

A CROSS NATIONAL SURVEY OF THE LEGAL FRAMEWORK FOR THE PROTECTION OF CASUAL WORK ARRANGEMENTS IN SOME SELECTED COUNTRIES*

Abstract

Nonstandard and casual work arrangements are paradigms shift from standard work arrangement which require special legal protection. This arrangement is prevalent in most developing countries as a result of high unemployment rates which has bedeviled their economies. Other factors like globalization, the shift from the manufacturing sector to the service and informal sectors and the spread of information technology have created a new economy which demands flexibility of legal arrangements in the workplace. Nonstandard or casual employment relationship is a worldwide phenomenon that cuts across various jurisdictions, genders and professions. This paper undertakes a comparative study of the legal framework of the protection of these categories of workers in Nigeria and some selected jurisdictions. The paper aims at analyzing the efficacy or otherwise of the extant Nigerian statutory framework in relation to those of other jurisdictions. The paper makes a case for an effective and adequate comprehensive body of legislation to deal with the precarious legal position of such workers.

Key words: *Casual Work Arrangement, Labour, Protection, Legal Framework*

1. Introduction

Nonstandard employment is rampant in virtually all Nigerian establishments including indigenous firms, multi-national firms, public and private sectors. The rate at which this trend is growing and substituting almost all permanent positions in every sector of our economy is worrisome. The status of a worker is an indication of how he or she is to be regarded and treated. The terms and conditions of employment of this category of workers are not regulated by law. As a consequence, such workers lack legal status.

2. The Meaning of “Casual and Non Standard Work Arrangement”

Nonstandard work arrangements or nonstandard employment is widely used to describe work arrangements which do not fall within the traditional understanding or definition of employment. This term though of global usage, lacks a definite internationally agreed definition because of variations in national laws. However, they are employments that are not permanent in nature. Danesi¹ defined nonstandard work arrangements as those associated with formal employment relationships (part-time work, temporary agency work, fixed-term work, etc.) and outside such relationships (e.g. informal work, commercial contract holders such as those in contracted/ subcontracted work, or economically dependent self-employment), including where relationships are either disguised or unclear. In other words, the term “nonstandard” is used to distinguish such work from the regular or standard model of full time, permanent and direct employment.

Thus, to understand the concept of nonstandard employment relations, it will be apposite at this juncture to analyze the meaning of standard employment. John posits that standard employment possesses a set of characteristics that translate to full time, permanent, on-site and waged employment.² Thus, the standard employment relationship can be defined as full-time,

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¹ R. A. Danesi, “Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria”, *NJILR* Vol. 4, No.4 (2010) p.6.

² B. John, “Nonstandard and Precarious Employment: A Review of Australian Workforce Data”, (1994) *Labour*,

continuous employment where the employee works on his employer's premises or under the employer's supervision. The central aspects of this relationship include an employment contract of indefinite duration, standardized working hours/weeks with sufficient social benefits. Benefits like pensions, and extensive medical coverage protected the standard employee from unacceptable practices and working conditions^{2a}. Nonstandard employment relationship sometimes called precarious work on the other hand is used to describe jobs that are poorly paid, insecure, unprotected, and cannot support a household. Kalleberg³ opines that nonstandard jobs are poorly paid, lacks health insurance and pension benefits, are of uncertain duration, and lack the protection that trade unions and labour laws afford. They are problematic for workers.

Nonstandard employment therefore refers to a form of employment that lacks job stability and entitlement to fringe benefits, union membership, and social security of full time, stable (standard) employees. Nonstandard employment is frequently associated with the following types of employment: part-time employment, casual work, outsourced jobs, fixed-term work, temporary work, on-call work and home workers. All of these forms of employment are related, in that they depart from the standard employment relationship. Each form of nonstandard employment may offer its own challenges but they all share more or less the same legal disadvantages such as low wages, few benefits, lack of collective representation by unions, and little or no job security and definite duration. In conclusion, there are at least four determinants of whether or not an employment is nonstandard (casual) in nature or not. These include the degree of certainty of continuing employment; control over the labour process which is linked to the presence or absence of trade unions and professional associations and relates to control over the presence or absence of certainty of continuing employment; control over working conditions, wages, and the pace of work; the degree or regulatory protection; and income levels.

