THE CONTRACT OF EMPLOYMENT, KNOWLEDGE WORKERS, AND THE "K-ECONOMY"

1. Introduction

At the time of writing, the K-economy masterplan is still being prepared. The government hopes that it will be ready by the end of year 2000 so that it might be incorporated under Outline Perspective Plan III which will contain Malaysia's development strategy for year 2001 and beyond.[1] As such, not much is known about what being in the "K-economy" really means, in particular from the point of view of work and workforce patterns. There is much talk about "knowledge workers", but precisely, what are their characteristics and how do they differ from workers of yesteryears?

There have been attempts at explaining the situation. For example, it has been said that a knowledge-based economy or k-economy is an economic structure which requires many knowledgeable workers in many new and emerging fields, such as robotic engineering, information and communication technology, nano technology and bio-technology. This development requires a high percentage of knowledge workers, which would form the backbone of the national economy. Knowledge work has been categorised as "something complex, uncertain, ambiguous, unstructured, difficult to observe and measure, and with high risk."[2] Knowledge workers are individuals who are supposed to be flexible and tolerant, versatile, autonomous and highly-skilled, possessed of very strong analytical skills.[3] The qualities of these workers are obviously different from workers in the era of production economy.

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[1] *New Straits Times*, 5 April 2000, at page 23.

[2] *New Straits Times* ('Appointments'), 13 May 2000, at page 8.

[3] *Ibid.* See also *Business Times* ('Human Resources'), 27 July 2000, at page 4.

The emphasis for the future is on creativity and invention, the development of new products or new technology and the creation of indigenous brands and patents which Malaysia can sell to the world. Hence, the movement in human resource has been explained as requiring a shift in manpower from a production-based workforce to an intellectual workforce.[4] The stress for the workers of tomorrow will be on continual reinvention, innovation, creation, healthy competition, networking and continuous education.[5] What would be the challenge for law in the face of the above change in the type of manpower?

It is true that computer technology has revolutionised the way people work. Fibre optic linkages have greatly reduced if not obliterated altogether the dimensions of time and place. One may be at home but would be able to issue directions, prepare memos and reports for dissemination and otherwise keep in touch with office progress just as effectively as if one were at the workplace. Similarly, one may be in Kuala Lumpur but would be able to effectively participate at a board meeting taking place in London. Greater usage of computer technology could declare the traditional workplace redundant and place at the disposal of employees greater flexibility in terms of working time and space. Flexibility in work patterns could mean that traditional "control" mechanisms of the employer would have to be reviewed or even jettisoned. Changes in employee work patterns due to changes in technology could require that it be matched with changes in employer attitudes about work and working conditions, the issue of prerogatives and the way in which "knowledge employees" ought to be treated. This article will explore one particular area of great significance in this context, that is, the way in which traditional notions of the "contract of employment" might have to be reviewed in light of the changing face of employment.

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[4]*Business Times*, 27 July 2000, at page 4 where it was stated, "...brainpower will be the key driver of the economy, ...".

[5]*New Straits Times*, 13 May 2000, at page 8.

2. Atypical Employment and Categorisation of the Individual Contract

Flexibility in employment envisaged by the K-economy could result in an increase in atypical employment. More and more people could end up working part-time, working from the home, free-lancing and working on short-term or fixed-term contracts as opposed to the orthodox scenario of life-long employment with a single employer. Increased competition consequent upon globalisation could force changes in the employer work structure, resulting in a diminution of full-time working and an increase in flexible work patterns. Such a trend had been evident, for example in the United Kingdom, since the mid-nineties, where between 1995 and 1996, it was reported that the number of part-time and self-employed workers increased by 264,000 and the number of temporary employees by 4,500.[6] Malaysia has braced itself for a similar swing in employment patterns and towards this end, the law has responded by including part-time employees under the Employment Act 1955.[7] The Minister of Human Resources has also announced that existing pieces of legislation are being reviewed "so that employees choosing to work at home can enjoy the same protection as those operating in conventional workplaces".[8]

Employment protection legislation have been around for a long time. However, their effectiveness in securing employee protection is limited to the extent that conventionally, such protection would only be afforded to those "who have entered into a contract of service with an employer."[9] The need to identify the contract of service and distinguish it from the contract for services have traditionally caused the exclusion of certain categories of workers such as casuals, part-

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[6]Fredman, S., "Labour Law in Flux: The Changing Composition of the Workforce" [1997] *ILJ* 337.

