EMPLOYMENT LAW

LORRY DRIVERS – INDEPENDENT CONTRACTORS OR EMPLOYEES?

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Introduction

The Labour Court in ***Nadushalian & 4 Ors v Offimo Marketing Sdn Bhd*** considered whether lorry drivers could fall within the definition of "employee" within the Employment Act 1955 and thus entitling them to rest day pay and public holiday pay. Our partner, Ms. Wong Keat Ching from our Employment & Industrial Relations practice group, was successful in defeating the claims instituted by 5 lorry drivers against Offimo Marketing Sdn Bhd at the Bentong Labour Court recently. This article discusses the facts, issues and judgment of the case.

Brief Facts

Jayabalan A/L Pichai, Vadivelu A/L Balakrishnan, Nadushalian A/L Letchumanan, Subramaniam A/L Doraisamy and Ravisamy A/L Sinnasamy ("the **Claimants**") were lorry drivers who were engaged as independent contractors in Offimo Marketing Sdn Bhd ("the **Company**").

The Company is in the business of providing transportation services, wherein the Company would engage lorry drivers to deliver goods from one destination to another based on Delivery Orders (DO) issued by its customers. The lorry drivers would receive payment from the Company based on the agreed rate stated in their contracts for services which was 20% of the total freight charges on each completed DO.

On 1.4.2021, the Claimants brought a claim before the Labour Court against the Company for the non-payment of (i) pay for work done on rest days; and (ii) pay for work done on public holidays amounting to RM82,350.10, pursuant to **Section 60(3)** and **Section 60D(3)** of the Employment Act 1955 ("**EA**").

The issues before the Labour Court were whether the Claimants were (i) independent contractors engaged under contracts **for** services; or (ii) whether they were employees employed under contracts **of** service, as only the latter would entitle the Claimants to succeed in their claims.

Decision of the Labour Court

The Labour Court dismissed the Claimants' claims and found the Claimants to be independent contractors engaged under contracts for services.

In its decision, the Labour Court had directed its attention to the case of ***Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia [1995] 3 MLJ*** which states that the terms of the contract between the parties must first be ascertained.

The Labour Court found that the Claimants had failed to produce any contracts of service or any other evidence to convince the Court that their relationship with the Company was that of employer-employee or that the Claimants were employees of the Company within the definition provided in Section 2 of the EA. Conversely, the Company had produced the contracts for services which the Claimants had admitted to signing.

The Labour Court **rejected the Claimants' testimony that they were unaware of the contents of the contracts for services** on based on the following evidence:-

a) the Claimants had given evidence that they had been **working with the Company for several years (some more than 10 years)**;
b) the Claimants had been **receiving 20% of the total freight charges from each completed Delivery Orders (DO)** throughout their years of working with the Company **without any complaints**;
c) the Claimants were at all times aware that they were **not entitled to EPF or SOCSO**; and
d) the Claimants were at all times aware that they were **not required to apply formally for any type of leave, including annual leave and sick leave**.

Further, in arriving at its decision, the Labour Court applied the "control test" as state in the case of ***A. Raseal Muthiriar & Company v National Union of Cigar Workers (Award No. 25/68 in I.C. Case No. 11 of 1968)*** as follows:

> "*an employer-independent contractor relationship exists where the* ***control is merely limited to the result to be accomplished and does not apply to the method and manner of the service rendered***."

The Labour Court found that the Company did not exercise sufficient control over the Claimants over the manner in which they are to perform their work, their working hours, and the amount of work to be done by them, based on the following evidence given in Court:-

a) The Company **did not control the Claimants' time of work** - for each Delivery Order (DO) taken on by the Claimants, there was no timeline given by the Company, and the Claimants had the freedom to choose when they wanted to begin their journey;
b) The Company **did not control the working days** of the Claimants - the Claimants chose their own working days and rest days;
c) The Claimants were **not required to follow any procedures for applying for leave** - the Claimants could go on leave for any number of days as they so choose in any given year, as opposed to employees under the EA, whose entitlement to annual leave, sick leave and public holiday leave under the EA is clearly limited;
d) The Company did **not control the manner in which the Claimants are to perform their work** - there was no one from the Company who would be present to supervise or instruct the Claimants during the loading and unloading of goods at the customer's premises, and the works carried out by the Claimants at the customer's premises was determined by the Claimants themselves and the customer;

e) The Claimants had **the right to hire and discharge** their own attendant - the terms of the contracts for services signed by the Claimants allowed for the Claimants to hire an attendant to assist them in performing their deliveries, if they so choose. The Claimants would bear the responsibility of paying EPF and SOCSO for their hired attendants; and

f) The Claimants **received 20% of the total freight charges from each completed Delivery Orders (DO),** consistent with the written terms and conditions of their contracts for services.

The Labour Court took note of the fact that the Company had provided the tools for the Claimants to perform their deliveries, i.e. the **lorries and maintenance of the lorries were provided for by the Company**, and the Company had installed a GPS in each of the lorries. However, the Labour Court found that the purpose of the GPS was not to control the manner in which the Claimants were to perform their work, rather, it was for the safety of the assets of the Company. The Labour Court also noted that the Claimants saved costs from not having to rent the lorries nor bear any maintenance charges on the lorries which they used to perform their deliveries.

The Labour Court found that the parties' intention at all material times was for the Claimants to be engaged as independent contractors of the Company as the Claimants had successively renewed and signed their contracts for services with the Company every 2 years. They had carried out work for the Company in accordance with the terms of the contract, without challenging the terms.

As such, the Labour Court found that the Claimants clearly understood or ought to have known the terms of their contracts for services which they had signed.

Key Takeaways

There is not one defining factor that will determine whether the Claimants are in fact independent contractors. Rather, the Court is bound to weigh several factors by stacking up the factors favouring and disfavouring a contract for services, to determine, on a balance of probabilities, the true nature of the Claimants' engagement with the Company.

In the present case, the factors **favouring contract for services** (independent contractor) are as follows:

(i) The Claimants were not paid any salaries, rather, they were paid 20% of the total freight charges from each completed Delivery Orders (DO);
(ii) There was never any contributions of EPF and SOCSO by both parties;
(iii) The Company did not exercise control over the Claimants, and never instructed them to respond to orders placed by customers and where to deliver the goods;
(iv) The Claimants' income was contingent upon the number of deliveries completed, and their income varied significantly each month depending on how many deliveries they took on;
(v) The Claimants had no fixed hours of work;
(vi) At no time during the course of their engagement were they given any extra payment for work on holidays;
(vii) The Claimants were never entitled to any annual leave or sick leave; and
(viii) The Company was not obliged to provide the Claimants with work;

(ix) The Claimants did not work every day, and the Company did not exercise any control over nor dictate their working days and working hours;
(x) The Claimants were not entitled to leave days, and the Claimants themselves admitted that there was no requirement for them to apply for or give formal notice before taking leave;
(xi) The Claimants did not need to obtain approval from the Company for leave;
(xii) The Claimants were not tied down to any particular working days, instead they would request work from the Company when they were ready and willing to work;
(xiii) The Claimants could control their own costs (and profits) by choosing whether to hire an attendant to assist them, planning their routes efficiently based on their experience and by taking on more deliveries if they so choose.

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