

BALANCING THE RIGHT OF GIG ECONOMY WORKERS IN THE CONTEXT OF COLLECTIVE BARGAINING

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ABSTRACT

Collective bargaining forms an integral part of a trade union. In Malaysia, workers are protected under the relevant employment legislations that provide basic minimum rights. Although Malaysia's freedom of association is embodied in the Federal Constitution, the rights of the gig economy workers, more often than not, are neglected. This is evident from the exclusion of this category of workers from the definition stated in the employment legislations. With this exclusion, gig economy workers are denied from establishing and joining a trade union. This subsequently unable them to have collective bargaining powers that resulted in the exploitation of their rights. The method adopted in this study is doctrinal in nature by analysing various employment related legislations and international conventions relating to trade union and collective bargaining and decided cases. It has been revealed that the weak definition of workmen impedes the right of workers in the gig economy to form a trade union. Based on the shortcoming identified, it is understood that the government plays a critical role in helping these workers to overcome barriers through strengthening the available legislations. This study proposed for gig economy workers to utilise other avenues currently available in other countries with the hope that collective agreement, non-binding agreement and application-based society exclusively for gig economy workers that could eventually lead to the forming of a trade union.

Keywords: Collective Bargaining, Trade Union, Gig Economy, Employment, Workers.

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MENGIMBANGI HAK PEKERJA-PEKERJA EKONOMI GIG DALAM KONTEKS TAWAR-MENAWAR KOLEKTIF

ABSTRAK

Tawar-menawar kolektif merupakan bahagian penting di dalam kesatuan sekerja. Di Malaysia, pekerja-pekerja dilindungi di bawah undang-undang pekerjaan relevan yang menyediakan hak-hak asas. Walaupun kebebasan berpersatuan termaktub di dalam Perlembagaan Persekutuan, hak-hak pekerja ekonomi gig selalu diabaikan. Ini terbukti dengan pengecualian pekerja-pekerja dibawah kategori ini dari definisi pekerja yang terdapat di dalam undang-undang pekerjaan. Dengan pengecualian ini, hak pekerja-pekerja ekonomi gig untuk menubuhkan dan menyertai kesatuan sekerja diabaikan. Ini seterusnya menghalang mereka dari mempunyai kuasa tawar-menawar kolektif menyebabkan eksploitasi pekerja-pekerja ini. Metod yang diambil di dalam kajian ini ialah secara doctrinal dengan menganalisa pelbagai peruntukan undang-undang pekerjaan yang relevan dan konvensyen antarabangsa berkaitan kesatuan sekerja dan tawar menawar kolektif dan kes-kes undang-undang yang telah diputuskan. Ia telah menunjukkan bahawa dengan definisi pekerja yang lemah, ia menghalang hak pekerja-pekerja ekonomi gig untuk menubuhkan kesatuan sekerja. Melalui kelemahan yang telah dikenal pasti, ianya difahamkan bahawa kerajaan seharusnya memainkan tugas kritikal dalam menolong pekerja-pekerja ini untuk menangani halangan-halangan melalui penguatkuasaan undang-undang sedia ada. Kajian ini mencadangkan pekerja-pekerja ekonomi gig untuk menggunakan cara-cara lain yang buat masa ini dipakai di negara-negara lain dengan harapan yang perjanjian kolektif, perjanjian tidak mengikat dan persatuan berdasarkan '*application-based*' secara eksklusif untuk pekerja-pekerja ekonomi gig yang akhirnya akan memimpin ke arah penubuhan kesatuan sekerja.

Kata Kunci: Tawar-Menawar Kolektif, Kesatuan Sekerja, Ekonomi Gig, Pekerjaan, Pekerja.

INTRODUCTION

Industrial relation is rather a complex subject. Although it is related to employment law, the difference is apparent. While employment law protects the rights of employees in general, industrial relation on the other hand deals exclusively with the relationship between employer

and employee by offering appropriate mechanisms to resolve trade disputes. Industrial relation as the name suggests deals with intricate relation among employer, employees and their representatives via trade unions and lastly, the government. All these key stakeholders have different interests and needs. However, balancing the rights of employees and the interest of the employer to achieve a harmonious relationship that exists between them would be the ultimate goal. Through the establishment of the Industrial Court, any differences or disputes between the two parties can be resolved amicably. In this context, the name of Tan Sri Harun Hashim is not foreign. He is known as one of the prominent figures when it comes to industrial relation dispute. The impartation of knowledge combined with wisdom are two important components that what made his judgment profound and relevant until today. During his time as the President in the Industrial court from 1980 to 1984, he made significant contributions especially in the establishment of the Court itself. His discerning thoughts were penned down in two landmark cases involving issues on collective bargaining and the power of the Industrial Court. At present, these cases are still cited and relevant in discussing issues on trade disputes. As time goes by, a new type of employment emerged. As of late, the gig economy is a sector that is gaining prominence and it has been identified as a new source of economic growth worldwide.¹

Although employment law in Malaysia seems to be providing basic protections to employees, the gig economy workers are excluded since they do not come within the definition of traditional employment.² This issue has discouraged gig economy workers from forming a trade union with a view to collective bargaining. In 2020, the first case involving a local gig economy worker was reported. In *Loh Guet Hing v Ministry of Human Resources & Ors*³, the claimant brought an action against the Ministry of Human Resources, the

¹ “Is Today's Gig Work Economy Taking over the World?” Bacon Work: Hire On-Demand Temp Labor. Bacon Inc, July 18, 2022. <https://www.baconwork.com/blog/the-rise-of-todays-gig-work-economy> accessed April 29, 2023.

² Mohd Shahril Nizam Md Radzi et.al, “Protecting Gig Workers’ Interests in Malaysia Through Registered Association under Societies Act 1966”, *IJUM Law Journal*, 30 (S1), 2022: 157 – 179.

³ [2022] MLJU 2503.

respondent in relation to the decision made by Industrial Court. In this case, the claimant who worked as a Grab driver for Grab was dismissed from the platform. He then referred the case to the Industrial Relation Department regarding his dispute for unfair dismissal. A meeting was set up between the claimant and the employer but failed to reach an agreement between the parties. Due to the failure of the meeting, the Ministry, based on what has been conveyed to him by the Director General, refused to further the case. The impugned provision, section 20 (3) of the Industrial Relation Act 1967 (IRA) provides that “upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.” The claimant was dissatisfied with the deliberation made by the Minister later brought an action for certiorari to review his case. The High Court held that there is no legal provision for the respondent to provide reasoning for the decision made based on section 20 (3) of the IRA. This is because the Court viewed that there is no requirement for the Minister to give any reason for exercising his discretion. It is interesting to note that the claimant tried to resolve the issue via the relevant department but the case was dropped before being brought to Industrial Court. From this case, the importance of having a trade union to protect these workers’ rights cannot be hardly over emphasised.

This study begins with an overview of the gig economy in Malaysia and proceeds to elaborate on the evolution of industrial relation law by focusing on the roles of the Industrial Court. Next, various international recognition of trade unions and collective bargaining with reference to Malaysia legal framework are discussed. Next, several major challenges that serve as impediments to form a trade union for the purpose of bargaining the terms and conditions of gig economy workers’ employment contract with their employer through collective bargaining are examined. Last but not least, the role of collective agreement in the future of work are analysed with several proposals made by emulating practice from other countries. The success story of championing the right of the gig economy workers in other jurisdictions are highlighted and serve as a guideline in enhancing the role of collective bargaining for these workers in Malaysia.

