

1. Introduction

Sparked by a 20% reduction in pay per order, 300 riders of Foodpanda, a local food delivery platform, went on strike in November 2021. The strike only ended after the riders and Foodpanda reached a deal after 14-hour negotiations.¹ It has placed the labour protection for “gig workers” in local spotlight.

The classification of gig workers is perhaps the most contentious aspect of the growing gig economy. Denying gig workers employee status and hence labour rights helps businesses in cutting labour costs and maximizing profits. Despite the economic efficiency and flexibility gig work offer, its precarious nature leads to *inter alia* income instability, unreliable long-term employment prospects, unpredictable scheduling, and anxieties over health and safety protection, all casting uncertainties upon employment law.

This essay discusses whether Hong Kong’s (“HK”) law on labour protection for gig workers should be reformed. It begins with defining gig work and examining the local regulatory landscape in Sections 2 and 3. Section 4 discusses the issues faced by gig workers which justify a legal reform. Section 5, with reference to overseas jurisdictions, reviews four major reform options. Section 6 concludes with a reform proposal that involves expanding the definition of employment and introducing a presumption of employee status.

2. Defining Gig Work

There is no universal definition for the term “gig work”. There are however some key features, including:-

- work organized by digital mediation, usually web-based platforms and mobile applications, that connects workers and end-users;
- workers providing some or all of the equipment used in their work and place of work;

¹ Kathleen Magramo, ‘Foodpanda riders’ strike: a look behind the scenes of 2-day action and what it says of Hong Kong’s labour movement’ *South China Morning Post* (HK, 25 November 2021) <<https://www.scmp.com/news/hong-kong/hong-kong-economy/article/3157373/foodpanda-drivers-strike-look-behind-scenes-2-day>>.

- compensation calculated by piece rate;² and
- platforms supervising and managing workers' performance through on-app rating systems based on multi-factorial assessment like time taken for deliveries.³ While these rules may not be entirely transparent, they shape workers' behaviours by rewarding "good" actors with higher ratings⁴ for example by a higher pay scale.

Common examples of local gig work platforms include Airbnb (short-term house rentals), Uber (transportation services), Freehunter (freelance services marketplace), Deliveroo and Foodpanda (courier delivery). Conventional business sectors like information technology, banking and finance, and retail have also hired more gig workers to complement their permanent employees to increase business adaptability.⁵

3. Current Regulatory Landscape

3.1. *Dichotomy between Employees and Independent Contractors*

HK employment law recognizes a distinction between "employees" and "independent contractors". The law does not define or provide guidance in distinguishing between the two categories, it is left to common law to determine which category a worker should be classified as.

In the landmark case *Poon Chau Nam v Yim Siu Cheung*,⁶ the Court of Final Appeal confirmed that the modern approach to determine whether there is an employee-employer relationship involves examining all the features of that relationship, looking into its substance. The test depends on the "overall impression": there is no determinative factor or combination of factors that will dictate a conclusion whether one is or is not an employee. The issue is therefore fact-sensitive and any labels

² Andrew Stewart and Jim Stanford, 'Regulating work in the gig economy: What are the options?' (2017) ELRR 1, 2.

³ International Lawyers Assisting Workers Network, *Taken For a Ride: Litigating the Digital Platform Model* (Issue Brief, 2021), 6.

⁴ Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32 AJLL 4, 5.

⁵ Human Resources Magazine, 'Hong Kong is at the frontline of gig economy' (*Human Resources Online.net*, 2018) <<https://www.humanresourcesonline.net/hong-kong-is-atthe-frontline-of-gig-economy/>>.

⁶ [2007] 1 HKLRD 951.

applied to the contract are non-conclusive. Non-exhaustive factors to be considered include:-

- the extent of control exercised over the manner of working;
- whether the individual provides his/her own equipment;
- his/her degree of financial risk and prospect of profiting; and
- his/her degree of responsibility for investment and management.⁷

3.2. Statutory Entitlements for Employees

Whether one is an employee or an independent contractor significantly impacts his/her entitlements to statutory benefits.

