

## PROTECTING NON STANDARD WORKERS' RIGHT TO FREEDOM OF ASSOCIATION AND TRADE UNIONISM\*

### Abstract

*The failure of the Labour Act to accommodate the increasing incidence of long-term casuals has left a yawning lacuna in our employment legislation. The right to unionise is a fundamental human right under the Constitution, but because they fall outside the definition of 'worker' in the Labour Act, nonstandard workers are denied this right. Moreover, research has shown that nonstandard workers are the most vulnerable to exploitation and abuse by their employers. By reviewing existing laws and relevant literature, this work attempts a concise but comprehensive expose` on the available laws that protect the right of nonstandard workers to unionise. Patterns and practices of trade union discrimination against nonstandard workers are presented and recommendations made based on empirical findings. Sector-specific legislation will be required to address peculiar issues that prevail in different employment sectors. The National Industrial Court is urged to make the most of its expanded jurisdiction which enables it to directly apply international labour conventions where apposite. The Labour Ministry is encouraged to embrace its responsibility of oversight for all classes of workers, industries and outsourcing firms.*

**Key words:** *Nonstandard work, trade union, fundamental human right, National Industrial Court*

### 1. Introduction

In the past few, decades we have seen significant changes to work arrangements globally, especially a growth of fixed-term, casual/temporary workers and 'conversion' of employees to self-employed subcontractor status; a growth of undeclared work (also known as the black economy), on-call, remote/mobile, tele-work and home-based work; outsourcing/ subcontracting (including multi-tiered subcontracting) of activities by employers.<sup>1</sup> The outsourcing of activities includes the provision of labour on a temporary basis by a growing number of firms (some international) specialising in this activity, namely temporary employment agencies or leased labour firms. There have also been changes to working-hours arrangements including the growth of night/afternoon work, extended shifts, part-time and irregular working hours and changes to work intensity and psychosocial conditions at work.<sup>2</sup> The changes have been characterised by less contract duration and job security, less regular working hours (both in terms of duration and consistency), increased use of third parties (temporary employment agencies), growth of various forms of dependent self-employment (like subcontracting and franchising) and also bogus/informal work arrangements (i.e. arrangements deliberately outside the regulatory framework of labour, social protection and other laws).<sup>3</sup>

The reasons for these changes are complex but include the increasing incidences of privatisation of public sector activities and adoption of private sector management techniques in the public sector, widespread rounds of restructuring/downsizing by large private and public sector employers, weakening government oversight and regulation of the labour market in favour of promoting more globally competitive trade and industry, weakening trade union influence and weakened collectivist regimes (where these existed).<sup>4</sup> A greater female participation in the workforce of most countries has also contributed to the growth of nonstandard work as married women (like students) tend to fall into the category of 'secondary earner'- workers who do not have opportunity to work as permanent staff due

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<sup>1</sup> M Quinlan, 'The Effects of Non-Standard Forms of Employment on Worker Health and Safety', *ILO Conditions of Work and Employment Series No. 67*, (Geneva: International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, 2015), p. 1.

<sup>2</sup> M Quinlan (n.1)

<sup>3</sup> V Benach & C Muntaner, *Employment, Work and Health Inequalities: A Global Perspective* (Barcelona: Icaria Editorial, 2013).

<sup>4</sup> International Labour Organisation (ILO), 'Non-standard forms of employment: Report for discussion at a meeting of experts on non-standard forms of employment', 2015, ILO Geneva.

to their dual responsibility for work and schooling/or taking care of the family respectively. There is no evidence for a preference for temporary work among women (though there is a strong preference for part-time hours). Women with family responsibilities can be stuck in their casual jobs for longer periods of time meaning that the adverse effects from the poor job conditions associated with casual work remains with them long term.<sup>5</sup>

All these changes have led to what can be called nonstandard work arrangements which for the purpose of this paper, refers to temporary employment including casual and contract staffing, temporary employment agency work, part-time work, dependent self-employment and undeclared work/informal sector work. There is frequently a significant overlap between different dimensions of non-standard work. For example, in some industries like construction and homecare, workers may move between temporary employment and self-employment on a regular basis. Temporary employment is quite a diverse category including on-call, casual, seasonal, fixed-term contract and agency work.<sup>6</sup> In Nigeria, it is not uncommon to see temporary workers who have worked for six years and more as casual workers without being given permanent status.<sup>7</sup> Such workers are often uncertain as to whether their job is temporary or not.

Non-standard workers may either be directly employed by a firm periodically or seasonally, hired on fixed term or temporary basis or supplied by labour brokers or outsourcing firms. As a result of brevity of their employment and/or the fact that they are not the direct employees, they are referred to as casual workers. These workers are typically concentrated in weakly unionised and poorly regulated sectors (like agriculture and construction), and their vulnerability to exploitative practices is exacerbated by illiteracy, ignorance of local laws and weaker regulatory entitlements/protection. There is a growing concern that the use of casual workers in firms is on the increase, with hosts of undesirable consequences for those who are compelled by unemployment and poverty to take such employment. The working conditions of such casual workers are not only incapacitating, but also precarious.