METHODOLOGY

This article applies doctrinal legal research and adopts a qualitative study. The references are mainly from relevant legal provisions from employment-related statutes such as the Federal Constitution, Employment Act 1955 (EA), Industrial Relations Act 1967 (IRA), Trade Unions Act 1959 (TUA) and Societies Act 1966 (SA) and relevant decided case law. Further, references are also based on international conventions on freedom of association, trade union and collective bargaining adopted by the United Nations. The secondary data is largely from textbooks and journal articles.

OVERVIEW OF GIG ECONOMY IN MALAYSIA

The term gig economy was originally associated with musical performances dating back as early as 1915. The term first came to light and popularised by Mario Khreiche through his thesis entitled ‘Milieus in the Gig Economy’ published in 2018.⁴ The term since then has been used largely to denote the labour landscape using a digital platform. There is no universal agreement on the definition of gig economy. Generally, it can be described as working for customers and clients through a designated platform although it is accepted that it normally implies temporary jobs.

Apart from the complex definition of the term gig economy, another issue that lingers around is the classification of the gig economy workers. As far as the definition of gig economy workers is concerned, the courts are torn apart in interpreting them as workers or independent contractors. This is evident from decided cases that for the first time challenged the legal definition of workers.

In the case of *Dynamex Operations West, Inc. v Superior Court*,⁵ the Supreme Court of California held that a worker in the gig economy would be an independent contractor if three conditions are

⁴ Khreiche, M, “Milieus in the Gig Economy” (PhD diss., Virginia Polytechnic Institute and State University, 2018),+ 84 , https://vtechworks.lib.vt.edu/bitstream/handle/10919/86205/Khreiche_M_D_2018.pdf?sequence=1&isAllowed=y.

⁵ 4 Cal.5th 903 (Cal. 2018).

fulfilled. Firstly, the employer should not have any control or directs the worker to perform the task. Secondly, the performing of the task that is not similar to the duties of the employees. Thirdly, the worker should be usually engaged in an independently established trade or business of a similar nature as the task performed. However, the situation is different in the United Kingdom. In the case of *Uber BV v Aslam*,⁶ although Uber stated in the contract that the company is merely acting as an intermediary between the drivers and passengers, thus making the drivers as independent contractors, the Court of Appeal held otherwise. It was observed that Uber exercised substantial control over the drivers in performing their duties, hence they should not be regarded as independent contractors. This case has been an eye-opener as the gig economy workers were initially misclassified as independent contractors. The judgment made it clear that the drivers also come under the definition of workers. Hence, basic employment benefits were made available to the drivers such as minimum wage, holiday pay and breaks. The judgment made also proves that workers in the gig economy sector are getting more recognition by including them to suit the definition of workers as prescribed by laws. It is therefore undeniable that the era of information technology not only enhances the working method as it allows flexibility but at the same time, it also creates the possibility to create a work-life balance which is said to deteriorate in the traditional employment.

It is undeniable that the gig economy sector has slowly transformed the labour landscape in Malaysia. It is estimated that by 2025, the gig economy will bring in approximately US\$2.7 Trillion.⁷ With such a promising figure, it is expected that more jobs to be available in the gig economy sector. The gig economy is given due recognition in this country not only because of its ability to generate revenue but most importantly, it is said that such sector has the

⁶ [2021] UKSC 5.

⁷ Manyika, J et. al., 'A Labor Market That Works: Connecting Talent With Opportunity In The Digital Age.' McKinsey Global Institute, June 2015, https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Connecting%20talent%20with%20opportunity%20in%20the%20digital%20age/MGI_Online_talent_A_labor_market_that_works_Full_report_June_2015.ashx, accessed April 27, 2023

potential to lessen inequality especially between the rich and the poor.⁸ This is because such sector is likely to provide workers with more regular and stable incomes in the long run by allowing workers to earn additional incomes without compromising their full time employment. Inequality does not just appear to close the gap on incomes but it also extends to gender. Women who initially represent a small fraction of gig workers are now starting to grow as the industry begins to mature. It is also forecasted that the gig economy helps to expand productivity and reduce the costs for small and medium-sized companies (SMEs) with the stable growth of freelancers.⁹

THE EVOLUTION OF TRADE UNION IN MALAYSIA

Historically, the relationship between employers and employees existed prior to independence largely due to the tin mining and rubber plantations. The importation of foreign labour particularly from China and India into Malaya as early as 1920s by the British government resulted in a significant change in the Malaysian population making it a multiracial community.¹⁰ Malay workers, on the other hand, were mostly in the civil service and together, General Labour Unions (GLUs) were formed.¹¹ The membership in the GLUs was open to any worker regardless of any industry, sector or workplace. The British ruled Malaysia (then Malaya) beginning from 1874 until 1957.¹² During the colonial period, the British not only influenced but also encouraged and allowed the migration of China nationals and India nationals to work in various sectors, vastly on plantations, which led to

⁸ Business Today, Gig Economy in Malaysia: Transforming the Labour Landscape and Promoting Decent Work <https://www.businesstoday.com.my/2022/12/10/gig-economy-in-malaysia-transforming-the-labour-landscape-and-promoting-decent-work/> accessed on April 11, 2023.

⁹ Ibid.

¹⁰ Nazrin Muizzuddin Shah, *Charting the Economy: Early 20th Century Malaya and Contemporary Malaysian Contrasts*, (Oxford: Oxford University Press, 2016).

¹¹ Christine B. N. Chin, "The State of the 'State' in Globalization: Social Order and Economic Restructuring in Malaysia," *Third World Quarterly* 21 (6) (December 2000): 1037, <https://library.fes.de/libalt/journals/swetsfulltext/11375733.pdf>.

¹² Ibid.

a significant change in the landscape of the Malaysian population. Some of the major issues employees were facing include the extremely low wages and the poor working conditions. Employees started to show dissatisfaction towards their employers by the late 1930s. This is evident from a wave of strikes that happened in Selangor plantations industry that instilled fear in the employers due to the strikers' violent behaviour.¹³ During this point of time, the establishment of various trade unions influenced by the Malayan Communist Party (MCP) took charge.¹⁴ It was reported that the number of trade unions was increasing where by 1947, there were 298 unions formed with membership reaching almost 200,000 consisting of workers regardless of their trade, occupation and position. To curb this issue, the first trade union legislation was introduced in Malaya known as the Trade Unions Enactment in 1940. By having this Enactment, the office of Registrar of Trade Union was created allowing for proper and legal registration of the trade unions in Malaya. Beginning 1950s onwards, the trade unions were no longer under the influence of the communist since the government managed to combat the communist ideology that was embedded in the earlier batch of trade unions by declaring the First Emergency in 1948.¹⁵ Along with the announcement made by Tunku Abdul Rahman, the first Prime Minister of Malaysia, after the country gained independence, there was an increase in the number of trade unions due to the encouragement by the government to provide bargaining power to union members for the purpose of safeguarding the employees' interest.¹⁶

Since the 1960s, there has been a steady growth of the establishment of trade unions. The apparent major change from the post-colonial industrial policy was the shift of heavy reliance on a single import-oriented policy to a dual policy; export and import

¹³ Leong Yee Fong, *Labour and Trade Unionism in Colonial Malaya*, (Penang: Universiti Sains Malaysia, 1999), 89.