As a general rule, statutory employment benefits do not apply to independent contractors. Only employees are entitled to the labour protection offered by the Employment Ordinance (Cap.57), such as wage payment, restrictions on wage deductions and statutory holidays, as well as other statutory protection like the minimum wage under the Minimum Wage Ordinance (Cap.608), compensation arising from work injuries under the Employee's Compensation Ordinance (Cap.282) and pension fund under the Mandatory Provident Fund Schemes Ordinance (Cap.485).

4. Reasons Justifying a Reform

4.1. Vulnerable Gig Workers and the Misclassification Issue

Under the current regulatory landscape, gig workers do not fit comfortably with the dichotomous classification between employees and independent contractors. They are commonly classified as independent contractors and therefore cannot benefit from the legal protection for employees.

Gig work platforms sometimes even deliberately misclassify workers as independent contractors in drafting contracts to bypass statutory labour protection requirements. Such a trend of “sham contracting” is observed in HK: the number of complaints regarding “false self-employment” lodged to the Labour Department increased from 4 cases in 2011 to 22 cases in

⁷ [16]-[18].

2017.⁸ This trend may become more prevalent as the local gig economy continues to grow.

Given the common classification as independent workers and enhanced by deliberate misclassification, platforms are able to transfer their major business risks to gig workers. By carefully framing relationships with gig workers in contracts (for instance, Uber terms its drivers “partners” to convey their non-employee status),⁹ platforms mask their interests while avoiding statutory duties towards gig workers.¹⁰

Gig workers thus bear most, if not all, financial and safety risks related to the provision of necessary equipment, interruptions in service by platforms, and irregularity in incomes.¹¹ Such risks range from income instability, unreliable long-term employment prospects, unpredictable scheduling, to lack of employment insurance or work injury compensation, all of which greatly increase their vulnerability. For example, one of the Foodpanda motorbike riders who went on strike in November 2021 expressed his concerns over bearing the costs of buying his own scooter to deliver meals and fuel, as well as road safety especially during bad weather like typhoons when roads are “*extra busy with deliveries*”.¹² Gig workers are therefore suffering from inadequate labour protection *vis-à-vis* platforms inclined to mistreat them to cut costs, justifying a reform.

4.2. Flexibility versus Digital Control Imposed by Platforms

The aforementioned risks are often said to be compensated by the flexibility gig workers enjoy due to their independent contractor status. Gig workers do not have fixed working hours and can offer services to platforms whenever they want, opening them to job opportunities they otherwise have no access to and enabling them to balance work with other

⁸ Legislative Council Secretariat, *Minutes of meeting of the Panel of Welfare Services of the Legislative Council* (LC Paper No. CB(2)1234/17-18, 2018) <<https://www.legco.gov.hk/yr17-18/english/panels/mp/minutes/mp20180226.pdf>>, [65].

⁹ Orly Lobel, ‘The Gig Economy & the Future of Employment and Labor Law’ (2017) 51 *USF L Rev* 51, 58.

¹⁰ *Ibid.*, 56.

¹¹ (n 2), 5.

¹² Kylie Knott, ‘Gig economy workers’ lack of rights in Hong Kong highlighted by Foodpanda delivery workers’ strike’ *South China Morning Post* (HK, 19 November 2021) <<https://www.scmp.com/lifestyle/food-drink/article/3156357/gig-economy-workers-lack-rights-hong-kong-highlighted>>.

commitments.