The practice of engaging casual workers in Nigeria for permanent positions has been referred to as 'casualization' and this practice abounds mainly in industries such as manufacturing, banking, telecommunications and oil and gas.<sup>8</sup> It is generally acknowledged that the use of casual work does not only promote indecent work, but also violates established labour standards.<sup>9</sup> The prevailing arrangement in most organisations in Nigeria is a situation where people are employed as casual and contract workers for many years and are paid less than their permanent counterparts in terms of wages and benefits even though they possess the same skills, work the same hours and perform the same tasks as permanent employees.<sup>10</sup> Casual workers are usually denied the right to organise; therefore allowing employers to avoid the problems they associate with union representation and collective bargaining.

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<sup>5</sup> P O Kalejaiye, 'The Rise of Casual Work in Nigeria: Who Loses, Who Benefits?' (2014) 8 (1) *African Research Review*, 156.

<sup>6</sup> D Pavlopoulos & J Vermunt, 'Measuring temporary employment: Do survey or register data tell the truth?' in *Statistics Canada Catalogue no. 12-001-X*, (Ottawa, 2015)

<sup>7</sup> AO Adewusi, 'Remuneration of Casual Workers in Selected foreign-owned Manufacturing Industries in Southwest Nigeria', (2015) Vol.7, No.22 *European Journal of Business and Management*, pp.184 – 192.

<sup>8</sup> RA Danesi, 'Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria', Paper presented at the IIRA Regional Conference, Lagos, 2011) p. 3.

<sup>9</sup> TM Fapohunda, 'Employment Casualization and Degradation of Work in Nigeria,' (2012) 3(9) *International Journal of Business and Social Science*, 11; E E Okafor, 'Globalizations, Casualization and Capitalist Business Ethics: A Critical Overview of Situation in the Oil and Gas Sector in Nigeria' (2007) 15, *Journal of Social Science*, 169-179.

<sup>10</sup> O W Onemola, 'Employment Casualisation and Workplace Violation as in Nigeria', *Ventures Africa*, December 2 2012, <http://venturesafrica.com/employment-casualization-and-workplace-violations-in-nigeria/>, accessed 25 March, 2015..

Nonstandard and casual workers may be called in for periods as short as several weeks, but their contracts are usually terminated after three month periods so that they do not attain employee status.<sup>11</sup> Casual/contract workers perform the same duties as regular employees, yet they are paid less and do not have access to the benefits, such as pension plans and sick leave, enjoyed by other workers. For most nonstandard workers, limited earnings and lack of benefits mean a generally lower quality of life, financial insecurity, an inability to plan for the future and often severe emotional and psychological stress. Moreover, they often do not have the right to bargain collectively or to join a union and are denied any protection under the Labour Act. Deprived of the basic rights long fought for by labour unions, nonstandard workers find themselves at the mercy of their employers. These workers cannot negotiate the terms and conditions of employment collectively. Moreover, they may be fired or disciplined without following due process. They could be mistreated but cannot file a grievance or otherwise defend themselves.<sup>12</sup>

## **2. The Right to Unionise under Nigerian Labour Laws**

The right to form or join a trade union of one's choice is the basis for the exercise of other rights at work. This is because it constitutes the foundation upon which other rights are built within the employment relationship and as such, if the right to unionise is circumvented, it diminishes the capacity of workers and unions to defend other rights. Similarly, the collective bargaining process adopted by organized labour affords workers, through representative trade unions, an opportunity to negotiate or re-negotiate the terms and conditions of their employment. Otherwise, they are condemned to the unilateral, if not arbitrary, rule of management in the world of work. Therefore 'the concept of freedom of association in labour relations means that workers can form, join or belong to a trade union and engage in collective bargaining.'<sup>13</sup>The right to unionise is espoused under the 1999 Constitution, the Trade Unions Act and Trade Disputes Act, the Labour Act and various laws international treaties which are enforceable in Nigeria. We shall look at the relevant provisions of these laws in brief.

### **The Right to Unionise under the Constitution and International Treaties**

Section 40 of the 1999 Constitution states that "Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests". A worker cannot be stopped by an employer from joining a trade union as this would be a usurpation of his fundamental right to freedom of association. A breach of this right or even an anticipated breach could be redressed by instituting a legal action at the State High Court<sup>14</sup> or the National Industrial Court (NIC).<sup>15</sup> The NIC has upheld the constitutional right to freedom of association in many cases. For instance, in *Management of Harmony House Furniture Company Limited v National Union of Furniture, Fixtures and Wood Workers*<sup>16</sup> the NIC held that the dismissal of the chairman of the worker's union because of his union activities violated his right to freedom of association. It also declared that two undertakings issued by the employer to be signed by workers forbidding them from joining their trade union were illegal.

