against occupational diseases and accidents. They can contribute to the Employee Provident Fund's Voluntary Contribution with Retirement Incentive (i-Saraan) programme on their own as the service providers are not obligated to contribute to the employees' provident fund.

RESULTS/ FINDINGS

The study illustrated that it is imminent for the gig workers to have an association to protect their rights and welfare in the gig economy. This view is based on the functions of the trade unions formed by traditional employees. It is argued that via a trade union or association, gig workers would be provided with a mechanism to exercise their rights on collective bargaining with the service providers.

Employees and Trade Unions

It is widely understood that the spirit behind establishing a trade union is to ensure that employees will receive a fair and predictable outcome of their services. Through the specific and structured organisation, employees can be represented by their union while dealing with the management, especially on the trade dispute, collecting bargaining, or forming a collective agreement. According to Maimunah, employees have several reasons to form and join trade unions, *inter alia* to improve the economic situation, ensure rights are protected, and social network reasons.⁴¹ It is also believed that trade unions' membership advantages and benefits become another factor in employees' decisions to participate in trade unions.⁴²

From the employer's perspective, the trade union will function as a strategic partner to enhance productivity and professionalism among employees. Moreover, the empirical evidence has suggested that trade unions' effective participation may ensure sustainability

⁴¹ Maimunah Aminudin. *Malaysian industrial relations and employment law*. (Kuala Lumpur: McGraw-Hill, 2007), 18.

⁴² Ashenfelter Orley, and John H. Pencavel. "American trade union growth: 1900-1960." *The Quarterly Journal of Economics* (1969): 434-448.

during an economic crisis.⁴³ Acknowledging the important role of trade unions, in 1959, the government passed specific regulations relating to trade unions, known as Trade Union Act 1959. Section 2 of the Trade Union Act 1959 describes the trade union as:

association or combination of workmen or employers, being workmen, whose place of work is in West Malaysia, Sabah or Sarawak within any particular trade, occupation or industry or within any similar trade, occupation or industries and whether temporary or permanent and having among its objects one or more of the following objects:

- a) The regulation of relations between a workmen and employers for the purpose of promoting good industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity.
- b) The representation of either workmen or employer in trade dispute.
- c) The conducting of, or dealing with trade disputes and matter related thereto.
- d) The promotion or organising or financing of strike or lock-outs in any trade or industry or the provision of pay or other benefits for its member during the strike or lock-out.

In *Ismail Nasaruddin Abdul Wahab v Malaysia Airline System Bhd & Anor*,⁴⁴ the appellant (Ismail Nasaruddin) was suspended before being dismissed by the respondent (Malaysian Airline System Bhd.) due to his press statement as the President of NUFAM (National Union of Flight Attendant) concerning the operation and management of the company. The issue before the court was whether the press statement was related to the objective of a trade union. This was due to the fact that the appellant, at the material time, was the President of NUFAM and also a member of its Executive Committee. The appellant argued that the press statement had been made in his position as the President of NUFAM and not in his capacity as a Chief Steward of MAS. It was held that as a registered trade union under TUA 1959, the press statement made by the union was part of the union objective, *inter alia*, to improve working conditions of the workmen as in line with section

⁴³ Balakrishnan Parasuraman. *Employee participation in Malaysia: Theory and practices*. (Kota Bharu: PenerbitUniversiti Malaysia Kelantan, 2014), 43.

⁴⁴ [2020] 6 CLJ 354.

2 of the Trade Union Act 1959. The court further ruled that a statement in which the appellant made calling for the resignation of the CEO as the President of NUFAM for the interest of the employee and therefore could not be alleged as misconduct. Establishing and recognising employees' trade unions is a prerequisite before employees' representatives meet with the management to negotiate employment matters. A successful negotiation will lead to a collective agreement between these two parties. However, it is essential to note that section 13 of the Industrial Relations Act 1967 limits the right of trade unions from negotiating matters which are within the managerial prerogative.⁴⁵ Among the managerial prerogatives of the employer are:

- a) The promotion by an employer of any workman,
- b) The transfer by an employer of any workman,
- c) The employment by an employer of any person,
- d) The termination by an employer of the services of any workman, and
- e) The dismissal and reinstatement of a workman by an employer.