In fact, gig workers regard such flexibility as the main reason they turn to gig work. For example, a study has shown that most Uber drivers in the US abandoned the traditional taxi market and turned to the platform because of its flexibility: the majority of drivers work for Uber for income additional to their full- or part-time employments; many prefer Uber's flexible working schedules over standard nine-to-five ones.¹³

However, gig workers' preference for flexibility offered by gig work should be approached with caution. The flexibility of choosing when to work is not exclusive to independent contractors or gig workers. Also, a study based on the San Francisco taxi industry have revealed that gig workers associated each employment status with features of work they want in a mutually exclusive way, such as flexibility only for independent contractors and health insurance only for employees, wrongly conflating an employee status with a mandate against flexibility.¹⁴

Furthermore, it is doubtful whether gig workers really enjoy so much flexibility that justifies sacrificing some labour protection. *First*, given the oversupply of and competition between gig workers, wages may be lowered to levels that force workers to give up flexibility and work long hours to make ends meet.¹⁵

Second, despite flexible schedules, platforms have been imposing a great deal of digital control over gig workers' manner of working through rating systems and algorithms of their apps, which in most cases gig workers are unable to know how they work.

Several overseas courts are able to see behind the veil of flexibility that platforms rely on to exercise digital control over their workers, which in practice limits gig workers' flexibility. For instance, the UK Supreme

¹³ Jonathan Hall and Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Working Paper No.587, 2015)
<<https://dataspace.princeton.edu/bitstream/88435/dsp010z708z67d/5/587.pdf>>.

¹⁴ Veena Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy* (Research Paper No.381, 2019)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488009>.

¹⁵ Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy' (2016) 37 *CLLPJ* 471, 479.

Court (“UKSC”), in its recent landmark judgment *Uber v Aslam* (which I will return in greater details below),¹⁶ summed up multiple ways in which Uber controlled its driver. Notably, two forms of digital control were raised, they include constraining drivers’ choices about whether to accept ride requests by algorithm that disallows drivers to know passengers’ destinations until they are picked up, and a rating system that automatically logs drivers off the app if their rates of acceptance fall below certain levels.¹⁷ Lord Leggatt then noted the significance of such control (at [101]):

Taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber ... From the drivers’ point of view, the same factors – in particular, the inability to offer a distinctive service or to set their own prices and Uber’s control over all aspects of their interaction with passengers – mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber’s measures of performance [emphasis added].

Similarly, the Belgium court, based on the same forms of digital control, rejected Uber’s contention that drivers were free to organize their working schedules because they could choose when to log on or off the app. It was further held that Uber drivers were not free to organize their work because they must follow the route indicated on the app.¹⁸

With regards to delivery platforms, the Italian court noted that the digital control exercised by Deliveroo’s rating system, by treating riders who do not participate in their pre-booked sessions for non-futile reasons (such as sickness and being on strike) the same as those who do not participate for futile reasons, deprives them of their priority in pre-booking sessions and

¹⁶ *Uber BV and others v Aslam and others* [2021] UKSC 5.

¹⁷ [96]-[97].

¹⁸ International Lawyers Assisting Workers Network, *Taken For a Ride: Litigating the Digital Platform Model* (Issue Brief, 2021), 24, citing *Dossier n°: 187 – FR – 20200707* (decision of the Commission administrative de règlement de la relation de travail).

flexibility in organizing their working schedules.¹⁹ Allowing for flexibility in rejecting jobs was in fact one of the main demands of HK Foodpanda riders who went on strike in November 2021.²⁰ Riders were aggrieved at Foodpanda’s rating system that penalize them by moving them to a lower pay scale if they refuse to deliver a certain number of orders, even due to non-futile reasons, such as Muslim riders refusing to deliver alcohol that is forbidden in Islam.²¹

Third, platforms have succeeded in “locking-in” gig workers’ commitment so they will not use competing platforms, without having to set fixed working schedules, for example by lowering workers’ ratings if they reject jobs while being available (which workers may do when they are committed to jobs offered by competing platforms), which lowers their priority in picking future working sessions.²²

The flexibility offered by gig work should not be overestimated. The oft-repeated argument that some labour rights should be sacrificed as the price for greater flexibility therefore holds little weight and should not be a reason denying a reform in the law.

5. Possible Reform Options

5.1. Codifying Common Law Principles

The first option is to codify existing common law principles in the classification test, which includes *inter alia* the factors to be considered in the “overall impression” test. This proposal clarifies the law and improves legal certainty, allowing for better understanding and application of the law.