3. The Forms of Nonstandard Work/Casual Work Arrangement

The most common forms of casual work arrangements are part time workers, casual workers, outsourced workers and fixed term contract workers.

Part Time Workers

Part time workers are usually engaged on a short term "casual basis". This is prevalent both in private and public sector employments. Employers of this form of labour are motivated by cost containment to use part-timers, since they typically cost less in terms of wages and particularly in fringe benefits. Part-time workers are used to meet the staffing needs for example in health sectors, where they are needed in order to maintain 24 hours service. The use of part time workers has experienced continuous growth over the years.

Casual Workers

The identifying characteristic of this form of work is that the duration of their employment is shorter than that of the 'traditional' or 'standard' employee. It has been identified to mean a situation involving the engagement of a worker or a group of workers in order to carry out jobs that are not of permanent nature. In some other jurisdictions, this type of work is usually referred to as 'temporary jobs'. In this kind of arrangement, workers may be hired, for instance, in order to meet a short-term seasonal need or sudden business demands for increased labour.

Employment and Productivity, Vol.6, 118-129.

^{2a} *Op. cit.* at p.7

³ A. Kallerberg, "Nonstandard Employment Relations: Part-time, Temporary and Contract Work" *Annual Review of Sociology*, Vol. 26, 341-365

There is no continuing contract of employment with the employer requiring their service again at a specified time, although they may agree as to when they will be available again. Each time they perform a work, they are working under a new contract of employment. Frequently, they will work fewer hours per week than the standard employee, thereby straddling the part time category, but this will not always be the case.

Casual workers are vulnerable to low pay and numerous form of labour insecurity such as income, working-time insecurity. In fact, casual employment is characterized by shortfalls in protection and substantive disadvantages over most of the dimensions in what can be termed 'precariousness' in employment. There are enormous factors contributing to the growth of casual workers. In Nigeria, the major determinant is the high level of unemployment, which has made workers in Nigeria to transit from the category unemployed persons who are desperate for work to casual workers because the desirable is not available. Many companies and organizations take undue advantage of the unemployment situation to keep people working continuously as casual workers without receiving wages that are commensurate to the work done or any other entitlement whatsoever. The disparity between the wages of casual and permanent workers is so wide that casual workers are often treated like second-class citizens. Casual workers are not entitled to pension, housing funds, national health insurance scheme, bonuses or profit sharing while their salaries are often slashed arbitrarily.

Outsourced Workers

Their identifying characteristics are that they are supplied by one employer, often an employment agency, to perform services for another user employer. It involves the transfer of the management and /or day-to day execution of an entire business function, project or programme execution or part of it to an external service provider. It entails a situation whereby a company through a third party, being referred to in labour parlance as a "recruiter" or "labour contractor" takes in nonstandard workers to perform certain tasks in its establishment. The term "outsourcing" is a feature of modern economy and is believed to offer greater budget flexibility and control as well as help firms to perform well in their core competencies while mitigating the shortage of skill or expertise in the areas where they want to outsource.

Frequently, the duration of employment of these workers with the user will be short term, thereby overlapping the casual category, and the number of hours they work may be less than that of the standard employee so as to bring them within the part time category too. The most common example is where the workers' services are supplied to a user by an employment referral agency. Typically, the agency charges the user a fee for assigning this function to it. The nature of the employment with the user is normally casual. The workers may be used to fill gaps caused by leaves of absence among the permanent staff, to meet seasonal changes in demand or to perform specific specialized projects for short term duration.

Fixed Term Contracts Workers

The identifying characteristics of this specie of workers is that their contracts expressly or impliedly provide for automatic termination upon the expiry of a certain period or upon the occurrence of a specified event, such as the completion of a project. Invariably, this type of contract of employment arrangement fall outside the ambit of standard work and can be said to overlap with the category of a casual worker *simpliciter*.