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<sup>11</sup> Section 7(1) of the Labour Act provides that after three months every worker must be given a written statement stating the terms and conditions of employment by the employer. The trade unions have interpreted section 7(1) to mean that if workers are employed for over three months then they cease to be casual or contract workers and should be made permanent employees. Some companies have devised sharp means to undermine this provision by employing casual workers for three months or less, dismissing them, requesting for new applications and re-employing them again. They repeat this process for years and may continue *ad infinitum*.

<sup>12</sup> EE Okafor, Globalisation, Casualisation and Capitalist Business Ethics: A Critical Overview of Situation in the Oil and Gas Sector in Nigeria, (2007) 15(2) *J. Soc. Sc.*, 160-179.

<sup>13</sup> RA Danesi, 'Casualisation and International Labour Standards: The Role of Trade Unions in Nigeria', (2010) 7(2) *US/China Law Review*, 33-44.

<sup>14</sup> Section 46, of the CFRN 1999 provides that any person who alleges that his fundamental human rights in Chapter IV have been, are being or likely to be contravened in any State may apply to a High Court in that State for redress.

<sup>15</sup> By Section 254C-(1) – (6) of the CFRN 1999 as amended by the Third Alteration Act of 2010, the National Industrial Court as a specialised court has full civil and criminal jurisdiction over labour, employment and industrial disputes and related issues.

<sup>16</sup> NIC/3/86, Digest of Judgments of National Industrial Courts (NIC) 1978-2006, p.187.

Despite this judgement, employers have continued to violate workers' constitutional right to freedom of association with impunity because there are no provisions for sanctions by the State against erring employers. In addition, there seem to be no enforcement mechanisms in place to ensure compliance with the Constitution in this regard. In fact, attempts by unions in the industry to organize contract workers and negotiate on their behalf are oft times met with police violence.<sup>17</sup>

However, in *Medical Health Workers Union of Nigeria (MHWUN) v Ministry of Labour & Productivity*,<sup>18</sup> the Appeal Court clearly stated that the right to freedom of association granted by Section 40 of the 1999 Constitution is not absolute. It is subject to the provision of Section 45 of the same Constitution. Section 45 of the 1999 Constitution provides:

Nothing in Section 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justiciable in a democratic society (a) In the interest of defence, public safety, public order, public morality or public health or (b) For the purpose of protecting the rights and freedom of other persons.

The reason for this constitutional limitation is best explained by the Supreme Court in *National Union of Electricity Employees v Bureau of Public Enterprises*<sup>19</sup> where it held that

The chaos and total confusion talk less of the economic damage that would be inflicted on the people and the nation as a whole should the 1st defendant/appellant as the sole provider of electricity power proceeded in an industrial action/strike could only be imagined. Such action if not checkmated timeously would bring the entire nation to its knees and standstill. To allow that stage of catastrophe to be reached would, with respect amount unpardonably to naivety. It was within this light that the Trade Disputes (Essential Services) Act had to be promulgated to empower the president to proscribe any Trade Union or Association whose members have embarked on threatening industrial unrest/strike action that would otherwise tend to thus disrupt the running of any of the Essential Services mentioned in the Act.

The International Labour Organisation (ILO) Freedom of Association and the Protection of the Rights to Organise Convention of 1948 and the ILO Right to Organise and Collective Bargaining Convention of 1949<sup>20</sup> are possibly the strongest pillars of support internationally for the rights of trade unions to organize independent of employers and public authorities. These Conventions have been ratified by Nigeria but not yet domesticated and are therefore, non-justiciable as an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly (domestication) in accordance with Section 12(1) of the 1999 constitution.<sup>21</sup> However, it is contended that non-domestication of a ratified treaty does not entitle a member state of the ILO to completely ignore development of standards in that field. On the contrary, States should be guided by such treaties in policy formulation. Indeed, Article 9 of the ILO Constitution states that provisions of Conventions

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<sup>17</sup> Human Rights Watch, World Report 2011 - Nigeria, 24 January 2011, available at:

<http://www.unhcr.org/refworld/docid/4d3e80220.html>, accessed 16 April 2015; Report for the WTO General Council Review of the Trade Policies of Nigeria (Geneva, 28 And 30 June, 2011 ) International Trade Union Confederation (ITUC), <http://www.ilo.org/public/english/ITUC/CEARC/report/imp.pdf> accessed 12th April 2015.

<sup>18</sup> *MHWUN v Minister of Health & Productivity & Ors*, (2005) 17 NWLR pt. 953 p. 120.

<sup>19</sup> *National Union of Electricity Employees v. Bureau of Public Enterprise*, (2010) Vol 2-3 MJSC 48. (2010).

<sup>20</sup> ILO Convention Nos 87 and 98 respectively.