In drafting provisions, further clarification to the classification test may be made. Similar to HK’s position, the UK classification test is governed by common law – which is indeed the position of most common law

¹⁹ *Ibid*, 25, citing *FILCAMS CGIL contro Deliveroo Italia S.R.L.*, N.R.G. 2949/2019, 19.

²⁰ Laura Westbrook, ‘What caused Hong Kong’s Foodpanda riders to go on strike? Long waiting times, pay cuts and order system among grievances’ *South China Morning Post* (Hong Kong, 16 November 2021) <<https://www.scmp.com/news/hong-kong/transport/article/3156153/what-caused-hong-kongs-foodpanda-riders-go-strike-long>>.

²¹ (n 12).

²² Zach Meyers, *Driving Uncertainty: Labour Rights in the Gig Economy* (CER Insight, 2021) <https://www.cer.eu/sites/default/files/insight_ZM_gig_10.8.21.pdf>, 2.

jurisdictions. With reference to the UKSC *Uber* case, I believe the most important point to be clarified is the starting point of the test. The issue in that case was whether Uber drivers are qualified for the statutory minimum wage. The UKSC confirmed that the starting point is not the contract but the purpose of the law on labour protection, which is “*to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment*”.²³ On this basis, the UKSC affirmed the findings of an employment relationship and that Uber drivers are protected by the minimum wage.

Amendments may also be made to cater for the unique features of gig work, especially the digital control. Same as the extent of control, equipment is often considered in assessing employment status, regardless of jurisdiction. In the UKSC *Uber* case, Lord Leggatt recognized the importance of such digital control, noting at [99] that “*the technology which is integral to the service is wholly owned and controlled by Uber and is used as a means of exercising control over drivers*”. The issue that codification can clarify is therefore: whether the app’s digital control provided by gig work platforms or other equipment provided by gig workers plays a more important role in the classification test? Insights may be drawn from the Canadian *Foodora* case, where the app was recognized as “*the single most important part of the delivery process and is a tool owned and controlled by [the platform]*”, confirming its disproportionate importance *vis-à-vis* the gig worker’s equipment.²⁴

However, the fatal weakness of codification is its inability to respond to gig workers’ preference for a more flexible independent contractor status and the misclassification issue. Despite codification provides more legal certainty in applying the classification test, legal uncertainties in other aspects remain, thus this option is unfavoured.

5.2. An Intermediate Third Category

The most common proposal is to create an intermediate third category between employees and independent contractors to provide gig workers with labour protection analogous but not identical to those enjoyed by

²³ (n 16) at [70]-[71], [76].

²⁴ *Canadian Union of Postal Workers v Foodora Inc* (2020) OLRB Case No.1346-19-R, [99].

employees.

As discussed above, gig workers do not fit comfortably into the existing categories of employees or independent contractors, a new intermediate category removes the need of choosing between ill-suited options and tackles the legal uncertainty in applying the classification test without laying down confusing or contradictory precedents.²⁵

This proposal was indeed adopted in multiple jurisdictions. For example, the UK Employment Rights Act 1996 created an intermediate category of “workers”, which can be further divided into “limb (a)” and “(b) workers” where the latter is close to employees as its purpose is to extend labour protection to workers who “*fail to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers*”.²⁶ Under the Act, workers receive basic labour protection including minimum wage, working hours and protection against discrimination but not against unfair dismissal.

Likewise, Italian employment law held an intermediate category of “quasi-subordinate” workers to provide workers who collaboratively provide personal services to businesses with some labour protection.²⁷ In Canada, independent contractors who have worked exclusively or largely exclusively for a business over a certain period are deemed “dependent contractors” in termination notification and representation.²⁸

This option, however, has its own problems. *First*, the logical next step of adopting it is to determine the scope of rights associated with the intermediate category. Whilst some rights should have universal application (such as those concerning health and safety), others are more ambiguous in terms of whether they should be framed as universal entitlements.²⁹ Legal definitions need to be developed to clarify the boundaries of this category of workers who enjoy some but not the full

²⁵ Seth Harris and Alan Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The ‘Independent Worker’* (Discussion Paper 2015-10, 2015) <https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf>.