Despite the clear provisions on managerial prerogative rights, such rights can cause adverse effects on both employers and employees. A study by Parasuraman revealed that the exercise of the prerogative right by the employer directly impacted employees' job performance and satisfaction.⁴⁶

Nonetheless, it has been argued that strict regulations and lengthy procedures in recognising trade unions have impeded the trade union's right to collective bargaining in Malaysia.⁴⁷ Malaysia has ascribed its commitment to the International Labour Organisation (ILO) by endorsing five of the ILO's eight foundational conventions as a global trading country. In facilitating the right to collective bargaining via trade unions, the Malaysian government has shown its

⁴⁵ Shahrilnizam, Mohd Radzi, Balakrishnan Pasuraman, and Murshamsul Kamariah Musa. "Employer's managerial prerogative right: An evaluation of its relevancy to the employer-employee relationship." *Pertanika Journal of Social Sciences & Humanities* 23 (2015): 227-238.

⁴⁶ Balakrishnan Parasuraman. *Employee participation in Malaysia: theory and practices*. (Penerbit Universiti Malaysia Kelantan, 2014), p 43.

⁴⁷ Siti Suraya Abd Razak, and Nik Ahmad Kamal Nik Mahmud. "Trade Union recognition in Malaysia: Legal issues." *UUM Journal of Legal Studies* 9 (2020): 23-37.

commitment by ratifying the ILO's Convention No. 98 on the Right to Organise and Collective Bargaining. However, Malaysia has not ratified the ILO's Convention No. 87 on Freedom of Association and Protection of the Right to Organise Convention, the purpose of which is to provide international standards and guidelines for effective recognition of collective bargaining among state members. It has been submitted that the Convention, which aims to protect workers' interests to form and join trade unions contains provisions that prohibit actions deemed as anti-union practices by the employer and the government.⁴⁸ It has been argued that the complex process and legal requirements under the Trade Unions Act 1959 and Industrial Relations Act 1967 have led to a decline in the density of trade unions and their membership in Malaysia.⁴⁹ Therefore, it is recommended that the Malaysian government abolish the employer's recognition process requirement for establishing a trade union. It is also suggested for Malaysia to establish a statutory definition for managerial, executive, confidential, and security posts and ratify the Convention Concerning Freedom of Association and Protection of the Right to Organise Convention No. 87 to ensure a more robust environment for the workers' rights to collective bargaining.⁵⁰

Today, the movement of trade unions in Malaysia is affected by statutory restrictions in the employment regulatory framework and received a significant impact from the transition of work environment in terms of flexibility of job design, more skilled workers, and adoption of new technology.⁵¹

In Malaysia, gig workers remain as independent contractors. Although they are subjected to the service provider's control, their

⁴⁸ Siti Suraya Abd Razak, and Nik Ahmad Kamal Nik Mahmod. "Ratification of International Labour Convention and the Reformation of Trade Union Recognition Process in Malaysia." *Pertanika Journal of Social Sciences & Humanities* 29, no. 1 (2021):193-206.

⁴⁹ Siti Suraya Abd Razak, and Nik Ahmad Kamal Nik Mahmod. "Ratification of International Labour Convention and the Reformation of Trade Union Recognition Process in Malaysia." *Pertanika Journal of Social Sciences & Humanities* 29, no. 1 (2021): 193-206.

⁵⁰ Siti Suraya Abd Razak. "Trade Union recognition in Malaysia: Legal issues." *UUM Journal of Legal Studies* 9 (2020): 23-37.

⁵¹ Nagiah Ramasamy, "The Future of Trade Union Movement in Malaysia." 1 *LNS (A)*, (2012): vii

relationship is not based on a contract of service or employment. Instead, it is based on a regular contract. Thus, they do not have the right to establish their in-house trade union. This restriction is due to a strict interpretation of the definition of "workmen" in section 2 of the Trade Union Act 1959, which is exclusively applied to those with a status of an employee to join trade unions and enter collective bargaining.

In forming a trade union under the Trade Union Act 1959, another insurmountable issue that needs to be addressed is the requirement of employers' recognition of such unions and the antecedent requirements under section 9 of Industrial Relations Act 1957 before gig workers can participate in the collective bargaining. From cases discussed earlier on, different jurisdictions accorded different treatment as to the status of a gig worker either as an employee or an independent worker whilst others, such as Malaysia, have not made a clear judicial pronouncement of the same.

The non-existence of workers' trade unions might cause industrial disharmony in the gig industry. There is a high potential for the contract between parties to exploit one party. As noted by Kamal and Mir, the strong economic position and high bargaining power possessed by the service providers companies may benefit them. This can lead to the exploitation of the workers. In addition to this, there is a possibility that the true contractual bargain between the parties is not disclosed to the workers.⁵² As a result, some of the issues related to the interest of gig workers might be neglected and they remain a vulnerable group. Their existence may not contribute to a competitive edge in the new digital economy.