<sup>21</sup> Section 12(1) of 1999 Constitution provides that '...no treaty between the Federation and any other country that have the force of law except to the extent which any such treaty has been enacted into law by the National Assembly.'

may be applied by laws or regulations, collective agreements, work rules, arbitration awards, court decisions or a combination of these methods.<sup>22</sup>

Moreover, in the Third Constitutional Alteration Act of 2010, the National Industrial Court was not only granted exclusive jurisdiction with regard to all employment related disputes, it was also empowered to directly apply all labour-related international conventions, treaties and protocols ratified by Nigeria even where they have not been domesticated.<sup>23</sup> Therefore the provision of Section 12 of the 1999 Constitution which made it mandatory for any international treaty to be enacted by the National Assembly before being applicable in Nigeria now no longer applies to labour and industrial relations treaties.<sup>24</sup> This provision is of compelling importance when one considers the large number of conventions, treaties and protocols which could help to create equity in our society.

The African Charter on Human and Peoples Rights is another instrument that guarantees freedom of association for workers in Nigeria. Although an international regional treaty, it has been enacted as an Act of the National Assembly and has therefore become part of Nigerias' *corpus juris*.<sup>25</sup> Article 10 of the Charter provides that 'Every individual shall have the right to free association provided that he abides by the law'. It is manifest from the foregoing that the right to unionise, being a fundamental human right, avails all workers whether full-time or part-time, non-standard or casual workers through Section 40 of the Constitution and Article 10 of the African Charter. Nigerian courts must give effect to such right.

### **The Right to Unionise under Nigerian Trade Union Laws**

The basic laws governing trade union activities in Nigeria are the Trade Unions Decree (now Act) of 1974<sup>26</sup> and the Trade Disputes Act of 1976.<sup>27</sup> Whilst the former creates modalities for the formation and maintenance of trade unions in the country, the latter provides for peaceful and orderly conduct of trade disputes. The Trade Unions Act has seen several amendments the last of which was the 2005 Trade Unions (Amendment) Act.<sup>28</sup>

The Trade Amendment Union Act increased the minimum number of members required to form a union from 5 to 50.<sup>29</sup> This was to ensure social stability and national development by having strong trade unions rather than a proliferation of weak mushroom unions. The requirement of a minimum of 50 workers to establish a union has been criticised for being excessive and a restriction of the right to unionise. The rule was misconstrued to mean that for workers to be unionised, the company had to have at least 50 workers in its employ, thus companies who had less than 50 employees readily rebuffed efforts to unionise their workers. Indeed, some companies made a conscious effort to keep the number of their employees below 50. The Trade Unions Act provides in Section 3 that an application for registration as a trade union of workers must be signed by at least 50 workers of the union; but this should not be confused with the required number of workers in the company, especially as the latter

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<sup>22</sup> Chineze S. Obi-Okoye, "The Creation of International Labour Standards by the ILO and their Enforceability in Nigeria," (2013) 4 *UNIUYO Journal of Commercial and Property Law*, 54-68.

<sup>23</sup> Specifically, section 7(6) of the NIC Act provides: 'The Court shall, in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practice in labour or industrial relations shall be a question of fact. This provision is novel and was actually borrowed from a similar provision in the Industrial Relations Law of Trinidad and Tobago.

<sup>24</sup> Section 254C (2) of the Constitution (Third Alteration) Act 2011.

<sup>25</sup> Nigeria has ratified this Charter and has indeed made it part of its national law by way of enactment through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act CAP. A9 LFN 2004. See also *Abacha v Fawehinmi* [2001] 51 WRN 1 at 83-85.

<sup>26</sup> Presently cited as Trade Unions (Amendment) Act, Cap T14 LFN, 2004.

<sup>27</sup> Trade Disputes Act, Cap T8, LFN, 2004 Cited as Cap. 432 and 436 respectively, Laws of the Federation of Nigeria (LFN) 2004.

<sup>28</sup> The Trade Union (miscellaneous provision) Decree was introduced in 1978 though it was later amended in 1989.

<sup>29</sup> Section 3

collective is merely a branch of the larger trade union which is in turn affiliated to the central labour organization. The requirement for 50 workers is with regard to application for registration of a new union, Section 3(2) lends further credence to this by stating that before a trade union is registered, the Minister of Employment, Labour and Productivity must be satisfied that it is expedient to register the union either by regrouping existing trade unions or registering a new trade union provided that no trade union shall be registered to represent workers or employers where there already exists a trade union.

### **The Right to Unionise Under the Labour Act**

According to the Labour Act, a 'worker' means any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour.<sup>30</sup> The Trade Union Act defines a worker as 'any individual who has entered into or works under a contract with an employer, whether the contract is for manual labour, clerical work or otherwise, expressed or implied, oral or in writing, and whether it is a contract personally to execute any work or labour or a contract of apprenticeship.'<sup>7</sup>

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Notably absent from these definitions is the non-standard worker and other variations of the term such as 'part-time worker', 'contract worker' or casual worker.' These are not even contained in the Interpretation Act.