²⁶ *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667, 677-678.

²⁷ (n 4), 10.

²⁸ (n 9), 65.

²⁹ (n 4).

labour protection available to employees, which may be uneasy to reach a societal consensus in the legal reform process.

Second, bearing the legal uncertainties of the existing dichotomous test in mind, the boundaries between the three categories of the new test may still be even more, if not just as, uncertain. For instance, while the UK Taylor Review recommended keeping the intermediate “worker” category (relabelled as “dependent contractor”), it also recommended greater clarity in distinguishing between workers and independent contractors,³⁰ which illustrates the definitional difficulty of the new test: despite the creation of an intermediate category, labour disputes still arise and gig workers still lack certainty in their employment status.

It may be argued that, instead of relying on vague definitions which require statutory interpretation like that of the existing categories or the UK’s “worker” category, the intermediate category may be defined with greater clarity than the existing two categories – for example, by qualifying gig workers who have a certain percentage of income coming from the same source and/or a certain number of working hours as falling into it. Indeed, in jurisdictions the like Canada, Germany and Spain, their definition of the intermediate “dependent contractor” category is based on the percentage of overall income a gig worker makes on a platform.³¹

Yet, not only that gig workers’ source of income and number of working hours for a platform varies from period to period which again renders the test unpredictable *per se*, it is also difficult to ascertain both items especially when they may work for multiple platforms,³² noting that both items may relate to the application of the classification test as well. Some scholars thus contend that gig workers should be excluded from hours-based benefits like minimum wage on the ground that their working hours are immeasurable: they are not idle even when they are waiting to accept their next job – they can be doing other paid work at the same time, sometimes even for competing platforms. Hence, while platforms can measure the number of hours workers have logged-in, those hours cannot

³⁰ Department for Business, Energy & Industrial Strategy, *Good work: the Taylor review of modern working practices* (2017).

³¹ (n 25).

³² (n 15), 495.

be uniquely assigned to a specific platform.³³ A definition based on percentages and/or numbers may appear to improve clarity, but actually adds to the definitional difficulty of the new test.

Third, this option may lead to further disenfranchisement of employees through deliberate misclassification of their employment status. Overseas experience suggests that this option still places workers who should be treated as employees at risks of losing their rights. In Italy, the “quasi-subordinate” worker category, since its introduction in 1973, was utilized as a cheaper alternative to employee-employer relationships. Instead of extending labour protection to some independent contractors, it significantly increased “sham contracting” and reduced the rights of workers who would otherwise be classified as employees.³⁴ The misclassification problem was finally remedied in 2015 by repealing the intermediate category and extending labour protection to all independent contractors where businesses organize their method of work.³⁵ This example echoes with some scholars’ contention that this option would complicate the regulatory framework, providing employers with further opportunities to misclassify workers into the new category to evade statutory responsibilities.³⁶

Fourth, this option raises the threshold for gig workers to claim employment status for full labour protection. In the UK, the intermediate “worker” category has posed challenges for individuals with discontinuous working schedules to claim an employee status. In high profile gig workers’ rights cases, including the UKSC *Uber* case, the courts held that claimants were “limb (b) workers”, and this in fact was the mere category gig workers asked for – perhaps because they foresaw great obstacles to be classified as employees.³⁷

Various overseas jurisdictions discussed in this subsection exemplify how intermediate categories are incapable of fully addressing the questions on labour protection thrown up by the gig economy. Thus, there is little merit in creating an intermediate category.

³³ (n 25).

³⁴ Miriam Cherry and Antonio Aloisi, “‘Dependent Contractors’ In the Gig Economy: A Comparative Approach” (2017) 66 AmU L Rev 635, 660-666.

³⁵ (n 4), 10.

³⁶ For example, Rebecca Burns, ‘Bargaining with Silicon Valley’ (2017) 64 Dissent 89; *ibid*, 11.