4. A Review of the Statutory Framework for the Protection of Non Standard /Casual Workers in Some Selected Jurisdictions

The position in Nigeria will be compared with those of some selected jurisdictions. The following jurisdictions have been selected for this purpose; Australia, United States of America, China and Ghana.

4.1. Nigeria

A review of the statutory framework for the protection of nonstandard workers in Nigeria will necessarily involve a consideration of the applicable labour laws in Nigeria. These Principles of labour law in Nigeria can be said to have been derived from various sources including common law, constitution of the Federal Republic of Nigeria, and other statutory enactments on employment and labour issues including international instruments.

Constitution

Section 40 of the constitution guarantees the right to freedom of association. The section provides 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 interest. This provision covers both standard and non-standard workers in any sector in Nigeria. Thus, where an employer prevents or bars his employees from joining a trade union, he is infringing on the constitutional rights of the employed. For instance, where an employee is made to sign a contract restraining him from joining any trade union, such arrangement in the light of this provision is illegal. This position of the law has been upheld by the National Industrial Court (NIC) in the case of *Management of Harmony House Furniture Company Limited v. National Union of Furniture, Fixtures and Wood Workers*.⁶

Another protection given to a nonstandard worker under the Constitution can be found in the provisions of section 36(1). This provision is the bedrock for the natural principle of right to fair hearing. The right confers the benefit of being heard in determination of a person's civil rights by a proper body. This right has been incorporated in rules, statutes or regulations providing for a code or procedure for removal or dismissal of an employee with statutory flavor.⁷ The Constitution has further vested the power to legislate on labour in the National Assembly exclusively⁸ by item 34 of the Exclusive Legislative List, Second Schedule of the Constitution. In this item, labour is expressed to include trade unions; industrial relations; conditions; safety and welfare of labourers, industrial disputes; prescribing a national minimum wage for the federation or any part thereof; and industrial powers.

Furthermore, item 17(a) part II, Concurrent Legislative List, Second Schedule of the Constitution vests power in the National Assembly to make laws for the federation or any part of it with respect to the health, safety and welfare of persons employed to work in factories, offices or other premises. In exercise of this powers vested in the National Assembly, laws have been made for the purpose of securing the interest of workers. Such legislations include but are not limited to the Labour Act,⁹ Factories Act,¹⁰ National Minimum Wages Act,¹¹

⁶ Suit No. NIC 3/86, Digest of Judgments of National Industrial Courts (NIC)1978-20006, P.187

⁷ E.E Uvieghara, 'Labour Law in Nigeria' (Lagos: Malthouse Press Limited, 2001) p.90.

⁸ Section 4(2) of the Constitution of the Federal Republic of Nigeria

⁹ Cap LI, LFN 2004

¹⁰ Cap F1, LFN2004

¹¹ Cap N61, LFN 2004

National Provident Fund Act,¹² Employees Compensation Act 2010,¹³ Pensions Reform Act 2014,¹⁴ and various civil service rules and public service regulations.

Another important provision is seen in chapter II of the Constitution. Section 17 of the Constitution provides that it shall be the duty of all authority and persons exercising legislative, executive or judicial powers to conform to, observe and apply the fundamental objectives and principles of state policy. Under section 17(3) (a), the state is mandated to direct its policy in order to promote its social objectives by ensuring adequate opportunity to secure suitable employment, good working conditions and ensuring that the health, safety, and welfare of all persons in employment are safeguarded and not endangered or abused and equal pay is made for equal work without discrimination. It is however regrettable that these constitutional provisions are not justiciable.

Labour Act

The said Act adopted a restricted notion of worker. Section 91(1) of the Act defines a worker to mean, ‘...any person who has entered into or works under a contract with an employee, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and 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’. The said definition is extremely complex and confusing and do not cover most workers under the category of nonstandard workers. This may be adduced to the fact that the current Labour Act was enacted in 1971 when nonstandard work arrangements were not known to Nigerian industrial relations environment. Unfortunately, this legislation has since not been reviewed to address the current realities on ground. The consequence of this however, is that the casual worker does not fall within the purview of the protection and rights available to permanent employees covered by the Labour Act. This form of work arrangement is therefore characterized by instability, lack of benefits and lack of right to collective bargaining.