¹⁴ Maimunah Aminuddin, "Employment Relations in Malaysia: Past, Present and Future," *New Zealand Journal of Asian Studies* 11(1) (2009): 304-317.

¹⁵ Todd, T and Peetz, D, *Globalization and Industrial Relations in Malaysia*. (Thailand: International Labour Organization, 2000).

¹⁶ "Trade Unions In Malaysia: Complexity Of A State-Employer System" in *Trade Unions in Asia: An Economic and Sociological Analysis*, edited by Benson, J and Ying Zhu, 123, (Oxfordshire: Routledge, 2008).

oriented as early as the 1970s.¹⁷ Due to this policy, Malaysia has shifted its industrial landscape towards the heavy and chemical industry by referring to other developed Asian countries such as Japan and South Korea as model nations during the 1980s.¹⁸ During the reign of Tun Mahathir Mohamed, he introduced the “Look East” policy that saw the wind of change from being under the influence of western countries particularly the United Kingdom to favouring the eastern countries mentioned above. By emulating these countries’ policies on trade unions, the government introduced the policy of enterprise unions also known as in-house unions in 1983.¹⁹ Contrary to the industrial union, the enterprise union confined its membership to employees belonging to the particular establishment or company only including the employees of the company's subsidiary or an associate company.²⁰ Temporary workers, contract workers and foreign workers are excluded.²¹ Hence, this marked the demise of the era of industrial unionism as Malaysia has resorted to enterprise unionism. This policy continues to exist until today with many criticising its practice as such policy would be relevant in bigger companies with a sufficient number of employees.²² The Government continues to receive criticism for its longstanding policies regarding rights of workers to organise associations and their freedom in operating the associations.²³

¹⁷ Wad, P, 2001. “Transforming Industrial Relations: The Case of the Malaysian Auto Industry.” CLARA Working Paper (12): 4, https://tradeunion.org.my/wp-content/uploads/2019/11/Peter-Ward_Malaysia-Auto-Industry.pdf.

¹⁸ Wad, P, 1988, *The Japanization of the Malaysian Trade Union Movement* in R. Southhall (ed.), *Trade Unions and the New Industrialization in the Third World*, (London: Zed Books, 1988).

¹⁹ Ibid.

²⁰ Wad, P, “Enterprise Unions: Panacea for Industrial Harmony in Malaysia”, *Copenhagen Journal of Asian Studies*, 12 (12) :89-125.

²¹ Ibid.

²² Ibid.

²³ Vanessa Ee-Lyn Gomes, “Workers have right to protest, says MTUC”, *Malaymail*, 2015, accessed September 23, 2022, <http://m.themalaymailonline.com/malaysia/article/workers-have-right-to-protest-saysmtuc>

INTERNATIONAL RECOGNITION OF COLLECTIVE BARGAINING IN THE MALAYSIAN CONTEXT

International Labour Standards (ILO) was introduced in 1919 largely due to end the exploitation and unfair treatment of workers during the industrial revolution. It was one of the United Nations' agencies for the purpose of securing peace on the basis of social justice. Essentially, the ILO provides the minimum standards of labour to promote equality and decent working environment to the workers.

Trade union has been recognised by the ILO as one of the human rights through freedom of association. It is enshrined in the ILO Constitution²⁴ and the ILO Declaration of Philadelphia.²⁵ These two important pieces of documents marked the beginning of fundamental liberties accorded to workers to associate themselves with worker unions in order for their common goals and interest to be well presented. The ILO Declaration on Fundamental Principles and Rights at Work which was adopted in 1998 further strengthens the freedom of association granted to workers and the effective recognition of the right to collective bargaining as proclaimed in the Universal Declaration of Human Rights.²⁶ It is worth noting that the right of workers to form and join organisations represents a free and open society. In many

²⁴ It was created in 1919, as part of Treaty of Versailles that put an end to the World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice.

²⁵ This Declaration was adopted by International Labour Organisations in 1944 focused on the aims and purposes of the Organisation.

²⁶ Part 2 of ILO Declaration on Fundamental Principles and Rights at Work (1998) reads

“Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour;

(d) the elimination of discrimination in respect of employment and occupation; and

(e) a safe and healthy working environment.”

countries, workers' organisations have played a significant role symbolising a democratic transformation.

As far as the trade union is concerned, there are a number of important conventions established by the ILO. Two key ILO conventions addressing freedom of association are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). To ensure the smooth running of these conventions, the ILO Committee on Freedom of Association was set up to examine complaints by employers' and worker's organisations about violations of freedom of association, whether or not the member State concerned has ratified these conventions. Despite the inception of these conventions, there are many challenges remain unsolved as certain categories of workers are denied the right of association.²⁷ Not only that, some workers' organisations are also unlawfully suspended or interfered with that could change the purpose of such organisations.²⁸

In the international arena, the notion of collective bargaining is associated with the freedom of association.²⁹ According to the ILO, research has shown that countries with excellent coordination of collective bargaining will have less employment issues such as inequality in wages, lower persistent unemployment, and fewer strikes.

²⁷ For an instance in Malaysia, public servants are excluded from joining trade union. Another category of workers is migrant workers who are also prohibited from forming their own association although they are allowed to join unions established by locals.

²⁸ According to the International Trade Union Confederation, it was estimated that union members faced violence in 59 out of 139 countries. In 2017, it was reported that trade unionists in Bangladesh, Brazil, Colombia, Guatemala, Honduras, Italy, Mauritania, Mexico, Peru, Philippines and Bolivarian Republic of Venezuela are murdered. See ILO, *Rules of the Game: An introduction to the standards-related work of the International Labour Organization (Centenary edition 2019)*, (Geneva: International Labour Organisation, 2019).

²⁹ Freedom of association is guaranteed to workers by allowing them to create and join organisations that represent them such as join trade union. Via trade union, workers can bargain the terms and conditions of their employment that are concluded in the collective agreement.

Strike rates are very low in Finland and Sweden where most workers are covered by collective agreements. Further, most workers belong to trade unions.³⁰ Under the ILO, there are important instruments created to promote collective bargaining. The first convention on this subject is the Right to Organise Collective Bargaining Convention, 1949.³¹ This Convention provides that measures to encourage and promote the development for voluntary negotiation between employers' organisations and workers' union to regulate the terms and conditions of employment via collective agreements. Secondly, the Labour Relations (Public Service) Convention 1978.³² Unlike the 1949 Convention, this Convention focuses on promoting collective bargaining among public employees. Lastly, is the Collective Bargaining Convention 1981. This Convention provides the definition of collective bargaining and calls for its promotion to be applied in every branch of economic activity, including public service. Malaysia has ratified the 1949 Convention on 5 June 1961. Acknowledging the importance of collective bargaining to ensure the harmonious relationship between employers and employees, collective bargaining is also incorporated domestically. In Malaysia, it is defined in the IRA as negotiation between parties with a view to conclude a collective agreement.³³ Although public servants are not covered under the IRA, there are five National Joint Council established for the purpose of negotiating terms of employment on behalf of the public servant with the government.³⁴ As for the 1948 Convention, Malaysia has yet to ratify it despite the commitment given to promote freedom of association. According to the report submitted to the ILO, Malaysia's government feels that the convention is not relevant to its local

³⁰ OECD, "Strikes", in *Society at a Glance 2006: OECD Social Indicators*, (Paris: OECD Publishing, 2007)

³¹ The Convention was adopted on 1 July 1949 during the 32nd International Labour Conference session, Geneva.