Workers membership of trade unions and trade union activities are protected by section 9(6) (a) and (b) of the Labour Act which provide that:

No contract shall-

- (a) Make it a condition of employment that a worker shall or shall not join a trade union or shall or shall not relinquish membership of a trade union; or
- (b) Cause the dismissal of, or otherwise prejudice, a worker
  - (i) by reason of trade union membership, or
  - (ii) because of trade union activities outside working hours or, with the consent of the employer, within working hours, or
  - (iii) by reason of the fact that he has lost or been deprived of membership of a trade union or has refused or been unable to become, or for any other reason is not, a member of a trade union.

Correspondingly, Section 4 of the Trade Union (Amendment) Act 2005 states as follows:

- (4) Notwithstanding anything to the contrary in this Act, membership of a trade union by employees shall be voluntary and no employee shall be forced to join any trade union or be victimized for refusing to join or remain a member.

Therefore, any company that makes its employees sign a 'yellow dog' contract or dismisses an employee for his or her trade union membership and activities is acting unlawfully. The NIC has applied and upheld the provision of sections 9(6) (a) and (b) severally. For example, in *Management of Harmony House Furniture Company Limited v. National Union of Furniture, Fixtures and Wood Workers*<sup>31</sup> the NIC held that the dismissal of the chairman of the worker's union for his union activities contravened the provisions of this section. It also declared that the two undertakings, issued by the employer to be signed by workers to scare them away from joining their trade union, were illegal. Also, in *Management of Atlas (Nigeria) Limited v. Shop and Distributive Trade Senior Staff Association*<sup>32</sup> the NIC held that, where the court finds that dismissed workers are victimized on account of their trade union activities, monetary compensation is payable to the dismissed staff. In the instant case, the court ordered that severance pay be made to each of the 11 dismissed workers. The NIC held in *National*

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<sup>30</sup> Section 91, Labour Act CAP. L1, LFN 2004.

<sup>31</sup> *Supra.*

<sup>32</sup> *Supra.*

*Union of Food, Beverage and Tobacco Employers v. Cocoa Industries Ltd. Ikeja*<sup>33</sup> that the court can, by virtue of section 9(6)(b)(ii) of the Labour Act, order the reinstatement of a worker where he or she was dismissed for embarking on trade union activities.

A major restriction to the voluntariness of trade union membership is that the Act does not provide a penalty for breach. This only explains the degree of impunity exhibited by employers in breach of this provision. Another restriction is that the trade union must be the appropriate/relevant union to the industry in which the worker is employed. In *Sea Trucks (Nigeria) Limited v. Pyne*<sup>34</sup> the Court of Appeal held that a worker in a sea transportation company could not properly belong to Nigeria Union of Petroleum and Natural Gas Workers as Sea Trucks Limited was a shipping company and not an oil & gas company, hence the proper union was Nigerian Union of Seamen and Water Transport Workers. Thus in such instances if the company in question could not properly be said to be in the sector, an attempt to join the industry union would be inappropriate and can be the basis of termination of workers' employment. If their purported union activities have adverse effects on the company's operations, the affected company could also lodge a complaint with the Ministry of Labour that its workers are seeking to join an inappropriate trade union, and/or seek clarification therefrom.

### **3. Can Non-Standard and Casual Workers Join Trade Unions?**

It is a commonly held belief in Nigeria that contract workers cannot belong to trade unions; indeed one of the main incentives for employers in using the non-standard and casual workers is that trade union issues are not likely to arise due to the workers' inability to join unions. But as far back as 1989 the National Industrial Court in *Patovilki Industrial Planners Limited v. National Union of Hotels and Personal Services Workers*<sup>35</sup> held that both regular and casual workers have the right to form a trade union. In this case, the appellant company was engaged in the business of industrial cleaning. The respondent union was a registered trade union. The union sought permission to unionize the appellant's workers, but the company refused on the basis that they were casual workers. The respondent therefore declared a trade dispute. The Industrial Arbitration Panel (IAP) heard the dispute and gave an award in favour of the respondent union.<sup>36</sup> The appellant being dissatisfied appealed to the NIC, which upheld the ruling of the IAP. It must be noted, however, that in this case it was not the casual workers who brought the matter to court but the union which had sought to organize them. The above case has created a precedent whereby casual and contract employees have the right to unionize, not only as a constitutional right but by virtue of judicial precedent. However probably due to a lack of publicity of the said case, the misconception as to non-membership of trade unions was still thought to apply to contract workers.

Section 1 of the Trade Unions Act<sup>37</sup> defines a trade union as 'any combination of workers or employers, whether temporary or permanent, the purpose of which is to regulate the terms and conditions of employment of workers.' it has been argued by trade unions that this section is the basis for recognising the right of contract workers to unionise, but the clear wordings of the section do not support that contention because "temporary or permanent" as used here refers to the longevity of that combination (trade union) of workers or employers for purposes of regulating terms and conditions of employment of workers, and not the nature of the workers' employment.