It will be recalled that where an Act creates certain rights and benefits, it is only those classes of persons who come within the definition of the statute that is covered by it and can benefit from it. Usually, a piece of legislation which confers rights or benefits on workers, prescribes the ambit of the benefits with regards to those entitled to benefit from the provisions of the statute. Section 7 of the Act merely provides that a worker should not be employed for more than three months without regularization of such employment. After three months every worker including the casual or contract worker’s employment must be regularized by the employer by giving a written statement stating the terms and conditions of employment relationship between the employer and the employee.¹⁵

Some have interpreted section section7(1) of the Act 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.¹⁶ The veracity of this assertion is doubtful as this section clearly states that a written statement should be given to the employee stating the terms and conditions of the employment contract, including “the nature of the employment” as well as “if the contract is for a fixed term and the date when the contract expires”. Some employers give the written

¹² Enacted by an Act of Parliament in1961.

¹³ Assented to on 17th December, 2010.

¹⁴ Act No. 4 of 2014.

¹⁵ Section 7(1) of the Labour Act Cap L1 LFN 2004

¹⁶ Animashuan

statement irrespective of the nature of the contract. It will therefore amount to a misapplication of the law to maintain that an employer who complies with the requirements of this provision by giving a written statement to the employee without stating the terms and conditions of employment is in breach of it.

The Act does not expressly refer to casual and contract workers. The lack of definition of the status of this category of workers as well as the legal framework regulating the terms and conditions of their employment and protection explains the motivating factor for the increasing use of casualization by employers and why this category of workers is exploited by employers who engage them. The prevailing arrangement in most organizations in Nigeria is a situation where people are employed as casual and contract workers for five years or more and are paid less than their permanent counterparts in terms of wages and benefits even though they possess the same skills and do the same tasks as permanent employees.

There is only one category of worker defined in the Labour Act and that is a ‘worker’ *strictu sensu*. Provision of terms of employment to casual workers therefore will offer more security than oral arrangements. The written terms serve as evidence of the contract of employment between the employee and the employer and a casual worker can rely on such terms to enforce any breach of it by the employer. In relation to outsourced workers, section 23 expressly prohibited the recruitment of such workers without a permit or licence, while section 48(2) of the Act empowers the minister to make appropriate regulations applying to labour contractors of referred agencies.

Trade Union Act

This made provisions with respect to the formation, registration and organization of trade unions, federations of trade unions and the central labour organizations. The Act defines a trade union in section 1 to mean ‘any combination of workers or employees, whether “temporary or permanent”, the purpose of which is to regulate the terms and conditions of employment of workers. Unlike the restrictive definitions employed by the Labour Act and other labour legislation, this definition encompasses all workers no matter their employment status, whether “temporary or permanent’ and grants them the right to join or form trade unions without prior authorization from their employer in order to improve their employment conditions.

Factories Act

This made provisions for the registration of factories, ensuring the safety of workers to which the Factories Act applies, and imposes penalties for any breach of its provision. Part I of the Act deals with the registration of factories while part II relates to general provisions on health of workers. It made specific provision on cleanliness, overcrowding, provision of ventilated and well lighted premises as well as drainage and sanitary conveniences. Part III, IV and V deals generally with the safety, welfare and health of workers working in the factory. It should be noted that these provisions apply to all workers working in the factory generally irrespective of their status.

The duty created by this Act is more onerous than the ordinary duty of reasonable care required by the common law. The courts have held that the failure of the employer to carry out the duties outlined in the Act amounts to negligence, which will attract consequential damages.¹⁷

¹⁷ *Avon Crown Capos & Containers Nig. Ltd. v Bamigboye* (2005) 17NWLR (pt.954) p.275.