[7]"Part-time employee" has been defined in section 2(1) to mean a person included in the First Schedule whose average hours of work as agreed between him and his employer do not exceed seventy per centum of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise whether the normal hours of work are calculated with reference to a day, a week, or any other period as may be specified by Regulations.

[8]*New Straits Times*, 5 May 2000.

[9]First Schedule, Employment Act 1955.

timers and free-lancers from enjoying the benefits of statutory employment protection. This is because earlier orthodox approaches to the issue tended to place a premium on "control" as the key element in the identification process, that is, it is only the employer who has the right of control over the employee,[10] and "control" in this context meant not only control over what is to be done, but also how it ought to be done.[11] Although different approaches were subsequently adopted by the courts which were in essence broader in scope than control,[12] when a situation is doubtful the control element appears to be decisive. However, subsequent cases speak of the "degree of control" exercisable, as opposed to a prescriptive right of control over the employee and his job which, as most judges agree, do not really exist any more in the context of highly-skilled workers in a modern employment setting. A workforce that is progressively better qualified and highly trained and the real possibility of increased flexibility in employment patterns pose a challenge to the law in the way it perceives the issue of a contract of employment or contract of service (here used interchangeably). Developments in the United Kingdom suggest that judges must learn to view the notion of a contract of employment from a different perspective so as to enable employees of the future to claim the advantages of employment protection legislation.

3. Contract of Employment and Mutuality of Obligations

The main, and perhaps the only reason for identifying a contract of employment is so that "genuine" employees might be distinguished from those who are actually self-employed or on business on their own account, having no "employer" to speak of. Employment protection legislation is designed to safeguard employee interests and provide

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[10]*R v GH Kiat* [1938] MLJ 150.

[11]*Yewens v Noakes* (1880) 6 QBD 530; *Performing Rights Society v Mitchell & Booker* [1924] 1 KB 762.

[12]*Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101, where Lord Denning introduced the "organizational test" applied in *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 and *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* [1982] 2 MLJ 232. *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497 introduced the 'integrated test' applied in *A Raseal Muthiriar & Co v Nat. Union of Cigar Workers, M'sia* [1969] 1 MLJ xxxiv.

them with a measure of protection, especially in case of retrenchment or dismissal. The identification of the contract of employment is normally undertaken by the court in the course of action taken to try and enforce certain statutory rights such as termination benefits. The difficulties associated with the process of identification is illustrated in the following cases regarding home-workers and "casuals", that is, those who offer themselves for work at the job site and are paid upon the conclusion of the job.

The home-worker in *Airfix Footwear Ltd. v Cope*[13] assembled shoe parts for the company and was paid 60p per dozen shoes satisfactorily assembled. She had been doing this for the company for seven years and generally worked five days in a week. She was free to work for other people and there was no real control over her hours of work or place of work. She claimed that she had been unfairly dismissed by the company.

In order to be able to make the claim, she had to show that she was an "employee" under the then Trade Union and Labour Relations Act 1974, United Kingdom. It was argued that as the nature of her work was seasonal and there were periods when she did no work and there was really no obligation on the company to offer her work, there was, at most a "general contract" between her and the company, but that was not a contract of employment. As her work pattern was flexible, it was further argued that she would not be able to satisfy statutory requirements of having to show that she had been employed for 26 weeks, or that she normally worked 16 hours per week.[14]

The Employment Appeal Tribunal ('EAT') affirmed the findings of the Industrial Tribunal that there was here established, "a continuing relationship, a continuing contract of employment",[15] by virtue of the relationship established between the parties which lasted seven years. The EAT accepted the "economic reality" argument[16] that "she was

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[13][1978] ICR 1210.

[14] As required under Paragraph 9(1)(f), Schedule 1 of the 1974 Act, United Kingdom - see page 1213 of case.

[15]Per Slynn J., at page 1215.