³² See preamble of ILO Convention No.98 Right to Organize and Collective Bargaining Convention.

³³ Section 2 of IRA.

³⁴ Sharifah Suhanah Syed Ahmad, *Industrial Relations Law in Malaysia: Cases and Materials* (Malaysia: University of Malaya Press, 2012).

circumstances and past historical events. It is also worthy to note that the convention will undermine the state's policy on national security.³⁵

TRADE UNIONISM IN MALAYSIA: A GLANCE AT THE RELATED LEGISLATIONS

There are many legislations concerning labour law in Malaysia. However, with regards to industrial relation specifically, four important legislations need to be highlighted namely the Federal Constitution, EA, TUA and IRA.

Federal Constitution

The freedom of association is guaranteed in Article 10 of the Federal Constitution.³⁶ Such freedom is echoed in the form of allowing

³⁵ Malaysian Government explains to the ILO that trade unions in Malaysia are structured on the basis of a particular trade, occupation or industry or within similar trades, occupations or industries. It claims that this requirement of the Trade Unions Act, 1959 does not contravene Convention No. 87 which Malaysia has not ratified but notwithstanding that, it stresses that the right of workers and employers to form, join and participate in lawful activities of trade unions to protect their interests is preserved in the Malaysian Constitution and other labour laws, consistent with ILO Convention No. 98, which Malaysia has ratified. It stresses that trade unions are free to engage in collective bargaining without interference by the State save in situations affecting the security, public order and economic well-being of the nation for which the Government bears overriding responsibility in its opinion. Refer to Report No. 248, March 1987, Case No. 1380 (Malaysia) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2901531 accessed November 22, 2023.

³⁶ Article 10 of the Constitution reads
 (1) Subject to Clauses (2), (3) and (4) – (a) every citizen has the right to freedom of speech and expression; (b) all citizens have the right to assemble peaceably and without arms; (c) all citizens have the right to form associations. (2) Parliament may by law impose – (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court,

employees to participate in the trade union. The provision allows workers and employers to establish and join trade unions.³⁷ However, it should be noted that such right is not absolute. Owing to history of communism prevailing prior to independence, Malaysia has taken measures to control trade union activities by imposing various restrictions.³⁸

Employment Act 1955

Under the purview of employment law, freedom of association is prescribed in Section 8 of the EA. It 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 – (a) to 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”. The Act which is recognised as an umbrella legislation for workers gives due recognition to the workers to express their freedom of association by allowing them to join trade unions in

defamation, or incitement to any offence; (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, or public order; (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality. (3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education. (4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

³⁷ Section 4 of IRA also allows for employees to participate in trade unions.

³⁸ Siti Suraya Abdul Razak and Nik Ahmad Kamal Nik Mahmood, “Trade Union Recognition in Malaysia: Legal Issues”, *UUM Journal of Legal Studies*, Vo. 9 No. 1, pp 23 – 27.

Malaysia. However, it is not absolute since further requirements are laid down in the TUA.

However, it is not absolute. Malaysia's experience on the communist's threat had taught the state government to control the trade union activities for the security of the Federation. Therefore, various restrictions have been imposed on the trade union movement for the nation's interest. Unfortunately, the limits have contributed to the lengthy and complicated trade union recognition process, and it directly impedes the trade union's right to collective bargaining.

Trade Unions Act 1959

Specific legislations were introduced to regulate the relation between employer and employee. The TUA was introduced in 1959, two years after Malaysia gained its independence. One of the main objectives of the TUA as described in Section 2 is to regulate the relations between employer and employee which would help to improve the employee's working condition and protect the employee from any kind of discrimination. According to Doucouliagos and Laroche, based on the meta-analysis data, it is believed that if the employee's interest is taken care of, this will increase productivity that will benefit the employer in the long run such as in United States of America.³⁹ To achieve this, negotiation of conditions and terms of employment governing the employee can be done through a process known as collective bargaining that eventually reflected in the collective agreement between the employer and employee. Another objective of a trade union is to regulate the relation between employee and employee or between employer and employer. Further, a trade union also functions as a representative to its member in legal proceeding brought against the latter.⁴⁰

The trade union is open to all employees starting at the age of 16 except for those in police force, armed force and prison service. Although the membership is offered to every employee, a union

³⁹ Doucouliagos, C and Laroche, P, "What Do Unions Do to Productivity? A Meta-Analysis", *Industrial Relations A Journal of Economy and Society*, 42 (4) (2003): 650 – 691.

⁴⁰ Section 19 of IRA.

consisting of employees from different industries is nevertheless prohibited.⁴¹ Another segregation is regarding public and private sector workers in which the workers are allowed to join the unions belonging to their respective sector only.⁴² Since the inception of the TUA, there are 751 unions established with a membership of amounting to 800,000.⁴³

Industrial Relations Act 1967

Another important piece of legislation is the IRA. While the TUA focuses on regulating the relationship between employer and employee, the IRA on the other hand concerns not only with employee and employer but also their relationship with the trade unions of the employee. This can be seen in the preamble of the IRA as its primary objective is concerned with promoting and maintaining industrial harmony by regulating the relations between employers and workmen and their trade unions and solving any differences or trade disputes arising from their relationship.⁴⁴

The IRA basically provides a mechanism that gives a legal recognition to a trade union. This is evident from Section 4 of the IRA also deals with collective bargaining and collective agreements between the trade union of the employers and workmen apart from the provision of conciliation procedures in trade disputes.⁴⁵ The settlement of any differences or disputes is normally done in the Industrial Court, a special tribunal established under the IRA. The Act has also defined various forms of trade disputes such as strikes, lock-outs, picketing, and intimidation.⁴⁶ In the event conciliation and settlement of the trade dispute failed to resolve the matter especially when it involves strikes

⁴¹ Section 26 (1A) of TUA.

⁴² Section 27 of TUA.

⁴³ Malaysia Trade Union Database, <https://tradeunion.org.my/about-us-2/> accessed April 2, 2023.

⁴⁴ Preamble of IRA.

⁴⁵ Section 4 of IRA.

⁴⁶ Section 10 of IRA.

or lock-outs, an investigation will be carried out by the relevant authority as prescribed under IRA.⁴⁷

The IRA also provides specific remedies that arise out of trade dispute such as ‘reinstatement’ to the former employment if the employee is dismissed without a valid reason. For an instance, in the case of *Norain Redzkiah Osman Salleh v. Petroliam Nasional Berhad*,⁴⁸ the applicant who was terminated unfairly was successful in her application to prove that she was dismissed from her employment without just cause and excuse. However, considering the facts of the case, reinstatement would not be a suitable remedy. Hence the court ordered the defendant to pay back wages and compensation in lieu of reinstatement.

The Industrial Court

The Industrial Court was established under the IRA. As a special tribunal, the Industrial Court main function is to settle any trade dispute between employer and employee regarding the term of employment or the conditions of work. The Industrial Court consists of a President who shall be appointed by the Yang di-Pertuan Agong and a panel of persons representing employers and a panel of persons representing workmen all of whom shall be appointed by the Minister. It should be noted that before appointing the panels the Minister may consult such organisations representing employers and workmen respectively as he may think fit.⁴⁹

Unlike other civil courts, the Industrial Court is expected to provide a speedy settlement of disputes at a lower cost. Section 30 of the IRA states that within 30 days from the date of a case is referred to the Court, such case must be settled without delay.⁵⁰ Further, the Industrial Court also allows for any dispute to be referred to an alternative dispute resolution. This is evident from section 18 of the IRA encouraging conciliation to resolve the dispute between parties.