Employees Compensation Act 2010

This Act represents a major step in the right direction in respect of labour rights and protection of casual or nonstandard workers. This Act introduces a new social security scheme for all workers in Nigeria. It makes provisions for compensation to employees and their dependants for any death, injury, disease or disability arising out of or in the course of employment and other related matters. It must be mentioned that this extant law repealed the Workmen's Compensation Act¹⁸, which was the law on the subject matter of workers' compensation. A notable feature of the ECA is that it is applicable to all categories of workers in Nigeria. It adopts a more inclusive definition of an employee, unlike the repealed Act, which excluded certain categories of workers and types of employment arrangements.¹⁹

Section 73 of ECA gave definition of an employee as 'a person employed by an employer under oral or written contract of employment whether on a continuous, part-time, temporary, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer in the federal, state and local governments and any of the government agencies and in the formal and informal sectors of the economy. This definition of employee is laudable as it incorporates all categories of worker, whether nonstandard or standard. Again, the express mention of 'part-time', 'temporary' and 'casual' basis makes the application of the benefits provided for under this Act to accrue to casual or non-standard workers.

There is a good degree of protection granted to temporary employees under government employment. This includes those in public service (generally referred to as public servants) and those in civil service (generally referred to as civil servants.). This is based on the fact that the definition of civil servants and public employees in the constitution did not draw such distinction between permanent and temporary employees.

Presently, there is no direct statutory provision defining or regulating or stipulating the terms of nonstandard employment relations in Nigeria. This is a grave legislative oversight capable of undermining effective protection of these workers. The terms and conditions in these work relations are as such subject to negotiation between the parties²⁰. Accordingly workers in this form of arrangement can be dismissed at any time without notice and are not entitled to redundancy pay. Hence, it is an unprotected form of employment because it does not enjoy the statutory protection available to permanent employees under the Labour Act.

4.2. The Position in Australia

The regulatory structure in Australia is more decentralized than that of Nigeria. At the federal level, there are the Industrial Relations Reform Act 1993(Commonwealth) and Workplace Relations and other Legislation Amendment Act 1996.²¹ The states also have in place similar measures such as the Industrial Relations Act,²¹ the Employer Relations Act 1992 of Victoria, the Industrial Relations Amendment Act,²² the Industrial Relation (Amendment) Act 1992 of Queensland, the Industrial Relations Amendment Act 1993²³ , the Minimum Condition of

¹⁸ Workmen's Compensation Act Cap W6, LFN 2004

¹⁹ Section 1(2) Workmen's Compensation Act Cap W6, LFN 2004

²⁰ M.Daniel, 'Protecting Workers' Rights in a Labour Environment Dominated by Nonstandard Work Arrangements and Unfair Labour Practices: An Empirical Study of Nigeria', *International Journal of Interdisciplinary Research and Innovations* 2015, Vol. 3, pp 65-83.

²¹ Animashuan

²¹ (1991) New South Wales

²² Enterprises Agreements and Workplace Freedom Act 1992 Tasmania

²³ West Australia (W.A)

Employment Act 1993, the Workplace Agreements Act 1993 and the New Zealand Employment Contract Act.²⁴

Basically, these laws provide that employment issues are matter of contract between the parties, that is, the employer and the employee. In pursuance of this object, the Industrial Relations Court of Australia was abolished and its jurisdiction absorbed by the Federal Court of Australia. The institution of the office of the Employment Advocate was however introduced. This body is charged with the following functions: the provision of advice and assistance to the parties with regard to their obligations under the Act, the approval of workplace agreements, the investigation of complaints and contraventions of such provisions as dealing with freedom of association. The use of casual workers is predominant in industries such as retail, health and community services.