[16]Applying *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173.

in reality a manual employee working in her own domestic environment as a matter of convenience to both sides."[17]

The economic reality argument likewise worked for the benefit of two home workers in the case of *Nethermere (St. Neots) Ltd v Gardiner & Taverna*.[18] The EAT applied the "fundamental test" whether the respondents were in business on their own account, and after considering several factors, concluded that they were not. Among the factors taken into consideration were:

(i) the respondents were provided with the tools, in this case, sewing machines to enable them to affix pockets on to boys' trousers;
(ii) the respondents were paid at the same rate as those who worked in the factory; and
(iii) although the respondents were free to choose their hours of work, once they had accepted the work they had to do it, and this was a "settled relationship" which had lasted for some considerable time.

Mr. Justice Tudor-Evans dissented at the EAT on the basis that neither the appellants nor the respondents were respectively under any obligation to provide or to perform work. The respondents in particular could elect whether or not to work:

> "This is a clear indication that the respondents were not bound to serve and equally that the appellants were unable to order the respondents to do the work."[19]

On appeal to the Court of Appeal, the majority decided that there was enough material present to make a contract of service. Stephenson LJ appeared to follow a similar line of thought as the EAT in *Airfix Footwear* when he said:

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[17]At page 1215.

[18][1983] IRLR 105 (EAT); [1984] ICR 612 (CA).

[19]Per Mr. Justice Tudor-Evans, at page 108 (EAT).

> "I cannot see why well founded expectations of continuing home work should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more."[20]

Kerr LJ dissented at the Court of Appeal and presented a two stage process to the determination of the issue - the first stage requiring the determination of the question whether there was any contractually binding nexus between the alleged employees and the alleged employer and secondly, if some binding contract exists as a matter of law, the precise nature of the contractual relationship. In this instance, Kerr LJ was not prepared to accept that there was any contractual relationship at all, let alone a contract of service. According to Kerr LJ:

> "... they [alleged employees] must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer. If not, then no question of any 'umbrella' contract can arise at all, let alone its possible classification as a contract of employment."[21]

Kerr LJ was not prepared to accept evidence of a lengthy course of dealings as being able to convert the relationship into a contractually binding obligation.

The above divergent opinions in *Nethermere* outlines the difficulties inherent in trying to legally identify the atypical employment relationship. Working away from traditional work environments with little of the traditional elements of supervision or control from a "master" has meant that traditional notions of working hours and working time has disappeared - hence, the dissenting opinions that such flexibility could not possibly connote "service" to an employer.

In *Nethermere* at the EAT, submissions were made on behalf of the appellants that mutual obligations are a crucial pre-requisite of a contract of service. This is based on the premise that a contract of service is a continuing relationship between employer and employee

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[20]At page 620.

[21]At page 628.

and that if the performance of work only arises from time to time, it would be inconsistent with the continuing obligations implicit in the master servant relationship.[22] This argument was to assume immense importance in subsequent decisions on cases regarding the status of casual workers.

In *O'Kelly v Trusthouse Forte Plc.*,[23] the applicants were "regular casuals" for Trusthouse Forte in the Banqueting Department at the Grosvenor House Hotel. They complained that they had been unfairly dismissed by the company and sought relief under section 77 of the Employment Protection (Consolidation) Act 1978. In order to be able to claim relief, they had to be "employees" of the company working under a contract of employment, that is, a contract of service.[24]

At first instance, the Industrial Tribunal examined various factors present in the relationship between the parties to see whether any one or more of them could be indicative either of employment or otherwise. The Tribunal agreed that many of those factors could point towards a contract of employment but that the one important ingredient was missing, that is, mutuality of obligations - the respondents were under no obligation to provide work for these casual workers. The Industrial Tribunal added:

> "...parties were fully aware of the custom and practice of the industry that casual workers were not considered to be employees working under a contract of employment .... when the parties embarked upon their engagement pursuant to the known custom and practice of the industry, it was indicative of their intention not to create an employment relationship."[25]

On appeal, the EAT construed the Industrial Tribunal's findings as pointing towards there being no "overall contract of employment", but further held that each individual contract covering a particular function was a contract of employment, and allowed the appeal. The Court of

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[22][1983] IRLR 103, at page 107.

[23][1983] IRLR 369.

[24]Section 153 of the Employment Protection (Consolidation) Act 1978 as amended by the Employment Act 1982.

[25]At page 370.

Appeal restored the Industrial Tribunal's findings as it felt that the EAT was not entitled to reach the decision it did. By so doing, it had exceeded its jurisdiction.