⁴⁷ Section 10 of IRA.

⁴⁸ [Case No: 4/4-2381/18], [2020] 1 ILR 142.

⁴⁹ Section 21 of IRA.

⁵⁰ Section 30 (3) of IRA.

OVERVIEW OF THE KEY PRINCIPLES OF COLLECTIVE BARGAINING UNDER THE PURVIEW OF INDUSTRIAL RELATIONS ACT 1967

The term collective bargaining generally refers to negotiation between employers and employees on the terms of employment. Collective bargaining was believed to have first came into existence in the United States of America, describing the process of accepting proposals made between trade unions and representative of employers.⁵¹ Essentially, as the name suggest, such negotiation is to be done collectively, not individually. The establishment of a trade union for employees and employers would be the antecedent before collective bargaining could take place. At this juncture, it should be noted that collective bargaining is interrelated to the collective agreement.

At this point, it is relevant to note that Tan Sri Harun Hashim had delivered two notable judgments while serving at the Industrial Court. The judgments were regarding the interpretation of terms in award or collective agreement and the non-compliance of the award or collective agreement. These judgements are discussed below.

Interpretation of Award or Collective Agreement

As mentioned earlier, a collective agreement is a reflection of a final consensus reached between the parties from the collective bargaining. As such, each party is assumed to have intended what they have said which is to be drafted in the agreement accordingly. The IRA stipulates that a collective agreement must be made in writing and signed by all the parties to the agreement.⁵² Once signed, the copy of the agreement must be deposited with the registrar of the court within 30 days from the date the agreement is entered into. It is the duty of the Registrar to bring the agreement to the notice of the court.⁵³ A collective agreement just like any other agreements contained a number of terms and conditions that sometime may be confusing and lead to disputes. In this

⁵¹ D. Quinn Mills, 'Reforming the US System of Collective Bargaining', accessed April 15, 2020, <https://www.bls.gov/opub/mlr/1983/03/art3full.pdf>.

⁵² Section 14 of IRA.

⁵³ Section 16 of RA.

respect, the Industrial Court is empowered with the role of interpreting the provision in the collective agreement should any conflict arise. Under section 33 of the IRA, it states that if any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question to the Court for a decision on the question. The similarity goes to any party bound by the award or agreement who seeks for interpretation of the question may also apply to the Court.⁵⁴ The Court may, upon the application of any party, by order vary any of the terms of an award or agreement if it considers it desirable so to do for the purpose solely of removing ambiguity or uncertainty.

There are a number of cases that can illustrate the interpretation made by the court. In the case of *Malayan Agricultural Producers Association v National Union of Plantation*,⁵⁵ the essence of section 33 (1) of IRA was discussed. The parties in this case had entered into a collective agreement. Later, this agreement received a consent award from the Industrial Court. The parties who were not satisfied with Article 8 of the agreement referred the case to the Minister who subsequently referred the interpretation of Article 8 of the award to the Industrial Court.⁵⁶

The Industrial Court dismissed the preliminary objection made by the respondent. In the preliminary objection, the respondent claimed that the Industrial Court had no jurisdiction to hear the reference as the reference letter of the Minister was void and/or ultra vires section 33 of IRA. The matter was then referred to the High Court. At the High Court, the respondent applied for a writ of certiorari to quash the award of the Industrial Court this was granted. The appellant appealed. In dismissing the appeal, Harun Hashim SCJ made the following judgments. Firstly, the gist of section 33(1) of the IRA is that the Industrial Court has the power to interpret any award or collective agreement if being referred to by the parties or the Minister. If the question is referred to by the Minister, the Minister should set out the

⁵⁴ Section 33 of IRA.

⁵⁵ [1992] 2 MLJ 57 (SC).

⁵⁶ Article 8 of the award provided that the provisions of section 16 of the Employment Act 1955 should apply to employees covered by the said section in respect of the minimum number of days' work in each month.

matters under dispute between the parties and the questions desired to be answered in relation to such dispute. Further, a reference by the Minister must be precise to ease the Industrial Court on the question it had to answer. If the question is too general, the Industrial Court has the right to decline interpreting the award due to the vagueness of the question. If a specific question had been framed according to the form endorsed by the court, the Industrial Court in interpreting Article 8 of the award must also interpret section 16 of the Employment Act 1955 to give effect to the former provision and the award as a whole. From the decision, it is clear that one of the roles of the Industrial Court is to interpret provisions in the collective agreement to avoid ambiguity. However as mentioned in the case, it also a duty upon the Minister to frame the reference and the question correctly before such an issue is brought to the Industrial Court for interpretation purposes. The decision made in this case has been followed by a number of cases.⁵⁷

Non-Compliance with Award or Collective Agreement

Another prominent issue in relation to trade disputes is in relation to the breach of award or breach of the term in the collective agreement. Non-compliance generally refers to the failure made by a party to act in accordance with the award or terms of collective agreement. For collective agreement, an act of non-compliance will be referred to the Industrial Court. In section 56 (1) of the IRA, it states that a complaint in relation to the breach of any provision of an award or collective agreement which has been taken cognisance of by the Court may be lodged with the Court in writing by any trade union or person bound by such award or agreement. Subsequently, the Court may also make an order directing any party to comply with any term of the award or collective agreement. Alternatively, the Court may also direct any party to cease or desist from doing any act in contravention of any term of the award or collective agreement. On the other hand, the Court may also make such order as it deems fit such as rectification or restitution for any contravention of any term of the award or collective agreement.

⁵⁷ *National Union of Bank Employees v Malayan Commercial Banks' Association* [2010] 2 ILJ 78 and *National Union of Bank Employees, States of Malaya v Malayan Commercial Bank's Association, Bank Muamalat Malaysia Berhad* [2017] ILJU 13.

Lastly, the Court may also vary or set aside upon special circumstances any term of the award or collective agreement.

In the case of *Dragon & Phoenix Bhd v Kesatuan Pekerja-pekerja Perusahaan Membuat Textil dan Pakaian Pulau Pinang & Anor*⁵⁸ Harun Hashim SCJ reiterated the difference between the two functions of the Industrial Court; the interpretative and the enforcement in the judgment below:

“In a complaint of non-compliance with any term of a collective agreement or award under section 56 of the Industrial Relations Act 1967, the Industrial Court should, as the general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely enforcement function. It should not embark on an expedition of examine the provision of the Employment Act 1955 in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the interpretative function of the court under section 33 of the Industrial Relation Act 1967 which is an entirely different exercise from that under section 56. It is important to recognize the difference between these two functions of the court because failure to comply with an order under section 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s 33.”

In this case, the employees of the plaintiff complained to their union, the defendant, that the former did not comply with art 26 (4) of the award made by the Industrial Court. That article stated that the employees should be given a paid-day off by the Plaintiff after working for 16 hours on the days in question. However, the plaintiff failed to comply with the requirement stated in the provision. The defendant represented the employees lodged a complaint to the Industrial Court. The Court gave judgment in the defendant's favour causing the plaintiff to apply for an order of certiorari from the High Court to quash the award. However, the application was dismissed by the High Court and the plaintiff appealed to the Supreme Court. According to the plaintiff, the employees only worked for 15 hours on the days in questioned and the one-hour break should not be included. Hence, the

⁵⁸ [1991] 1 MLJ 89.

employees were not entitled to the paid day-off on the next day. Harun Hashim SCJ in the above case highlighted the importance to separate different functions bestowed to the Industrial Court. In this regard, section 56 and section 33 of the IRA are dealing with two functions of the Court. Section 33 allows the Court to interpret any term of the award or collective agreement. However, section 56 deals with the breach of any terms in the award or collective agreement.