Another striking phenomenon peculiar to this jurisdiction is the categorization of casuals into long term (permanent or regular) casual and short term (irregular or true) casuals. The ‘permanent casuals’ are used in a long term regular way that is similar to the way in which permanent employees are used and it stands out as the main way in which the casual workers are exploited and abused in this jurisdiction as significant number of casual workers have been in their post for over five years. In fact, their status could be classified as permanent casual staff. The courts have exhibited great courage in applying equitable remedies where this issue of casualization is at stake. In *Zuijs v Wirth Bros Pty Ltd*²⁵, a circus trapeze artist was injured as a result of falling while performing. The defendant’s position that an artist with special skills who is a casual worker could not be under his control hence independent and not entitled to compensation was rejected by the court. This casual arrangement differs in form. There is the use of placement agencies, which involves a brokering process whereby an agent brings together an employer with particular staffing needs and persons who possess the requisite skills and dexterity for the relevant position.²⁶ The agent receives a fee from the putative employer for this service and often an additional amount if the person is engaged by the employer. Another form involves specialist labour hire companies that maintain a pool of workers with particular skills. The labour hire company contracts with business entities for the supply of workers to do work needed by that entity. The workers are however paid by the labour hire company which collects from the business entity an amount that incorporates the workers’ wages together with the labour hire company’s profit. This form of labour hire arrangement is structured in a way that the labour hire company continues as the employer notwithstanding the fact that the casual work is being done for a third party. More complex arrangements have also been forged, often with the intent of relieving the labour hire company of the legal responsibility and cost implications associated with being the employer of the workers in its labour pool. The difficulties that such artificial arrangements have caused in respect of a range of employer’s responsibilities came to a head in the construction industry (particularly in Victoria) during the late 1980s and early 1990s when it culminated in litigation involving a labour hire company (that went by the name of Trouble Shooters Available) and various Victorian building industry trade unions. Trouble Shooters had created a pool of 15 different categories of workers ranging from labourers to project managers.

There was an elaborate induction process structured to create the impression that the workers in the pool were employees rather than independent contractors in order to minimize conflict

²⁴ 1991

²⁵ (1955) 93 CLR 51

²⁶ O. Animashuan, “Casualization and Casual Employment in Nigeria: Beyond Contract”, (2007) *Labour Law Review*, Vol. 1, No. 4, pp 13-34

with building industry union. This included the pool members taking out membership with various industry schemes such as the construction industry long service leave registration scheme and the building industry superannuation scheme. On the other hand, the formal agreement between the pool members and the Trouble Shooters explicitly declared that there was no employer-employee relationship and these members had the choice of whether or not they were available for work on any particular day. The building industry unions who were determined to protect favourable employment conditions won after considerable struggle contained in the Victorian building industry agreement, saw the operations of Trouble-Shooters as threatening these conditions and attempted to enforce these conditions on sites upon which members of the Trouble-Shooters pool were engaged on the basis that they were employees. The company took an action against the union under the Trade Practices Act 1974 and in tort for interference with contractual relations.²⁷ Among the matters in issue in this litigation was the status of the workers dispatched by Trouble-Shooters to various employers in the building industry. Woodward J at first instance was inclined to give particular weight to what he discerned as the intention of the parties while the full court placed greater weight on the presence or absence of control. In both decisions, it was held that the members of the pool were independent contractors and not the employees of their Trouble-Shooters or the business to which they were hired. The upshot in the determination of worker status in the labour hire area is fraught with uncertainties and may be highly dependent upon the nature in which the particular context in which the arrangements between the agency and its pool of workers are constructed. As well, it may be dependent upon the particular context in which the arrangements are examined and proceedings brought. In another case involving Trouble-Shooters, the court adjudicated on its liability for the payment of workers' compensation premiums under the Accident Compensation Act 1985. At first instance, in the Victorian Supreme Court, Gray J found that Trouble-Shooters was caught by these provisions and liable as an employer to make the relevant payments.²⁸ On appeal, the full court (Murphy, Marks and Beach JJ) held that none of the contracts in issue was caught by these provisions. However, on further appeal the high court overturned this decision and restored the order made by Gray J.

4.3. The Position in the United States of America

The Fair Labor Standards Act (FSLA) has no provision for the protection of workers in nonstandard work arrangements. Workers in this work arrangement do not receive minimum wage and overtime, and are denied the right to organize and bargain collectively under the National Labor Relations Act.²⁹ A growing movement of grassroots organizations and labour unions took up the challenge of changing the laws at state levels. Thus many states have made legislation covering all categories of nonstandard work and many laws have been enacted establishing specific protections for temporary workers, part-time workers, independent contractors, day labourers and other nonstandard workers.³⁰ In the United States, the design of social security insurance programmes was based on the traditional labour relations notion that most workers have regular full-time employment with a single employer.³¹ The decisions of the courts have been in favour of the view that the Fair Labor Standard Act (FSLA) could be applied to temporary workers. The FLSA provides a definition. For an employee and for it to apply to a worker, such a worker must come under this definition. In other words, the onus of