By virtue of section 24(1) of the Trade Unions Act, an employer must recognize a trade union of which persons in his or her employment are members, on registration in accordance with the provisions of the

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<sup>33</sup> Suit No. NIC/1/2001, pp. 486-489. See also *National Union of Banks, Insurance and Financial Institutions Employees v. Management of Nigerian Industrial Development Bank*, Suit No. NIC/8/85, pp. 235-236. Digest of Judgments of National Industrial Courts (NIC) 1978-2006.

<sup>34</sup> (1999) 6 N.W.L.R (Pt 607) 514

<sup>35</sup> Suit No. NIC/12/1989, Digest of Judgments of National Industrial Court (1978-2006) pp.288-289

<sup>36</sup> By virtue of section 12 (4) of the Trade Disputes Act 1976, an IAP judgment is binding on both workers and employers as from the date of the award.<sup>53</sup>

<sup>37</sup> CAP. T14 Laws of the Federation of Nigeria (LFN) 2004

Act, provided that the union comprises 50 or more members.<sup>38</sup> This provision has been upheld in a plethora of cases by the National Industrial Court.<sup>39</sup> However, that the cases above only involved permanent employees. The writer is not aware of any reported case where a contract worker has challenged an employer with regard to the denial of the right to join or form a trade union. Reported cases are usually instigated by union members and officials. The reasons for this are obvious. Firstly, casual or contract staff who so joined a trade union are at risk of not having their contract renewed upon expiration. Alternatively, their contract would contain a termination clause (usually 1-month notice or 1 month salary in lieu of notice). Provided the requisite period of notice is given or payment made in lieu of notice, such termination would seem proper in the circumstance. An employer is not bound to give the reasons for termination, as the employee's employment can be terminated for good reason, bad reason or no reason at all;<sup>40</sup> neither is the motive for termination relevant. Hence it is difficult in most cases to fault such terminations. Secondly casual workers who have been seconded to organisations from third party outsourcing companies may not be able to properly belong to a union because the outsourcing company (their contractual employer) is not actually in that industry to which they were seconded. As such it is difficult to justify an attempt to join a union. Some employers even require employees to sign an undertaking (yellow dog contract) not to belong to trade unions as a precondition for taking up a job.

#### **4. Practice of Trade Union Discrimination against Casual Workers**

Even though Nigeria ratified the ILO Conventions 87 and 98 which protect a worker's right to freedom of association, the State has not been seen enforcing the principles of freedom of association contained in these Conventions particularly as it concerns casual and contract workers in Nigeria. Therefore, employers flout provisions in the Constitution and labour legislations with impunity because the State has abdicated its duty of enforcement through its agencies. Union officials have been victimised and dismissed because of their active opposition to the discrimination meted out on this category of workers who are denied the right to organise by their employers. For example, on 3<sup>rd</sup> and 4<sup>th</sup> February 2012, members of the Petroleum and Natural Gas Senior Staff Association of Nigeria (PENGASSAN) and the National Union of Petroleum and National Gas Workers (NUPENG) shut down two worksites operated by Mobil Producing Nigeria (MPN), ExxonMobil's subsidiary in Nigeria, to protest against the sacking of casual workers by Mobil's contractors and the company's failure to address the matter with unions first. Since September 2009, up to 100 Nigerian nationals have been sacked by contractors serving under MPN after taking part in a collective protest to gain fair remuneration, while other contractors have sacked Nigerian nationals from full-time positions, replacing them with casual workers. The sackings are not just of junior staff, but also of highly skilled and experienced nationals in technical, engineering, administrative, and commercial positions.<sup>41</sup>

In March 2012, the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) reported that many companies had done away with full-time junior staff in their employment, including MPN, which phased out NUPENG members in favour of contract staffing. The ICEM

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<sup>38</sup> An employer who fails to recognize any trade union registered pursuant to the provision of section 24(1) is guilty of an offence and can be liable on summary conviction to a fine of 1,000 Naira – S. 24(2).

<sup>39</sup> *The Austrian – Nigerian Lace Manufacturing Company Limited v. National Union of Textile, Garment and Tailoring Workers of Nigeria*, Suit No. NIC/1/81 Digest of Judgments of National Industrial Courts (NIC) 1978-2006, p. 104; *Management of Harmony House Furniture Company Limited v. National Union of Furniture, Fixtures and Wood Workers*, Suit No. NIC/1/85 Digest of Judgments of National Industrial Courts (NIC) 1978-2006, p. 187; *Metallic and Non-Metallic Mines Senior Staff Association v. Metallic and Non-Metallic Mines Workers Union and Nigerian Mining Corporation*, Suit No. NIC/17/85 Digest of Judgments of National Industrial Courts (NIC) 1978-2006, pp. 198-199; *Mix and Bake Flour Mill Industries Limited v. National Union of Food, Beverage and Tobacco Employees (NUFBTE)*, Suit No. NIC/4/2000, p. 528, Digest of Judgments of National Industrial Courts (NIC) 1978-2006. *Corporate Affairs Commission v. Amalgamated Union of Public Corporations, Civil Service Technical and Recreational Service Employees*, Suit No. NIC/1/2003, Digest of Judgments of National Industrial Courts (NIC) 1978-2006, p. 478.