From these cases, it is worthy to note that the role of the Industrial Court is important as it is the last resort to protect the sanctity of the collective agreement entered between employees and employers. From the employee's point of view, their rights are said to be protected on a few levels, from the collective agreement right to the Industrial Court with the role to uphold the terms stated in the agreement between employees and their employer.

CHALLENGES FOR WORKERS IN THE GIG ECONOMY

Hurdles faced by workers in gig economy sectors are often shadowed under the pretense of flexibility. These workers often faced challenges primarily because they are not protected like the traditional workforce. The major hurdles for these workers are inadequacy of relevant legislations, gig economy as temporary jobs and survival in unpredictable market. Due to these challenges, it strengthens the need for a trade union that advocates collective bargaining for the benefit of these workers.

Inadequacy of relevant legislations

At present, gig economy workers do not have a similar coverage enjoyed by the traditional workers. The biggest barrier in extending social security in the platform economy is due to the fact that it falls under a non-standard form of employment. To begin with, the workers are not included within the definition of workers under the EA. A similar situation goes to the Labour Ordinance (Sabah Chapter 67) and the Labour Ordinance (Sarawak Chapter 76). An "employee" is defined as a person who meets the category as specified in the first schedule that the relevant ministers order or when the employment is

other than under contract of service prohibits.⁵⁹ Such definition is also absent in other related legislations such as the Employees' Social Security Act 1969 and Employees Provident Fund Act 1991. The definition provided under these legislations suggests that the gig economy workers are being excluded since "contract of service" does not include gig economy workers who are employed on a temporary basis with no agreement entered with an employer.⁶⁰ As mentioned above, a contract of service includes terms of employment such as working hours, leave benefits that are spelled out in an employment agreement which gig economy workers are not provided with. Because of their undefined status, there was no record of labour cases under the purview of the Human Resource Ministry in relation to gig workers.⁶¹

⁵⁹ Sec 2 (3) of EA reads

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

- (a) any person or class of persons specified in the order shall be deemed to be an employee or employees;
- (b) the person, statutory body, or local government authority employing, engaging, or contracting with every such person or class of persons shall be deemed to be an employer; with one another;
- (d) the place where such employee carries on work for his employer shall be deemed to be a place of employment; and
- (e) the remuneration of such employee shall be deemed to be wages, for the purposes of such specified provisions of this Act and any other written law.

⁶⁰ In section 2 (a) of EA, contract of service refers to 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.

⁶¹ Gig economy workers not included under definition of workers, says deputy minister, The Malaymail, November 8, 2021, <https://www.malaymail.com/news/malaysia/2021/11/08/gig-economy-workers-not-included-under-definition-of-workers-says-deputy-mi/2019292> accessed on April 30, 2023.

For this purpose, gig workers are identified as independent contractors as they do not come within the definition of ‘workmen’ under Section 2 of the TUA. The relationship that existed between the gig economy workers and service providers is based on a regular contract. Hence, it makes it difficult for these workers to establish trade unions as they are not recognised as employees. Not only that, employers’ recognition of such unions provided under Section 9 of the IRA also hindered the forming of a trade union by the gig economy workers. Failure to form a trade union would subsequently impede the right of gig economy workers to participate in collective bargaining. Without these rights, the tendency of these workers to be exploited by the service providers is high. This is because the service providers can create contract to their advantage owing to the status of the gig economy workers which are not protected under the law. As such, these workers can establish a society since their rights to join a trade union is denied. The establishment of society is governed by the SA with the aim to provide these workers with a solution since the same mechanism adopted by trade unions can be duplicate to the gig economy society.⁶² In the United States of America, an app-based association helps create solidarity among workers in the gig economy sector with the longer vision of protecting their rights of employment. From here, collective bargaining between workers and service providers can take place. Take Rideshare Drivers United (RDU) as an example. It is an association comprising of Uber and Lyft drivers in the United States of America advocating for better working conditions. In fact, strikes were held in March 2019 to protest unfairness in the terms of their employment.⁶³

It is also equally important to reform the definition of ‘workmen’, for example to amend and include workers in the gig economy sector in the EA. At present, the EA does not cover a contract-for-service relationship assigned by an employee involved in an

⁶² Mohd Shahril Nizam Md Radzi et. al., Protecting Gig Workers’ Interests in Malaysia Through Registered Association under Societies Act 1966, *IIUM Law Journal* 30 (1) (2020), 157 – 179.

⁶³ Yount, A, Building Solidarity among Gig Workers through Digital Organizing, Annenberg, School of Communication, University of Pennsylvania, <https://www.asc.upenn.edu/news-events/news/building-solidarity-among-gig-workers-through-digital-organizing> accessed 1 May 2023.

independent contract, or a contract for service such as the e-hailing sector. Without a proper legal status, necessary protections to the extent of providing collecting bargaining power via joining of a trade union cannot be accorded to the gig economy workers.

Not only that, these workers are not subjected to the National Wages Consultative Council Act 2011 and the Minimum Wages Order 2020. Nevertheless, it should be noted that Malaysia has moved a step further by regulating social security legislation that governs gig workers. The Self-employment Social Security Act 2017 (Act 789), provides social security protection to self-employed individuals, including gig economy workers in which they can opt to make contributions under the Act. This initiative was initially made compulsory for the self-employed within the passenger transportation sector such as taxi and e-hailing which took effect on 1 June 2017. It was later extended to cover another 19 other sectors which also include food delivery sector beginning January 2020. Although gig workers can now contribute to the savings for retirement age, it is still not made mandatory for employers to contribute to the fund. While the full-time workers enjoy contributions from their employers, gig workers may not be able to depend on the fund when they retire as the amount of their retirement savings may not be sufficient. This is in stark contrast to the full time employees' contributions who also receive a percentage of contributions from their employers. In 2020, it was reported that only 7% of the more than four million gig workers are registered under the social security scheme.⁶⁴ This is one of the major drawbacks as far as the old-age contingency is concerned.

Survival in the upswing of markets

Owing to the unique concept of the gig economy, it creates many uncertainties in contractual arrangements between the employee and the employer. In fact, the gig economy has been criticised by many experts claiming that it somehow reminisces the old industrial time as

⁶⁴ Muzaffar Shah Habibullah et al., "Labour Market Reactions to Lockdown Measures during the COVID-19 Pandemic in Malaysia: An Empirical Note", *Jurnal Ekonomi Malaysia* 55(1) : 39-49.

those workers back in the days were exposed to extremely casual and gullible working conditions.⁶⁵ Ironically, in the modern days where human rights are often glorified, it seemingly excludes the gig economy workers' right to association. In this sense, the proper recognition of gig economy workers to be included in the legal definition of workers would make ways for them to establish a union with the function of proposing terms of contract that will favour them in general. It is acknowledged that with the changing patterns of employment, it poses new challenges to the union movement as engaging the gig economy workers with the hope to extend representation to these non-standard workers requires hard work.