²⁷ *Building Workers Industrial Union of Australia v Odco* (1999) 29 FCR 104

²⁸ *Odco Pty Ltd Trading as Troubleshooters Available v Accident Compensation Commission* (Unreported VTA No. 3 of 1988, ruling delivered on 9/9/1988 by Gray J at Supreme Court of Victoria.

²⁹ National Labor Relations Act 1935

³⁰ R.A Danesi, 'Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria' *NJLIR* Vol.4 No. 4(2010) pp1-41

³¹ *ibid*

proof lies on the temporary worker to show that he or she is an employee and not an independent contractor. The Supreme Court has held that the definition of an ‘employee’ in the Act should be construed broadly and the status of an employee should be determined by an ‘economic reality test’ rather than the narrower common law master-servant test.³²

4.4. China

The Chinese government supports and encourages flexible work arrangements. It encourages it as an answer to the problem of unemployment created by layoffs from the state sectors. However, the system ‘is much more organized and less informal with more government intervention than equivalent employment in many other developing countries’ like Nigeria. The recent intervention of the Chinese government for the regulation of the temporary staffing industry has given it legitimacy, increased the protection of worker’s rights in the workplace and also made more detailed and enforceable regulations to protect worker’s rights and entitlements. Casual workers are hired for user firms through dispatch firms. Dispatch firms are firms engaged under fixed term contracts for duration of not less than two years. The labour dispatch firm remains the employer of the dispatch worker and shall pay the worker the remuneration due to him or her. The User Company is bound by law to ensure that the dispatched worker’s remuneration and working conditions shall be of the same standards of the location where it is situated.³³ The overtime, dispatched worker must be paid overtime, performance bonuses and benefits relevant to the post irrespective of employment status and must earn the same pay as that received by workers of the accepting entity.³⁴ The law also provides that they have the right to join or form a labour union while in employment ‘to safeguard their lawful rights and interests’. The legal framework in China if implemented properly will go a long way in protecting the rights of nonstandard workers in the workplace as well as protecting them from exploitation. It will also become less attractive in the long run to employers who have previously before the law used labour dispatched workers as a substitute for their regular workforce. This may eventually phase out or curb the growth of labour dispatch firms.

4.5. Ghana

Ghana is a developing country in the western part of Africa with a similar economy like Nigeria. Ghana also shares the same history of British colonization and got independence at about the same time. In view of the common experience of these countries, the legal framework of nonstandard work arrangement in Ghana is important as it might help in drawing a pattern that would assist in curbing the issue of casualization in Nigeria. The various legislation on labour in Ghana were harmonized in 2003 into one Act known as the Labour Act.³⁵

The Act embraced nearly all other pieces of local legislation on labour, international conventions and standards to which Ghana is signatory. Ghana as a signatory to ILO Convention reflected its provision in the new Act. It sought to finally balance the interest of workers and their employers and reasonably address the perennial and thorny issue of casual and temporary workers. The Act covers all employees except those in strategic positions such as the Armed forces, police service and security intelligence agencies. Some of the major provisions of the Act include establishment of public and private employment centers, protection of the employment relationship, general condition of employment, employment of

³² *Rutherford Food Corp. v MCcOMB*, 331 u.s. 722, 728-729(1947).

³³ Article 61, Labour Contract Law

³⁴ Article 62 and 63 LCL

³⁵ No.651 of 2003, which was passed into law on 25th July 2003. It became operational by Executive Instrument E13 on 31 March 2004.

persons with disabilities, employment of young persons, employment of women, fair and unfair termination of employment, protection of remuneration, temporary and casual employees, unions, employers' organizations and collective agreements, strikes, establishment of the National Labour Commission.

Part X³⁶ of the Labour Act provides a legal framework for the regulation and protection of employment of casual and temporary workers in Ghana. It defined the two concepts and prescribes the remuneration that should accrue to them as well as the procedure to follow in the event of a breach by the employer.

