Classifying Employment Relationship of the Sharing Economy in China

por Xiaohui Ban

I. The Status Quo of Sharing Economy in China

Nowadays, the sharing economy is developing very rapidly in China and has been taken as one of the most important impetus for economic growth by the government. The Eight government departments, including the National Development and Reform Commission, the Central Network Information Office ect., issued the Guideline on Promoting the Development Sharing Economic in 2017[1], which points that the "internet plus" has created a lot of new forms in the industries, resolved excess capacity, and created a lot of employment.

The annual report of The National Information Center of Sharing Economy and Sharing Economic Work Committee of the National Internet Society revealed that more than 700 million people were involved in the sharing economic activities in China in 2017, an increase of 100 million over the previous year. The number of people involved in providing services was about 70 million, an increase of 10 million over last year. In 2017, the number of workers hired by the platform enterprise of sharing economy was about 7.16 million, an increase of 1.31 million over the previous year, accounting for 9.7% of the number of new jobs in the City (135.44 million)[2].

Sharing Economy has played a significant role in solving the unemployment problem in the process of China's economic transformation. DIDI platform which is the largest ride-hailing company in China, has provided 3.931 million workers from the de-capacity industry (coal, steel, cement, chemical, non-ferrous metals, etc.), and 1.78 million military veterans with job opportunities. It also helped 1.33 million unemployed people and 1.37 million zero-employment families to achieve re-employment. By the end of 2017, the number of active riders of Meituan Platform, which is the world's largest online and on-demand delivery platform, has exceeded 500,000, of which 156,000 riders were formerly workers in traditional industries such as coal and steel, accounting for 31.2%[3].

Thus, the sharing economy not only meaning a new economic model, but also creating more job opportunities for Chinese government. Therefore, the government adopt more open and loose policy to sharing economy, and avoid excessive intervention to affect the development momentum of the sharing economy.

II Ambiguity of Employment Relationship in Sharing Economy

[1] See Guiding Opinions on Promoting the Development of Sharing Economy No. 1245 [2017] of the National Development and Reform Commission.

[2] The National Information Center of Sharing Economy, Sharing Economic Work Committee of the National Internet Society, Annual Report about China's Shared Economic Development (2018), 2018, p. 9.

[3] Ibid, pp. 9-10.

China's labor legislation is with the characteristic of binary adjustment model. In order to reduce labor costs, platform enterprises always take "de-employment relationship" as the core of employment management strategy.

In practice, platform companies in China have begun to adopt more diversified evasive strategies. On the one hand, they have outsourced business to local agents, which is responsible for organizing the recruitment of employees and forming a relatively fixed team. The platform enterprise takes the identity as the information intermediary platform. On the other hand, the "crowdsourcing" approach is adopted by attracting unspecified free workers to participate in the platform, in order to compensate for temporary shortage of employment demand of platform enterprises. In the former case, when the relevant labor dispute occurs, the local business contractor is always regarded as the "employer". In the latter case, the platform enterprises always reduce the characteristics of employment relationship through the contract terms of freedom work.

The labor arbitration and courts always classify employment relationship by the Notice [2005] No.12[4]. According the clause 1 of the Notice, the employer shall be deemed to have entered into an employment relationship with a worker, when all the following conditions are met, despite the absence of a labor contract.(1) The employer and the employee meet legal qualification prescribed by law and regulation;(2) Workplace rules stipulated by the employer according to law are applicable to the employee, while the employee performs paid work offered by employer and is subject to the management of employer; (3) The service provided by the employee constitutes a part of the employer's business. Besides these indicators, "who take the risk of losses of the business is also be considered by arbitration and court[5]".

However, under the employment mode of sharing economy, workers of platform enterprise face many difficulties for identifying employment relationship as the flexible arrangement of contracts by use of Internet technology. Classifying employment relationship of platform enterprise have been one of the hardest case for court.