The *O'Kelly* decision appears to give effect to Kerr LJ's dissenting judgment in *Nethermere* at the Court of Appeal, that is, that in these cases, an examination of whether there was a contract of employment could proceed at two stages: first, the "overall contract" governing the relationship between the parties (what would subsequently be referred to as the "umbrella contract" or a "global contract"), and secondly, the individual contracts each time work is actually performed and paid for. In *O'Kelly*, when the Industrial Tribunal found that the relationship was missing the vital ingredient of mutuality of obligations, this went to show that there was no "overall" contract.

The above view received support in the subsequent case of *McLeod & Ors. v Hellyer Brothers Ltd.*,[26] where the Court of Appeal reiterated that in order to create a contract of service, there must be mutual legally binding obligations on each side, and a "global contract" cannot be brought into existence simply by counting the heads of a series of individual contracts which may have subsisted during its alleged currency. There has to be present the necessary element of "continuing mutual contractual obligations."[27] In this case, the appellants, trawlermen were free to work for other employers in between their crew agreements with the respondents. Due to this, the court stated:

> "We do not see how it is possible to infer from the parties' conduct the existence in between crew agreements of a trawlermen's obligation *to serve*, which is part of the 'irreducible minimum of obligation' on the part of the employee required to support the existence of a contract of service."[28]

Finally, in *Carmichael & Anor v National Power Plc*,[29] support for the doctrine of mutuality of obligations came from the House of Lords. In this case, guides who took visitors round power stations were held not

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[26][1987] IRLR 232.

[27]Lord Justice Slade, at page 243.

[28]At page 242. Emphasis is judge's own.

[29][2000] IRLR 43.

to be employees, as they worked when work was available and when they chose to work. There were, therefore, periods when they did not work, during which time, they were free to do as they chose, including working for others. Based on this, the House of Lords stated:

> "...there was no intention to create an employment relationship which subsisted when the applicants were not working ... the arrangement turned on mutual convenience and good will and worked well in practice over the years. The flexibility suited both sides. The tribunal correctly concluded that the applicants' case 'founders on the rock of absence of mutuality'."[30]

The requirement to establish mutuality of obligations as a pre-requisite to the existence of a contract of employment obscures the fact that mutuality is inherent in all contracts.[31] So long as the supplier continues to supply his goods, the other contracting party is obliged to pay the price. However, the difference between other types of contracts and the employment contract is that an employment contract normally lasts for a protracted period of time wherein an individual would be "continuously bound" to serve a single employer. This does not necessarily have to happen in other forms of contracts, some of which may last only a few moments (for example, a simple sale transaction or a short ride on a bus).

There is no denying that as work is actually performed and paid for, a contract exists in that particular instance. The only question is whether one is prepared to accept that if there were a series of such contracts, short in duration and not continuous in nature, the relationship between the parties could nevertheless amount to a contract of employment. What really troubled the courts in the above cases was that the alleged employment relationships were not continuous and the

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[30]Per Lord Irvine of Lairg LC, at page 45.

[31]Under the objective theory of contract, contract is seen as a bargain between the parties and what is paramount is the legal expectations aroused by the conduct of the parties - hence, the expectation of being provided work on the part of the employee and the expectation of receiving finished work according to specification on the part of the employer. This reciprocity is enshrined in the fundamental doctrine of consideration under contract law - see *Cheshire & Fifoot's Law of Contract*, Twelfth Edition, Butterworths, at page 28; *Chitty on Contracts*, Twenty-Fifth Edition, at page 24.

courts appeared unwilling to accept this flexible form of work pattern as being symptomatic of an employment relationship. The doctrine of mutuality of obligations was therefore used to reinforce the need for continuity in the relationship before it could be said that such a relationship could crystallise into an employment relationship. The effect would be to place the employment relationship back in its outhodox pigeon-hole instead of moving forward with the changed economic scenario. Special pre-requisites such as the right of control would be important, as well as the notion that one must "give oneself to serve" a particular employer.[32] For the twenty-first century, such a statement which harks of a by-gone era of "master and servant" seems clearly out of place. Flexible work patterns such as working from the home and working part-time on short-term contracts where there is no continuity would then be relegated to being governed by the normal rules of ordinary contracts and these workers would then be denied statutory employment protection.