A casual worker is defined as "a worker engaged on a work which is seasonal or intermittent and not for a continuous period of more than six months and whose remuneration is calculated on a daily basis."³⁷ The Act also provides that the contract of a casual worker need not be in writing³⁸ and a casual worker must be given equal pay for work of equal value.³⁹ According to the Ghanaian labour law, a permanent worker is employed for twelve months per year continuously, while a temporary worker is someone working for a maximum of six months per year (whether continuously or intermittently) but less than twelve months. A casual worker is employed less than six months per year (whether continuously or intermittently). Where however she is employed for a continuous period of six months and more for the same employer she shall be treated as a permanent worker.⁴⁰ The Act also made provision with regards to the breach of its provision and provided that where an employer breaches these provisions, the temporary or casual worker may present a written complaint to the Commission for determination and its decision shall be binding on both parties.

A careful look at the case of Ghana will reveal that the provisions of their Act points towards the fact that casual employment is not work and ought not to be a permanent employment just as temporary employment is not meant to be permanent either. The casual worker in Ghana is unlikely to complain, as his or her work period is apparently dictated by the nature of the work itself. All that remains to be seen is how the Commission ensures that undue casualisation of workers does not occur under conditions that conduce more to permanence and continuity in employment.⁴¹ The foregoing depicts that casual and temporary workers in Ghana unlike in Nigeria, enjoy adequate protection.

5. Conclusion and Recommendations

Nonstandard employment relation is a worldwide phenomenon. The Nigerian labour market has many forms of nonstandard employment relationships. In some countries, entering into such arrangements is mostly driven by choice while in others it is the opposite. Regrettably, the case of Nigeria falls within the latter situation. Most of these employees have less favourable terms of employment than other employees performing the same work and have less security of employment. They do not receive welfare benefits such as medical and or pension, or provident funds.

³⁶ Special Provisions Relating to Temporary Workers in the Ghana Labour Act 2003

³⁷ Ghana Labour Act 2003, S77

³⁸ *ibid* s 74(1).

³⁹ *ibid* s.74(2) (a)

⁴⁰ *Ibid* s.75(1)

⁴¹ O.A Orifowomo, 'Legal Perspectives on the Casualization of Workers under Nigerian Labour Laws' (2007) *East African Journal of Peace & Human Rights* Vol.14, No.1, pp104-127

The legal position of nonstandard workers in Nigeria is surrounded by uncertainties because of the lack of clarity in the labour legislation in the definition of their status. This fact is peculiar with Nigeria. This has led to all forms of marginalization against this class of workers unlike those of other jurisdictions whose laws have advanced in order to meet up with the standard of international best practice by expressly enacting statutes that apply to all classes of workers including nonstandard workers. Unlike in Nigeria, courts in Australia and the US have applied a broader approach to the definition of employees by holding that labour legislation could be applied to casual workers. In China and Ghana, legislation have been made which clearly defines the status of casual workers and confer direct benefits on this category of workers.

This paper concludes with the proposition that the position of casual workers in Nigeria needs be revisited. Legal policy must therefore be put in place to determine the rights, privileges and obligations of this category of workers. A legislation that is based on a minimum of general principles, universally applicable to every employment contract without discrimination will be preferred. It is more realistic and will eliminate the present discrimination against workers under nonstandard work arrangements.

The NIC has a crucial role to play in checkmating nonstandard work arrangements and unfair labour practices in Nigeria. The Constitution of the Federal Republic of Nigeria and the NIC Act 2006 (as amended), contain provisions that can be used to advance the course of justice, fairness, equity and harmonious industrial relations climate in Nigeria. The NIC being the final arbiter in employment, labour and industrial relations issues should adopt broad interpretation of the term “employee” like the courts in Austria and US, thereby extending the benefits contained in our labour legislation to nonstandard workers. This will further checkmate the tendency of corporate employers in Nigeria such as Banks to exploit the loopholes in our laws and the serious unemployment situation in the country to perpetually casualize workers.