Gig Workers' Associations

Realising the new challenges faced by the gig workers, it is highly recommended that the gig workers community establish an association to strengthen their working community and protect their rights to replace the role of the trade union. Through such association, they may have a platform to bargain for their rights, and it may be a dispute settlement mechanism for them. The right to the association has been

⁵² Nik Ahmad Kamal Nik Mahmud, and Altaf Ahmad Mir. "*Employment law in Malaysia.*" (International Law Book Services, 2013), p 41-42.

guaranteed in the Federal Constitution, whereby Article 10 (1) (c) provides the right of all citizens in Malaysia to form an association. Article 10 provides for freedom of speech as well as the right to assemble peaceably and without arms, including the right of processions or pickets as procession or picket is an assembly in motion.⁵³ The court has confirmed this in the case of *Dewan Undangan Negeri Kelantan v Nordin Salleh & Anor*.⁵⁴ The court held that the expression right of freedom of association means that a citizen has the right to form, join, not to join, or to resign from his association. Nevertheless, this fundamental liberty is not absolute, whereby the government will play an active role in controlling the administration and operation of the association to ensure it is for the public interest.⁵⁵

In relation to the recommendations put forward, the suggested association can be registered and governed under the Societies Act 1966. Registration of a society can be easily done via a simple process at the Register of Societies Malaysia website. Once approved, it will be categorised as a non-governmental organisation (NGO). As a registered organisation, the association will consist of a structured committee similar to trade unions representing various sectors of gig economy industries.

However, there are several mandatory requirements under this Act that need to be complied with by any new organisation. Among them are:

- 1) The organisation to submit its structure to the Registrar of Societies, Malaysia, and
- 2) The organisation needs to comply with its constitution. The constitution will reflect the objective of the establishment and the whole operation of the society.

It is believed that the structured association will be operating effectively in promoting the gig workers' interest. The gig workers may acquire any benefits through this structured organisation. Apart from being the best avenue to voice their rights and interests to the stakeholders, the gig workers will have a good platform to share their

⁵³ Noor 'Ashikin Hamid. et al. "Rukun Negara as a preamble to Malaysian Constitution" *Pertanika J. Soc. Sci. & Hum.* 29(S2), (2021): 29-42.

⁵⁴ [1992] 1 MLJ 697

⁵⁵ See *Lau Dak Kee v Public Prosecutor* [1976]2 MLJ 229, p 230.

common interests. The association can also generate extensive social networking among the gig workers.

Gig Association and Service Providers

The service provider should not ignore the existence of an association of gig workers because the association can influence its members to choose a service provider which offers better terms of employment. Although the service provider might not recognise the proposed association to enable them to enter into collective bargaining and conclude a collective agreement, it does not restrain the association from representing all its members in a particular industry. Such an association can negotiate and enter into a formal agreement with the service provider to offer better contract terms and avoid manipulation. Through this formal agreement, the association will be functioning as the primary key player in reconciling between the service providers and the workers. This reconciliation will establish a collective responsibility for business efficiency and improve productivity among the gig workers.

In addition, the formal agreement entered into by the gig workers and the association is neither subjected to any provisions in the Trade Union Act 1959 nor the Industrial Relations Act 1967. In contrast to collective bargaining, any formal agreement between the association and the service providers can also reach out to various aspects of employment such as welfare, economic, and even managerial rights if the agreements will benefit both parties.

Furthermore, another advantage of having an association is that the formal agreement signed by both parties needs not to be deposited with the Registrar of Industrial Court for cognisance. Both parties are free to determine the contract's lifespan to ensure the effectiveness of the agreement. This is contrary to the collective agreement formed based on the collective bargaining between employees' trade union and the employer as required under the Industrial Relations Act 1967. The Act stipulates that the duration of the collective agreement should not be less than three years.

Section 14 (2) (b) of the Industrial Relation Act 1967 reads:

- (2) A collective agreement shall set out the terms of the agreement and shall, where appropriate—

(b) specify the period it shall continue in force which shall not be less than three years from the date of commencement of the agreement.

In the absence of strict requirements to be complied with, this formal agreement may replace a collective agreement and function effectively. Thus, in a nutshell, due to its flexibility, both parties can design and negotiate all terms and conditions of the agreement. In addition, the formal agreement between the association of gig workers and service providers allows parties in dispute to bring the case directly to be heard in a civil court. This will avoid difficulties relating to processes and procedures in seeking remedies. With experienced and expert judges, the courts have more jurisdictions than the industrial court, not only to try the case but may use its discretionary power to issue an injunction or specific performance if necessary. Section 21 (1) of the Specific Relief Act 1950 states:

The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

Zainun Ali FCJ observed specific performance in *Bandar Eco Setia Bhd v Angelina Eng*.⁵⁶

The relief of specific performance is a discretionary remedy. In any suit for specific performance, the court will consider the conduct of the plaintiff and the circumstances of the defendant before making any decree. Standard grounds of defence in equity such as laches and acquiescence will provide a defence to a claim for specific performance.