4. Conclusion

The Malaysian government appears committed to flexibility in employment, which means embracing flexible work patterns such as part-time working and working from the home. Such commitment must be matched with the commitment towards employment protection and the safeguarding of employee rights and interests, otherwise a sizeable proportion of the workforce could be left out in the cold. Towards this end, legislators, lawyers and judges must re-examine the notion of a contract of service or contract of employment and they must take heed of the error[33] committed by English judges in imposing continuity of employment through the device of mutuality of obligations. Such a

[32]See *WHPT Housing Association Ltd v Sec. of State for Social Services* [1981] ICR 737 per Webster J., at page 748.

[33]See Hugh Collins, "Employment Rights of Casual Workers", *ILJ*, Volume 29, March 2000, at page 73. See *McMeeChan v Sec. of State for Employment* [1997] IRLR 353 where a temporary worker was held to be an employee for the purposes of the specific contract governing the engagement in respect of which payment was owed to him.

method would exclude workers working under flexible work patterns rather than include them for the purposes of employment protection. The broad entrepreneurial approach utilized in early cases such as *Market Investigations* and applied in *Airfix Footwear* would be more in keeping with developments in this area as it recognises the changed economic realities and is prepared to give effect to the arrangement made for mutual benefit between the employer and the employee. It has been expressed that the workplace of the future must provide the right environment for the continued development of knowledge workers, and this would include flexible working hours and giving employees more space or freedom and independence to be creative.[34]

Statutory provisions which require "continuous employment" would also have to be looked into. For example, the Employment (Termination and Lay-off Benefits) Regulations 1980 requires a "continuous contract of service" as a pre-requisite to claims for termination benefits under the Regulations, and a continuous contract of service has been defined to mean "uninterrupted service with an employer."[35]

The future may bring a myriad of different forms of work patterns and employment as life-time employment with a single employer may no longer be prominent. In the future there is no reason why one could not be regarded as being "employed" for a few hours each day, for a week, a month or parts of a year.[36] In the final analysis, the *duration* of employment is not important, but what is more valuable would be giving due regard to worker's work and recognising their contribution to society by giving them the protection they deserve.

Sharifah Suhanah Syed Ahmad*

* Associate Professor
Faculty of Law
University of Malaya

[34]*New Straits Times*, 19 September 2000, at page 14.

[35]Regulation 2.

[36]See Hugh Collins, *supra*.

Miah v Khan : Penetapan Beberapa Prinsip Mengenai Kewujudan Perkongsian

Pendahuluan

Mahkamah House of Lords pada tanggal 2 November 2000 telah memberi penghakiman dalam kes *Miah v Khan*.[1] Keputusan dalam kes ini berkisar di sekitar beberapa isu penting dalam bidang Undang-undang Perkongsian.

Di dalam kes ini, mahkamah dikehendaki membuat keputusan sama ada sebuah perkongsian wujud di antara empat orang individu. Soal sama ada sebuah perkongsian wujud atau tidak adalah satu persoalan yang amat penting. Ini adalah kerana sekiranya sebuah perkongsian dianggap sebagai telah dibentuk di sisi undang-undang, maka kesan-kesan sampingan seperti isu hak-hak serta tanggungan atau liabiliti akan turut dibangkitkan. Hak-hak serta tangunggan atau liabiliti bukan sahaja akan timbul sesama pekongsi, bahkan akan melibatkan pihak luar atau pihak ketiga yang mungkin telah berurusan dengan salah seorang ataupun semua pekongsi dalam perkongsian tersebut.

Nota kes yang ringkas ini akan menggunakan keputusan kes ini sebagai tanda rujukan untuk kita merenung serta mengkaji kembali beberapa prinsip asas mengenai Undang-undang Perkongsian.

Fakta Kes

Sebelum kita meneliti prinsip-prinsip yang telah ditetapkan dalam kes ini secara terperinci, adalah elok untuk kita mengimbas kembali fakta dalam kes ini.[2]

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[1]http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd001102/miah.htm

[2]Fakta kes seperti yang dikemukakan oleh Roch LJ dalam penghakiman yang diberikan oleh Hakim Yang Arif dalam Mahkamah Rayuan dilaporkan di [1998] 1 WLR 477, di muka surat-muka surat 480-481.