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HK COURT RULES THAT GIG DELIVERY DRIVER WAS NOT AN EMPLOYEE

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With the continued prevalence of the "gig economy", a common question that arises is whether "gig workers" are employees or independent contractors of the digital platform.

One of the reasons why this distinction is important is because it is only employees that enjoy the rights conferred upon employees under various laws, including the Employee Compensation Ordinance (Cap 282) ("**ECO**").

The term "gig economy" often refers to a market system whereby platform companies (usually through digital platforms) engage temporary or freelance workers to perform "gig" work. Well-known examples are car ride companies and food delivery companies.

This common question was the subject of another recent court dispute - in *Gurung, Sanjayaman v Deliveroo Hong Kong Limited* [2024] HKDC 1932 (Date of Decision: 15 November 2024), where the Hong Kong District Court ruled that a former gig rider was not an employee but rather was an independent contractor.

BRIEF FACTS

The Applicant was a former rider of the Respondent. The Applicant allegedly suffered from a traffic injury which he said was sustained in the course of his work. The Applicant then sought employees' compensation against the Respondent under the ECO.

The Respondent denied that the Applicant was its employee, and contended that it was an abusive of process for the Applicant to seek employee compensation when he already had taken the benefit of a voluntary insurance policy provided by the Respondent on the basis that its drivers were not employees.

DECISION

After summarising the relevant case authorities, the District Court applied the following "indicia of employment", as part of the process of deciding, as a matter of overall impression, whether the

relationship in the present case was one of employment:

1. Level of control: The Applicant was free to accept and reject work as he wished, and could choose when and where he was available for work. The degree of control exerted by the riders' app (with its tracking function) was low, and was for legitimate commercial purpose, facilitating efficiency, providing information to restaurants and customers, and following up on complaints against riders.

2. Provision of equipment: The Applicant provided and used his own motorcycle and mobile phone. Although the Respondent provided him with its Riders' Kit, it was the Applicant's own choice to purchase the Riders' Kit from the Respondent.

3. Delegation and competition: The Applicant was able to delegate delivery tasks to third parties and to compete with the Respondent – these were factors against any employment relationship.

4. Financial risks: The Applicant had to maintain his motorcycle, and to bear the risk of committing any traffic offences and any fluctuation in petrol price. He could earn more money by doing more rounds of delivery by efficient time management.

5. Investment / management responsibility: The Applicant had a choice whether to accept orders, to manage his working hours, and he had to take into account the costs of providing and using his own equipment (e.g. his motorcycle). These were investment and management decisions which determined his productivity.

6. Integral part of the Respondent's business: The Applicant was not engaged by the Respondent on an ongoing basis and had no management obligations.

7. Agreement between parties: The parties' agreement expressly stated that the Applicant was a "supplier".

8. Tax and insurance: The Respondent did not make any MPF contribution or tax filing for the Applicant. However, as stated above, the Respondent did purchase a voluntary insurance policy which did not constitute an employees' compensation insurance policy.

9. Industry standard: The court noted that there was no industry standard which could provide substantial guidance in respect of this industry.

In light of the above, the court found that there was no employment relationship between the Applicant and the Respondent, and struck out the Applicant's claim under the ECO.

DISCUSSION

While the court in this particular case decided that the "gig worker" was not an employee, this decision should not be treated as authority that all "gig workers" will be treated as independent

contractors in the future.

Indeed, in or about 2023, the Labour Tribunal decided that six gig workers were employees of Zeek, a digital courier platform company, after carefully considering the indicia above[1].

Whether a worker is an employee or an independent contractor is not a simple matter, and each case will depend upon its specific facts. To minimise the risk of dispute with employees/contractors as to their true contractual status, employers (in particular those engaged in the "gig economy") should assess the status of their "gig workers" through a holistic approach, by reference to the indicia as discussed above.

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[1] As stated in paragraph 70 of the *Gurung* judgment, "*there is no published judgment for [the Labour Tribunal's decision regarding the Zeek case], and it appears that the most detailed summary of that case is in a report issued by the Hong Kong Christian Industrial Committee*".

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