³⁷ (n 15), 497.

5.3. Industry-Specific Legislation

Some scholars, instead of suggesting an intermediate category covering *inter alia* gig workers, argue for industry-specific legislation covering gig work exclusively. For instance, Blackham proposed a specific legislation analogous to Australia's Independent Contractors Act 2006;³⁸ Noting that specific labour protection laws already apply in occupations like domestic workers in Spain and Italy, Todolí-Signes proposed a specific legislation covering gig workers.³⁹

This option may cater for gig workers' necessities as well as the unique business model in the gig economy without over-obstructing the infant industry's development. Take the digital control issue as an example, this may be tackled by requiring gig work platforms to publicize, at least to workers (in order to balance with protection to commercial interests and development of the platforms), the algorithms and factors used in their rating systems – in fact, this is what Spain's "Rider Law" introduced in May 2021, one of the world's first industry-specific legislations protecting gig workers, requires.⁴⁰

Yet, gig workers are far from homogenous in their needs and working patterns. Whilst riders of delivery platforms are concerned about their safety, freelancers on digital marketplaces are more concerned about communication with clients. It may be infeasible to draft an industry-specific legislation capable of catering for gig workers' diverse needs.

Finally, introducing a legislation applicable only to gig workers is greatly controversial. Issues over employment status and misclassification, and their implications on labour protection is not exclusive to the gig economy. Providing for such a specific legislation artificially segments the regulatory landscape and adds complexity to it given the difficulty to define gig work.⁴¹

³⁸ Alysia Blackham, "We are All Entrepreneurs Now": Options and New Approaches for Adapting Equality Law for the "Gig Economy" (2018) 34 IJCLIR 413, 430.

³⁹ Adrián Todolí-Signes, "The "Gig Economy": Employee, Self-Employed or the Need for a Special Employment Regulation?" (2017) 23 Transfer 193, 201.

⁴⁰ Gorka Perez, "Spain approves landmark law recognizing food-delivery riders as employees" El País (Madrid, 12 May 2021) <https://english.elpais.com/economy_and_business/2021-05-12/spain-approves-landmark-law-recognizing-food-delivery-riders-as-employees.html>.

⁴¹ (n 15), 498.

5.4. Expanding the Definition of Employment

A more direct option to extend labour protection to gig workers is expanding the definition of employment in the traditional employment regime. This involves introducing a rebuttable presumption of employee status, which is displaced only if businesses can prove otherwise, relieving the more vulnerable workers' burden to prove that they are employees to enjoy legal labour protection. By such, a broader set of labour activities, including those organized and supervised by digital mediation, are taken as equivalent to employment. The employee category thus covers gig work more clearly and gig workers are entitled the same rights as employees.

This proposal receives support in the California state of the US. California passed the Assembly Bill 5 (“AB5”) in September 2019, which extends employee status to gig workers by codifying an earlier decision that presumes workers to be employees unless businesses satisfy a three-pronged “ABC test” (elaborated further below).

The misclassification issue is best alleviated by this option. Indeed, AB5 was introduced in response to increasing misclassification of workers as independent contractors, especially in the gig economy, in California.⁴² A presumption of employee status limits gig work platforms' ability to reclassify employees as independent contractors, providing vulnerable gig workers with an extra layer of protection against attempts of “sham contracting”.⁴³ Furthermore, instead of relying on a list of factors classify employment status, the presumption is easier to apply. This option is thus preferable to the second option, which risks encouraging reclassifying employees into the intermediate category and becoming a new hurdle in protecting gig workers.

Among all options, this option best deals with uncertainties created by an unpredictable application of the classification test. It is, of course, impossible to eliminate all problems concerning the scope of protection offered to different types of workers, yet a broader defined employment category will sufficiently negate the danger of reducing rather than expanding labour protection to gig workers brought by an intermediate

⁴² California Legislative Information, ‘AB-5 Worker status: employees and independent contractors’ (2019) < https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB5>.