Another issue that worth highlighting is the fact that some of the workers in the gig economy sector are working on a short-term basis. Due to the flexibility it offers, workers seem to enjoy moving in and out of different gigs with no intention to participate in one gig over a long period of time. This would bring impact to the workers to create a union that identifies their shared interests.⁶⁶ Having that said, the establishment of collective agreement for the workers would be a difficult task as workers may be in a position of hard to reach and engage. As a result, trade unionism may have to evaluate the best way to organise a union for the gig economy workers. It is also worthy to note that this platform is highly competitive. With more people attracted to the flexibility it may offer, more workers will have to compete for the same job. As of 2022, 26%, about 3.9 million people of the total workforce are engaged in the gig sectors in Malaysia.⁶⁷ The significantly growing number of competitors among drivers

⁶⁵ Zhi Ming Tan et. al., "The Ethical Debate about the Gig Economy: A Review and Critical Analysis," *Technology in Society* 65 (2021): 29.

⁶⁶ Conditions of Work and Employment Series No. 94 Organizing on-demand: Representation, voice, and collective bargaining in the gig economy Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy.

⁶⁷ Muhd Amin Naharul, "The gig economy: What monster are we breeding?" The Malaysian Reserve, October 18, 2022, <https://themalaysianreserve.com/2022/10/18/the-gig-economy-what-monster-are-we-breeding/#:~:text=And%20it%20involves%20the%20future,Gig%20economy> accessed 1 May 2023

themselves may in turn reduce the income of the workers.⁶⁸ Further, with the unstable income that these workers receive every month, it is proven to be difficult for them. This is because proof of income serves an important requirement to demonstrate financial stability and competence to any bank which are normally reflected in the payslip and EPF statement.⁶⁹

Gig Economy as job trap or job gap

Working in this sector is sometimes equated with ‘quicksand’ as it offers no way out. According to Kost, the boundaryless career goals, and lack of formal organisational support from the employer, have raised a question of to what extent can gig workers develop their career competencies.⁷⁰ For this purpose, personal development refers to assessing their skills and qualities, considering their aims in life and setting goals in order to realise and maximise their potential. A report of a survey conducted by CII.CO, a start-up platform company shows that the youngsters in India are more interested with the short-term income but gig platform managed to keep them employed for a period of time without a long term growth trajectory.⁷¹ Based on the same report too, some workers are planning to look for a stable job.⁷² The longer the workers are stuck in the gig sector, the bigger chance for

⁶⁸ Gerrit De Vynck, Faiz Siddiqui and Nitasha Niku, Inflation is helping gig companies like Uber and hurting their workers, *The Washington Post*, August 7, 2022 <https://www.washingtonpost.com/technology/2022/08/07/gig-economy-inflation/> accessed on 2 May 2023.

⁶⁹ In Malaysia, if a person wish to obtain a loan, he or she must show proof of income. The most common practice is proof of income via payslip. For workers in gig economy sector, they do not receive payslip at the end of every month.

⁷⁰ Kost, D et. al., “Boundaryless careers in the gig economy: An oxymoron?” *Human Resource Management Journal* 30 (1): 100-113.

⁷¹ Survey finds how gig jobs could turn into a trap for over half of gig economy, *The Economic Times*, September 6, 2022, https://economictimes.indiatimes.com/jobs/survey-finds-how-gig-jobs-could-turn-into-a-trap-for-over-half-of-gig-economy-workers/articleshow/94033022.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst accessed 25 April 2023.

⁷² Ibid

self-development to be missed.⁷³ Some may argue that personal development or upskills can be developed by oneself as they take responsibility of their own career. Personal development and skills upgrade can be achieved if the worker himself makes the effort which is normally not the case since the worker may not simply have the time to invest in themselves.⁷⁴ With that in mind, the gig sector replicates a quicksand or a trap for the workers to shift to another career that is on full time basis.

COLLECTIVE AGREEMENT IN THE FUTURE OF WORK: THE NEED FOR COLLECTIVE BARGAINING AND THE WAY FORWARD

With the advent of technology in today's world, the modern types of employment begin to take shape. The gig economy, known as the future of work, started to operate in many parts of the world including Malaysia. Unlike the traditional employment, the gig economy offers flexibility in terms of time and workplace. It serves as an alternative to traditional employment that normally requires a worker to work in a designated space and during a specific duration of time. Although gig economy employees seemingly enjoy benefits from this flexibility, in reality, protections accorded to them are inferior as compared to those doing the traditional job.

Collective Bargaining and Gig Economy in Malaysia

In Malaysia, the rhetoric issue of categorising gig economy workers is prevalent. Under the EA 1955, no room for definition is given to fit these workers under the category of workers. Instead, they come under the definition of independent contractors as they are viewed to be hired under the contract for service.⁷⁵ This ill translation of gig economy

⁷³ Webber, A, "Gig economy 'like quicksand' and workers unable to develop skills", *Personnel Today*, January 29, 2020, <https://www.personneltoday.com/hr/gig-economy-skills-development-doteveryone-report/> accessed March 28, 2023.

⁷⁴ Ibid.

⁷⁵ The definition of contract for service as opposed to contract for service, see section 2 of EA.

workers has subsequently excluded them from benefitting various rights provided under the said Act. Within this context, the right to form a union would be out of reach unless clearer terminology is used to depict the gig economy and its workers. Only then the government through its relevant agency could grant these workers the right to form labour unions and collectively bargain their rights against the platform providers for any breach of term in the contract. It is interesting to note that California has passed a law that caters the workers in this particular sector by providing a befitting definition of gig economy workers. This law known as the California Assembly Bill 5 (CAB5) which came into effect on January 1, 2020.⁷⁶ The laws require companies to reclassify these workers as regular employees. The bill came into existence following the landmark judgment made in the case of *Dynamex Operations West, Inc. vs. Superior Court of Los Angeles* mentioned above. One of the significant provisions in the CAB5 is the requirement for companies to reclassify their contract drivers as employees providing the same protections and benefits as other employees. Big companies such as Uber and Lyft will have to comply with the law as the workers are no longer categorised as independent contractors. These workers will be protected and entitled to various benefits such as workmen compensation, minimum wage and sick leave among others.

Another major threat posed towards the gig economy workers is the inability to form a trade union let alone to establish collective bargaining. This is owing to the fact that gig economy workers do not come within the definition of employees under the EA. In fact, they are viewed as independent contractors. Without providing proper definitions to these workers, they are denied from forming trade unions to protect their rights under the TUA. These independent contractors or freelancers are denied from establishing trade unions under the Trade Union Act 1959 as compared to traditional employees. Without the trade union, the power of collective bargaining to improve their

⁷⁶ It is an act to amend Section 3351 of, and to add Section 2750.3 to, the California Labour Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor. See pdf version of the statute at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

working conditions cannot be achieved. With the increasing number of gig workers, their solidarity would give them a voice to channel any dissatisfactions, protect their rights and be at par with traditional workers.

Likewise in Malaysia, the trend of working in the gig economy is currently on the rise. With that in mind, the scenario here is nevertheless quite different from what is happening in the United States of America. Here, the workers seem to be obliging with the terms of employment laid down by the employers. However, in September 2019, Foodpanda Sdn Bhd has introduced a new service fee scheme for all the riders. This scheme was said to have reduced the riders' income significantly. Following the announcement, the riders went on a strike to protest the new scheme. Due to the strike, the Ministry of Human Resources felt obliged to address the issue by setting up a meeting between the employer and the riders to resolve the issue. However, until today, the settlement achieved between the parties was not disclosed. This event is an example of how important it is for the gig economy workers to form a trade union to negotiate the terms of contract so that oppression will not occur due to their non-employee status to avoid any form of manipulation from the employers.