Chaoyang District Court of Beijing City issued the Trail White paper about labor dispute of platform enterprise. From 2015 to the first quarter of 2018, the Chaoyang District court has accepted 188 cases of labor disputes of platform enterprise. The workers around 61.2% of these cases claimed that they were employee. 107 cases were settled by judgement, of which 37.1% confirmed that the platform enterprises had employment relationship with the workers. 55.2% of the cases were determined that the two parties did not establish employment relations, and 7.6% of the cases were determined that the two parties established labor dispatch relations[6].

In 2016, Ministry of Transport, Ministry of Industry and Information Technology, and other departments jointly enacted Order [2016] No.60 to regulate the online car hailing service[7]. The order confirm the legality of online car hailing service, but did not explained the legal relationship between the driver and the platform company. According to the article 18 of the Order, the platform would establish different kinds of contract with the driver, which depends on the characteristics of work, including working hours and service frequency etc. Therefore, as to the issue of employment relationship, the government attitude is still ambiguous. The hard question is left to arbitration and court.

In Jiangsu Province, the Labor dispute arbitration commissions issued the guideline for the difficult cases[8]. As regards classifying employment relationship involving in platform enterprise, the arbitration institution should pay attention to balance the relationship between protecting the labor

---

[4] Notice of Certain issues on Identification of Employment Relationship (Notice [2005] No.12 of the Ministry of Labor and Social Security).

[5] See Zengyi Xie, Labor Law in China: Progress and Challenges, Springer, 2015, p.13.

[6] See Trail White Paper of Labor Dispute of Internet Platform by Chaoyang District Court, available at:http://bjgy.chinacourt.org/article/detail/2018/04/id/3261190.shtml.

[7] Interim Measures for the Administration of Online Car Hailing Services (Order [2016] No.60).

[8] Summary of the Symposium on the Difficult cases of Labor and Personnel Disputes in Jiangsu Province Labor and Personnel Arbitration Committee [2017] No.1.

rights and promoting the flexibility of the labor market. The arbitrator should comprehensively consider the operation form of the platform enterprise, the working situation, and the degree of management of the platform company, the way of income distribution, whether the worker independently bears the business risk and other factors. If the platform enterprise plays the role of intermediary for clients, provides service information and collects management fees or information fees through the network platform, the two parties should not be treated as employment relations.

III. Recent Judicial Cases for Classifying Employment Relationship

In the past two years, the two cases of Beijing city have attracted the attention of social media. One is the "Good Chef" platform case, which is called the first labor dispute case of the sharing economy in Beijing[9]. The other one is the "FlashEx" platform case. In both cases, the court denied the "cooperation agreement" between the platform enterprise and the workers, and found that there was a de facto employment relationship between the two parties.

1. "Good Chef" Platform Case

In this case[10], the Good Chef platform was established by Lekuai Company for providing demanding information of chef services. The "Cooperation Agreement" between the two parties provided that: They have established a cooperative relationship, and the Good Chef Platform (party A) provides the Chef (Party B) with online promotion of cooking service and provides customer reservation services for Party A. If the customer submits a home cooking appointment to the platform, Party B shall arrive at the designated service place with the customer at a certain time for cooking. Party A provides Party B with a set of professional cooking service tools and a set of tool timers. The cooperation agreement also emphasize that the agreement is a business cooperation agreement, and Party B does not need to accept the management of Party A. There is no affiliation between the two parties. Party B accepts that the legal relationship between the two parties does not directly or indirectly constitute employment relationship. Party A has the right to punish Party B if it fails to reach the service location requested by Party A on time or if the service cannot satisfy the customer. Party A has the right to terminate the cooperation relationship with Party B and request compensation. Party B cannot make an appointment to change the service price of the customer.

The court held that the legal relationship between the worker and the employer should not subject to the "subjective understanding" of the parties. The court found that Lekuai Company only operated the chef business, and the chef mainly provided chef skills, which means strong affiliation to the platform. During the execution process, the company actually has some management conducts, such as dispatched order to the chef, rewards and punishment behavior for the chef according to the working performance. The court also found that the payment of remuneration was fixed on a monthly basis. The company claimed that it was convenient for calculating service fee by month, the fee is not wage of employee, but the court believed that the employer failed to provide evidence. Based on the facts, the court decided that employment relationship existed.