In contrast to trade unions, which are limited geographically and are subjected to certain restrictions,⁵⁷ under the Trade Union Act 1959 and the Industrial Relation Act 1967, operating as an NGO may be flexible. A registered society will give an advantage to the association to expand its operation widely in any part of the country and cross industries

⁵⁶ [2016] 3 CLJ 173.

⁵⁷ Siti Suraya Abd Razak, and Nik Ahmad Kamal Nik Mahmood. "An analysis of the good faith bargaining practice in the trade union recognition process: Reform of the Malaysian trade union legal framework." *IIUM Law Journal* 27, no. 2 (2019): 501-524.

through branches. This flexibility will enable expanded social networking among gig workers in Malaysia within the spirit of solidarity and mutual interest to protect their rights and promote the sharing economy model.

In addition, without strict regulations, the association will have more opportunities to play starring roles as activism, pressure groups, or even as a lobby group for the sake of gig workers' interest. Evidently, since independence, NGOs have played an essential role in developing government policy relating to community development in Malaysia. Nowadays, various societies are established in multiple sectors such as environmental protection, human rights, consumer protections, and many more applying similar approaches to achieve their objectives.⁵⁸

It is important to note that in addition to its role to protect the rights and interests of the gig workers, the proposed association may also be actively involved with the government and private sectors in the decision-making process, especially for the future development of the gig economy industry in Malaysia.

Challenges of Gig Association

Despite the advantages of the association mentioned above, operating as a registered society and being classified as a non-profit organisation may trigger several issues. The sustainability of the organisation is always a major concern among non-profit organisations. As non-profit organisations, the association will be prohibited from being involved in commercial activities as a source of funding to support daily operations. Thus, it will rely heavily on donations and government funding to operate. This situation jeopardises its sustainability, as the government's policy towards non-profit organisations constantly changes.⁵⁹

In addition, as an unincorporated body, a registered society will not enjoy a separate legal entity as a trade union has whereby it has no

⁵⁸ Hooi Khoo Ying. "The NGO-Government relations in Malaysia: Historical context and contemporary discourse." *Malaysian Journal of Democracy and Election Studies* 1, no. 1 (2013): 76-85.

⁵⁹ Akingbola Kunle. "Staffing, retention, and government funding: A case study." *Nonprofit Management and Leadership* 14, no. 4 (2004): 453-465.

legal right to own property under its name, and the management has no limited liability.⁶⁰ This has been discussed in the case of *Malayan Banking Bhd v Chairman Sarawak Housing Developers' Association*.⁶¹ The court had to determine whether the respondent was correct in prosecuting the appellant in his capacity as the chairman of the society, rather than as a registered officer, as required by Section 9 of the Society Act 1966. Judges of the Federal Court unanimously agreed that an unincorporated body or society cannot sue or be sued in its own name but must do so through its registered officer. However, in the officer's absence, the other members may claim to act on behalf of the society as the officer's representative. Therefore, the organisation's management or trustee will be exposed to all liabilities under the association's name.

CONCLUSION AND RECOMMENDATIONS

In this new digital era, the emergence of the gig economy has challenged a traditional method of employment whereby this economic sharing concept is available for all people without being strictly subject to the conventional employment approach. Nevertheless, unlike the developed countries, Malaysia is still left behind in recognising the contribution of gig workers to our economic growth. In the absence of specific regulations to protect gig workers' interests, they are highly dependent on their contract for services with the service provider. It is to be reiterated that as independent contractors, gig workers in Malaysia are denied their right to form a trade union. Little attention may be given to listening to their voices and interests without a specific organisation or association. This has made gig workers in Malaysia continue to become defenseless.

As an independent and democratic state, Malaysia has always upheld the fundamental liberties of human rights, which are embodied in Article 5 until 13 of the Federal Constitution, including freedom of speech, assembly, and association. Hence, it is believed that establishing an association is the best platform for gig workers in Malaysia to protect their community interest. Gig associations may be covered under the Societies Act 1966, just like trade unions which are

⁶⁰ Section 9 (a) till (d) Societies Act 1966.

⁶¹ [2014] 6 CLJ 409.

subject to the employer's recognition for collective bargaining as prescribed under the Industrial relations Act 1967 and governed under the Trade Union Act 1959. The suggested associations under the Societies Act 1966 may enter into a formal agreement with the service providers to provide a fair contractual agreement. Moreover, with a very determined objective of establishment, this association also may represent all gig workers from various industries as an important stakeholder in promoting and developing government policy to better recognise this new emerging economic model.