<sup>40</sup> *Taiwo v. Kingsway Stores* (1950)19 NLR, 122; *Chukwuma v Shell Petroleum Devt. Co of Nig.*, 1993 4NWLR (286) p 539.

<sup>41</sup> <http://survey.ituc-csi.org/Nigeria.html>. Accessed 12th April 2015.



reported that further to the February strike by NUPENG and PENGASSAN, MPN converted some 10% of all casual workers to full-time staff. However, in November, 66 members of NUPENG and 18 members of PENGASSAN were sacked by MPN ostensibly as a cost-cutting exercise. The unions believed this was an act of discrimination against union members and Nigerian workers, following the pattern of replacing national workers with expatriates. PENGASSAN and NUPENG also report that prominent oil and gas servicing companies Baker Hughes Nigeria Ltd., BJ Services and Mak Mera Nigeria Limited (Shell Nigeria) have persistently resisted the unions' attempts to obtain recognition for their respective unions with the view of negotiating collective bargaining agreements.<sup>42</sup>

It is submitted here that the right to belong to a trade union is a fundamental right which every worker whether permanent or temporary should enjoy as provided by section 40 of the Constitution and section 1 of the Trade Unions Act as well as international labour standards. It should be understood that there is no government policy today that favours the denial of the right to associate imposed by employers in the country on casual workers. This practice has no legal backing either in terms of legislation or policy. However, the employers usually argue that casualisation helps to create jobs for a growing number of the unemployed. This is not a plausible argument. Denying casual workers, the right to freedom of association is a denial of a fundamental right from which other rights at work evolve. Most have, in theory, the protection of current legislation (as we have seen) but in practice, the circumstances of their employment make the enforcement of rights extremely difficult. For instance, it has always been a contentious issue whether nonstandard employees such as agency workers should have a claim against the end-employer, the agency, or both or neither. This is yet to be tested in court in Nigeria.<sup>43</sup> Legal policy must, therefore, be put in place to determine the rights, privileges and obligations of this category of work organisations.

## 5. Conclusion and Recommendations

Nonstandard workers will benefit from Sector Specific Legislative Intervention. Different industrial and employment sectors have unique work conditions and even unique economic roles in the State. It is prudent for Government to identify the key issues in the different sectors and address them through either legislation or policy. The Minister for Labour and Productivity is empowered to 'prescribing anything which is to be prescribed under the Act which is not otherwise provided for' and to 'further make regulations containing such procedural or ancillary provisions as he considers necessary or convenient to facilitate the operations of the Act.'<sup>44</sup> A good example is the government policy document titled 'Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Industry 2011' Of the six issues addressed in the Guidelines, unionisation and collective bargaining are most notable. Some provision include: No employer whether third party contractor (labour/service contractor) or principal (user) company must hinder overtly or covertly the unionization of workers; All contract staff under a manpower/labour contract must belong either to NUPENG or PENGASSAN as appropriate; The principal oil companies must endeavour to facilitate unionization and collective bargaining by streamlining labour contractors especially where there are large numbers of such contractors; For all service contracts, trade union membership must be determined by the economic activities of the contractor company and in line with extant labour laws as contained in the Third Schedule Part B of the Trade Unions Act.<sup>45</sup> The Guidelines have made it mandatory for all contract employees to exercise the freedom to join a trade union. No employer must violate this right, and, in

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<sup>42</sup> *Ibid.*

<sup>43</sup> Compare with the UK: while the dominant view is that an agency worker will always qualify as an employee when they work for a wage and are the more vulnerable party to the contract, the English Court of Appeal has issued conflicting judgments on whether an agency worker should have an unfair dismissal claim against the end-employer, the agency, or both or neither. See *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 21 and *James v Greenwich LBC* [2008] EWCA Civ 35).

<sup>44</sup> Section 88 (1) (e) of the Labour Act

<sup>45</sup> Part 3.3 -3.8, Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector, (A Document of the Federal Ministry of Labour and Productivity), p.3, 25 May 2011.

addition, the user company must ensure that contractors comply.<sup>46</sup> Such innovative Guidelines need to be adapted and replicated for other employment sectors other than oil and gas.