2. "FlashEx" Platform Case

The court went much further in this case[11]. The delivery man (Lixiang Guo) downloaded the "FlashEx" app on his mobile phone and engaged in grabbing order and delivery work. The FlashEx platform claimed that intermediation contracts the parties had. The cooperation model was

---

[9] See http://legal.people.com.cn/n1/2016/0810/c42510-28624665.html.

[10] Zhang Qi vs. Lekuai Information Technology Company, (2017) 3rd Intermediate people's court of Beijing, Case No. 11768.

[11] Li Xiangguo vs. Tongchengbiying Technology Company. (2017) Haidian District Court of Beijing, Civil Case No.53634.

intermittent and accidental, and had no continuity and subordination which were characteristics of employment relationship. When the worker selected the “listen” mode, the company would know the location of the worker. The customer sent the delivery request to the FlashEx platform. The FlashEx platform evaluated the cost according to the distance and weight. The customer can also float the fee on his own. The order information was sent to the worker surrounding the demanding customer. The worker had the right to decide whether to take the order or grab the order. After the worker had successfully accepted the order, he would pick it up and deliver it to the recipient. The platform would randomly send the verification code to the recipient. After getting the verification code from the recipient, the flasher would input it into the platform, then the delivery would be deemed successful. The court determined that the employment relationship is based on the following reasons.

1) The court found that the two parties had no intermediation contracts. In view of such contract, the middleman only reports to the client about the opportunity to conclude the contract or provide intermediary service. The content of contract are still determined by clients. However, in FlashEx case, the company not only obtained the information of demand of the delivery service and sent it to many workers through platform, but also stipulated the rights and obligations of delivery contract, including service standards, charging standards, etc.

2) Although the delivery worker would decide whether to take the order, once he accepted the order, he needed to complete the service according to the workflow specified by the Company. In practice, the worker do not have much autonomy in working hours and workload in order to maintain his income level. In this case, the court found that Li Xiangguo worked about 10 hours per day.

3) The court asserted that delivery vehicle was not the main means of production, the data information collected by the platform through Internet technology was the most important means of production. The worker has to depend on the technology information provided by the platform to achieve the work. Moreover, the Court believed that during the working period, the remuneration from the FalshEx platform was the worker’s main labor income. The company also explicitly required the worker not to provide service for other platforms at the same time. The worker obviously had economic dependence on the company.

4) The company mainly operated cargo transportation services. The delivery service provided by the worker is part of the business of the company.

In the above two cases, the courts adopted a more flexible explanation of legislation in determining employment relations. On the one hand, the court emphasizes that the facts of contract performance take precedence over the content of the agreement, which is especially important for dealing with the issue, which is the electronic format clause adopted by the platform companies to avoid employment relation. On the other hand, the court do not rigidly apply Notice [2005] No.12. In the judgment of the personal subordination, the court focused on the the actual control indicator, just as dispatched order and reward or punishment policy etc. In the second case, once taking the task, the worker had to follow the instructions of the platform enterprise, the court considered it as the indicator of personal subordination. Economic pressure also would make the worker has no chance to refuse the order. In terms of economic dependence, the court considered the importance of information resources handed by the platform. On the issue of organizational subordination, the courts examined whether the business scope of the platform enterprise was specific, and whether the services provided by the workers were consistent with the business scope.

The above cases can be taken as good examples to classifying employment relationship. However, since China is not of common law system, and the judgment of labor disputes in China has strong regional characteristics, it is difficult for judicial cases above to be deemed the criteria for all such cases. In the interview, the judge of the above case also stated that the employment model of the platform enterprises was diversified, and the single case should not determine other cases in the

same platform[12]. In the background of promoting the sharing economy, how to balance the protection of labor rights and the enthusiasm of platform enterprises will be a lasting issue in China.

Xiaohui Ban
Research Center for Labor and Social Security Law Calificación

[12] Huang Jie, Classification of Employment Relationship of Internet Platform Needs Substantive Examination, Legal Daily, 2017-07-03.