Way Forward

The emergence of the platform economy has given universal assumptions from the legal practical point of view that it would be almost impossible for platform workers to participate in organisations of workers and collective bargaining⁷⁷ because their workers are dispersed across different jurisdictions. However, there are instances where it has been proven that gig economy workers have taken approaches including trade union not only to protect their rights but also to advance the interest of the members. Many European countries have moved forward in protecting the rights of the gig workers through collective agreement and non-binding agreement which were union-led. In the United States of America, the workers utilised the

⁷⁷ Johnston, H and Land-Kazlauskas, C, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy*. Conditions of Work and Employment Series No. 94, (Geneva: ILO, 2018).

technology by creating an app-based association with the same aim of having a trade union. For trade union to come into existence, the government has to play a role especially in initiating various methods to engage employers in understanding the rights and plights of gig economy workers. In this context, the government needs to work together with employers and relevant agencies to identify the issues and assist in filling in those gaps.

a) Collective Bargaining Agreement

A number of European countries such as Norway, Austria, Italy and Denmark have introduced collective agreements that replicate collective bargaining to protect the rights of gig workers. In Norway for example, an agreement was entered into between the food-delivery platform Foodora and the trade union Fellesforbundet after a strike by the Foodora workers occurred. Further, another food-delivery platform, Just Eat Takeaway.com in Austria, Italy and Denmark, has taken an interesting turn where the company has vowed through a collective bargaining agreement to protect the courier costs including salary and expenses incurred by their workers.⁷⁸

b) Non-binding Agreement

Although there are only a few countries in which gig platform companies have shown interest in protecting their workers' rights, other countries are slowly following in the former footsteps. For instance, Airtasker, a job-posting platform in Australia has agreed with the Trade Unions in the New South Wales to inform customers of the minimum pay rates.⁷⁹ However, the agreement that took place in 2017 did not materialise because the parties were not able to formalise the

⁷⁸ Hadwiger, F, Realizing the opportunities of the platform economy through freedom of association and collective bargaining, ILO, <https://www.ilo.org/legacy/english/intserv/working-papers/wp080/index.html>, accessed on April 10, 2023.

⁷⁹ Taylor, D, "Airtasker agrees to minimum working conditions for 'gig economy' contractors." ABC News, May 1 2017, online edition. <http://www.abc.net.au/news/2017-05-01/airtasker-agrees-to-minimum-working-conditions-for-contractors/8484946> [last accessed 28 November 2017].

protection under the labour standards.⁸⁰ In 2018, two local food delivery platforms, Sgnam, MyMenu together with the city's mayor of Italy signed a "Charter of fundamental digital workers' rights within an urban setting".⁸¹ The Charter which contains minimum standards for gig workers such as health, safety and remuneration was not binding. Nevertheless, the companies are expected to observe the standards.⁸² Application of the non-binding agreement has been extended to Kenya.⁸³ In 2018, a Memorandum of Understanding (MoU) was entered into between ride-hailing companies, trade unions and non-governmental organisations representing gig workers and the Ministry of Transport.⁸⁴ A strike occurred signifying the dissatisfaction among the workers of Uber Bolt, Little Cabs and few other companies.⁸⁵ Hence, as a first step in resolving the issue, the MoU serves as a foundation for further negotiations on the insufficiency of workers' salary and welfare.⁸⁶ The Republic of South Korea is the first Asian country that shows commitment in protecting the rights of gig workers via a non-binding agreement.⁸⁷ The agreement which was signed in 2020, guaranteed the rights and interests of gig workers such as working condition, compensation, safety and health.⁸⁸ Interestingly, the agreement also highlighted to right given to the gig workers to form trade unions.⁸⁹

⁸⁰ Ibid.

⁸¹ Platform Economy Database: Database of Initiatives and Court Cases in the EU, <https://apps.eurofound.europa.eu/platformeconomydb/riders-union-bologna-103125> accessed April 30, 2023.

⁸² Ibid.

⁸³ Fairwork, Kenya Ratings 2021: Labour Standards in the Gig Economy, 2021, <https://fair.work/wp-content/uploads/sites/17/2021/12/Fairwork-Kenya-2021-Report.pdf> accessed April 30, 2023.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Claire Lee, South Korea's gig workers to receive greater employment protection, HRM Asia, December 14, 2020, <https://hrmasia.com/south-koreas-gig-workers-to-receive-greater-employment-protection/> accessed April 30, 2023.

⁸⁸ Ibid.

⁸⁹ Ibid.

c) Application-based Association

As of late, there is a transition of trade union using electronic gadgets. In line with the establishment of gig platform, gig economy workers unified through an application-based society. For an example, in the United States of America, Uber, Lyft and Sidecar have worked together to create an online application-based driver associations with the aim to promote greater national and international cooperation and solidarity with fellow app-based transport workers and other workers in similar sector as well as recognising the global reach of common platforms of these employers.⁹⁰ Application-based society is not new. In fact, such a society has already existed to govern housing residents relating the rules and regulations in the premises.⁹¹ The same practice is now being adopted for gig economy workers for their rights to be heard in one voice. For such association to be legally recognised, there is a need to comply with all the requirements set up in the societies legislations. In Malaysia for example, society is governed by the SA. Society is defined in Section 2 of the Act as any local society or clubs that consists of seven or more individuals. It is also mandatory for all societies to be registered in accordance with the categories of society specified under the statute. Hence, gig workers in Malaysia can emulate the practice in the United States of America by establishing an application-based society to help safeguard the right of the workers in the sector.

CONCLUSION

Despite the recognition of the freedom of association in the Federal Constitution, Malaysia is yet to ratify the Freedom of Association and Protection of the Right to Organise Convention, 1948. Hence, the trade

⁹⁰ Nicoll, E and Armstrong, S, "Ride Sharing: The Rise of Innovative Transportation Services" MaRS, April 2, 2016, <https://www.marsdd.com/news/ride-sharing-the-rise-of-innovative-transportation-services/> accessed April 2, 2023.

⁹¹ Gunag Ping Qiu et. al, "Mobile APP-based intelligent monitoring system for the home environment", Paper presented at 3rd International Symposium on Robotics & Intelligent Manufacturing Technology (ISRIMT), China, September 25 – 26, 2021, https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=9596653&casa_token=Msb207_DkIsAAAAA:KVEYHqInIamFHRLCgXSceCmFbV40LdoeVxkhvmivf8JR_dCwErkk5VQ_NURiHFJBEaSaURVF8ct24RA

unions in Malaysia are urging the government to ratify this Convention. It should be noted that this is not something new as the previous leadership of the Malaysian Trade Union Congress (MTUC) has tirelessly been campaigning for its ratification. The call for ratification would lead to the reforming of the TUA and IRA by removing certain provisions that violate the notion of freedom of association. Secondly, trade unionism in Malaysia is not all inclusive. There are many economic activities that are excluded such as gig economy workers. The application of collective bargaining through trade unionism, despite lacking in many aspects, has worked well in Malaysia. Lastly, realising the potential of the gig economy in Malaysia, the need to promote collective bargaining to ensure that the workers are engaged in a union that will protect their shared interests through collective agreement, non-binding agreement and application-based society is equally paramount.