⁴³ (n 4), 14.

category. It must also be noted that this option produces positive externality: it does not only benefit gig workers, but also the broader group of non-employees.

6. The Way Forward

Section 5 suggests that expanding the definition of employment is the most preferable option. In the following section, I will elaborate how this expansion may be achieved, and how the flexibility and digital control issues may be addressed.

6.1. Presumption of Employee Status

Whilst some scholars proposed that the presumption should involve assuming workers engaged in a certain number of working hours or earning a certain level of income to be employees,⁴⁴ this essentially takes us back to the definitional difficulty to ascertain them as discussed in Section 5.2.

It is thus recommended that the presumption to be introduced should draw reference from AB5 in California law. Under the ABC test, gig workers are only classified as independent contractors if platforms prove they:-

- are free from the businesses' control in their manner of working;
- do work not integral to the platform's business; and
- engage in independent businesses in the industry.

To better address the digital control issue, I propose that HK's first prong should further specify that rating systems and algorithms that shape behaviours, even though not necessarily involving monetary benefits (for instance, only affect priority in scheduling not pay scale), are taken as control in the manner of working.

All three prongs must be met for workers to be classified as independent contractors. The test therefore increases the threshold to classify gig workers as independent contractors, which deprives them of legal labour protection, and improves consistency in the statutory definition of

⁴⁴ (n 38), 429.

employees,⁴⁵ which is desirable in that it ensures gig workers enjoy labour protection and addresses the misclassification issue.

6.2. Further Refining the Proposal

The presumption of employee status poses challenges to workers who perceive flexibility as the biggest benefit of gig work and may force them out of the labour market. For instance, under the three-prong test, if gig workers' services are found to be integral to the business of a platform, they can no longer keep their independent contractor status or serve multiple platforms.⁴⁶ To reduce stakeholders' opposition in the legal reform process, lawmakers are suggested to respond to gig workers' desire of flexibility, especially in working hours, by expanding the entitlements of employees under the Employment Ordinance, such as adding scheduling autonomy into the panoply of rights.⁴⁷

Besides, the proposal has the potential to free gig workers from part of the digital control imposed by platforms. In California, the introduction of AB5 has prompted Uber to stop penalizing drivers for refusing ride requests.⁴⁸ To further address this issue, measures to improve transparency in rating systems should be introduced such that gig workers know the conditions under which their ratings change, which also improves fairness in business decisions such as logging workers off from their apps or changing their pay scales,⁴⁹ yet mandating platforms to publicize all algorithms in this regard may go too far as this may cause strong stakeholder opposition from platforms.

7. Conclusion

Despite HK's growing gig economy, the Government has reiterated that it has no plans to expand statutory labour protection to cover independent contractors,⁵⁰ not to mention gig workers. In contrast, several overseas

⁴⁵ Legislative Council Secretariat, *Protection of labour rights of 'gig workers' in selected places* (IN10/19-20, 2020) <<https://www.legco.gov.hk/research-publications/english/1920in10-protection-of-labour-rights-of-gig-workers-in-selected-places-20200526-e.pdf>>, [4.5].

⁴⁶ (n 42).

⁴⁷ (n 15), 21.

⁴⁸ Alex Heshmaty, 'Regulation of the gig economy' (*Internet Newsletter for Lawyers*, 2020) <<https://www.infolaw.co.uk/newsletter/2020/09/regulation-of-the-gig-economy/>>.

⁴⁹ (n 15), 500.

⁵⁰ GovHK, 'LCQ17: Protection for flexible workforce' (13 June 2018)

jurisdictions examined in this essay have reviewed their employment laws to enhance labour rights enjoyed by gig workers such that they receive some or even equal protection as employees. It is time for HK to reform its law on labour protection for vulnerable gig workers.

Among the options explored, the first three fail to address the misclassification issue which allows gig work platforms to further shirk their responsibilities or have potential negative implications that cannot be underestimated. Expanding the definition of employment by a presumption of employee status is therefore recommended.

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