The Ministry of Labour and Productivity has a critical role to play in strengthening labour standards and practices in all sectors of the economy in order to ensure minimum floors of protection for vulnerable groups such as casual workers.<sup>47</sup> In order to check abuses of working conditions emerging from outsourcing of labour arrangements, section 23 of the Labour Act, put in place a system of licensing and certification of labour contractors/private employment agencies for identification, regulation and streamlining of the labour recruitment business. This in-built mechanism for control and monitoring of employment agencies has not been adequately deployed by the Ministry to ensure compliance. It is therefore recommended that the Ministry should ensure periodic monitoring of the activities of employment agencies through both scheduled and impromptu visits by officers of the Ministry to ascertain compliance by employment agencies. Defaulters should have their licences revoked by the Ministry or denied renewal when the issued ones expire.<sup>48</sup>

The National Industrial Court (NIC) also has a crucial role to play in ensuring that nonstandard and casual workers are allowed to unionise. With the NIC now the final arbiter in employment, labour and industrial relations issues, it is expected that workers under NSWAs will take matters that concern their status, rights and privileges and unfair labour practices of employers against them to the NIC for adjudication and justice. Moreover, the provision of Section 12 of the 1999 Constitution which made it mandatory for any international treaty to be enacted by the National Assembly before being applicable in Nigeria now no longer applies to labour and industrial relations treaties.<sup>49</sup> Thus, all labour-related international conventions, treaties and protocols ratified by Nigeria are now directly applicable. An applicant or party seeking to invoke the jurisdiction of the Court under this provision among other things would have to establish that the treaty has been ratified by the required number of state-parties including Nigeria and that the treaty has come into effect. In *Nestoil Plc v National Union of Petroleum and Natural Gas Workers (NUPENG)*<sup>50</sup> Hon. Justice O. A. Obaseki-Osaghae of the National Industrial Court relying on ILO Convention No 87 of 1948 stated:

...No employer is permitted to interfere, no matter how minutely it may be, in the internal running and management of a trade union. That is the exclusive preserve of members of the trade union itself. This statement of principle accords with section 40 of the 1999 Constitution, as amended, and the International Labour Organisation (ILO) jurisprudence regarding the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), which establishes the right of workers' and employers' organisations 'to organize their administration and activities and to formulate their programmes' (Article 3) and recognizes the aims of such organisations as 'furthering and defending the interests of workers and employers' (Article 10). This freedom entails a number of principles, which have been laid down over time and which ...include the following: right of workers and employers, without distinction whatsoever, to establish and join organisations of their own choosing; right to establish organisations without previous authorization; right of workers and employers to establish and join organisations of their own choosing; free functioning of organisations in terms of

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<sup>46</sup> This is in consonance with 'Ruggie's Principle' which states that an organization is responsible for the actions of its subsidiaries and contractors and that it should take diligent care to ensure that its subsidiaries and contractors comply with the standards set by it and by municipal laws and international labour standards.

<sup>47</sup> RA Danesi (n.8), p 13.

<sup>48</sup> Section 25(5) of the Labour Act empowers the Ministry to suspend or withdraw license granted if the licensee is convicted of any offence under the Labour Act or any other law or has conducted himself as in the opinion of the Minister to be no longer a fit and proper person to undertake recruitment operations.

<sup>49</sup> Section 254C (2) of the Constitution (Third Alteration) Act 2011.

<sup>50</sup> Suit No: NIC/LA/08/2010 decided on 2012-03-08. See also *Non-Academic Staff Union of Educational and Associated Institutions (NASU) v Vice-Chancellor, University of Agriculture, Abeokuta*, Suit No: NIC/LA/15/2011 delivered on 2012-02-21.

right to draw up their constitutions and rules; right to elect representatives in full freedom; right of trade unions to organize their administration; right of organisations to organize their activities in full freedom and to formulate their programmes; right of workers' and employers' organisations to establish federations and confederations and to affiliate with international organisations of workers and employers; right against dissolution and suspension of organisations except through judicial procedure; protection against acts of anti-union discrimination; and adequate protection against acts of interference.

Organised labour has always been behind the move to strengthen the right of nonstandard workers to unionise. The pressure they put on institutions and the government through collective agreements and industrial action has been the driving force behind most legislative and policy protections afforded to workers. Therefore, they should not relent in their efforts; rather they need to be more strategic. It is no longer enough for labour unions to only call on their members to strike when their salaries are delayed or unpaid. They should be interested in the full structure and welfare of workers under both NSWAs and permanent employment. The organised labour should have constant engagements with lawmakers to ensure that laws reflect international best practices. Trade unions should be proactive to formulate strategies for improving the employment conditions of their members and also to protect the right of prospective members who are denied access to join them. We saw instances where trade unions succeeded in actions against corporations who denied their casual staff access to join the union.<sup>51</sup> The tool of collective bargaining should be well ventilated before resorting to industrial action.

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<sup>51</sup> *Patovilki Industrial Planners Limited v. National Union of Hotels and Personal Services Workers*, Suit No. NIC/12/1989, Digest of Judgments of National Industrial Court (1978-2006) pp.288-289.