Changing work arrangements and the scope of the employment relationship in Trinidad and Tobago: Trends and Challenges

by

Roodal Moonilal

April 2006

ILO Subregional Office for the Caribbean
Moonilal, R
Changing Work Arrangements and the Scope of the Employment Relationship in Trinidad and Tobago:
Trends and Challenges
Port of Spain, International Labour Office, 2006
## Contents

1. Some conceptual issues 1
2. Overview of the labour market 4
3. Labour relations systems of Trinidad and Tobago 7
4. Employment relationship in Trinidad and Tobago 9
5. Case studies on newer employment strategies 12
6. Changes in hours of work 14
7. Status of labour protection 15
8. Non-standard employment practices: views from the tripartite community 16
9. Data from the Tripartite Committee 20
10. The legal status of workers in non-standard employment situations 22
11. Recent common law developments concerning non-standard employees 24

References 30
1. Some conceptual issues

This paper seeks to identify and highlight some of the newer issues surrounding the use of non-standard employment practices by employers in Trinidad and Tobago. The resource material is empirically driven and is replete with a host of practical experiences, observations, new trends and emerging case law. Data is drawn from structured and semi-structured interviews with the key stakeholders and experts in the field of industrial relations. Earlier research efforts provide the starting point for this study which explores the newer issues while recognizing the presence of much older challenges. While the mainstay of this study is the qualitative data, we found it useful to begin with a short discussion on some of the conceptual issues and thereafter locate Trinidad and Tobago within its peculiar economic and labour market context.

Admittedly, non-standard employment per se, is not new. But, the increasing use of contract workers, the greater diversity observed within the ambit of contracting and the implications for labour market institutions (collective bargaining, worker organizations) based on standard patterns of employment is. With regard to the differences between standard or regular employment and non-standard or atypical work, Cordova explains that:

> typical patterns (of employment) first took shape with the emergence of large scale industry, they developed with labour law and trade union action, …which implies working for another, for a wage and in a subordinate role… in addition to these features the worker had one employer, worked full time on the employer’s premises and expected (or was expected) to continue doing so indefinitely. Where these conditions were present and employment was protected by the law, the worker enjoyed statutory entitlement to a whole series of guarantees and benefits; at the same time the law imposed a number of responsibilities and obligations on the employer and the state (1986, 642).

Such full-time employment patterns provided the premise on which labour law, collective bargaining and social security systems were established. The role of trade unions conformed to the norm of full-time, standard employment, patterned, as it was, on the British-descended model. In the English-speaking Caribbean, common law had enshrined the concepts of control, dependency and subordination to define an employment relationship. This fitted snugly into the full-time employment model. However, by the 1970s, a new model of atypical employment had emerged, characterized by the absence of one or more of the standard features.

Seven main actors can be identified in the non-standard employment debate. They are:

1. The user enterprise or principal employer—in some instances many contract firms are themselves user enterprises.
2. Contract workers—this category includes (1) a core and (2) a peripheral labour force within the contracting firm. Many firms keep a large temporary or casual labour force as a pool from which to source workers when contracts are obtained from a user enterprise.
3. Regular workers—the use of contract labour can have a prejudicial impact upon the
terms and conditions of those deemed core workers. Additionally, the action of
regular workers (in a strike perhaps) impinges upon the safety and status of contract
workers.
4. The contractor or subcontractor—who may function only as a labour or job
contractor.
5. Intermediaries—individuals or agencies which perform a labour market
“brokerage” function, bringing employers and job seekers together.
6. Trade unions or employee associations with a traditional interest in contract work,
which seek to either (1) stamp out this form of labour utilization for fear of
undermining its members’ bargaining position or (2) to enlist contract workers as
new members.
7. The state as the supervisor of the labour arbitration machinery which has
historically served the needs of standard or regular employees.

Cordova (1986, 643-645) identifies three broad types of contract employment situations:

1. Self-employment—while this is not new, it is no longer the exclusive purview of
skilled workers but may include unskilled, manual workers and those on the marginal
sectors of society.
2. Atypical employment contracts deviate from contracts of full-time wage employment
by establishing triangular employment relationships in which a worker establishes
occupational connections with several employers. These would include employment
with temporary work agencies, sub-contractors, labour pooling, etc. A range of job
practices can be found within this format such as part-time employment, short-time
working, alternating work and rest (traditionally used in mining and extractive
industries), fixed-term contracts, trial employment and training cum employment
contract; in this model continuity in employment is discontinued.
3. Clandestine work is also a growing form of atypical work which can be further sub-
divided into undeclared labour (carried out beyond the reach of labour, fiscal and
administrative law), family work and micro enterprises which operate outside of
industrial regulations.¹

The international debate on developing an instrument to address the incidence of contract
work, to guide the national practices of member States, has been suspended because of
some conceptual difficulties with delineating the parameters of contract work and
creating an all encompassing framework to take into account harshly divergent legal and
socio-economic variables spun across multi-lingual environments. However, it is almost
universally agreed that non-standard employment as described in this section has been on
the frontier of the emerging labour relations landscape. In any event, the discussion on
contract work and the imperative to move towards greater institutional protection and
eliminate the exploitative nature of this form of labour utilization has received

¹ The local Industrial Court is today still exerting great effort to address this matter of the willful attempt to
hide an employment relationship, as will be seen later with the case research.
widespread support in the Caribbean and a general acceptance of the character of the problems facing the tripartite partners.

It is observed that within the domain of non-standard employment practices a form of legal flexibility is discerned whereby firms are increasingly trying to gain legal recognition for a work relationship in which the principal employer is devoid of all responsibility as an employer as the worker is judged to be an independent contractor. As an independent contractor the worker has a few legal rights of an employee but does not enjoy the benefits of the role of employer since he neither sets the rates of pay nor conditions of work and work process. Like Cordova, Veneziani has sought to distinguish between standard and non-standard employment models. He has summarized five major deviations from the classic model of employment:

1. The duration of the contract—employment relationships are neither of a continuous nor unspecified duration, instead, the relationship has a specific termination date and/or the job performance is interrupted. The social relationship underlying the contractual tie is also time specific. The temporary worker agreements (TWAs) is a case in point.

2. The duration of work—the increase in part-time work, the hiring of peripheral workers within the wider labour market and its increased propensity within the contracting sector is indicative of attempts to alter the employment relationship. It may include a reduction in normal working hours (horizontal part time), or by full-time work being done on alternate days (vertical part time) or job sharing and job alternation in combination with an unemployed worker.

3. The place of work—work is now carried out outside the central place of production (i.e. the firm). This is by no means a new phenomenon, however, its frequency poses a central problem for labour law when defining the concepts of subordination and control with which the law determines an employment relationship. Because of the nature of work and the technical capability of managers today, one cannot depend on control (in terms of what, how and when work is performed) to indicate subordination, but, increasingly subordination has to be measured in terms of the link between work and organization.

4. The bilateral relationship—increasingly the relationships become bilateral between the employer and the individual worker. In the case of triangular relationships, involving the worker, the user enterprise and the contractor, the worker is usually legally bound to the latter although socially and economically dependent on the former.

5. The availability to work - in the classic model of employment, subordination consists of being both materially and legally available to work (a worker is still bound on contract even though on holidays or ill), in the new model a pre-contractual situation arises whereby the worker promises to work (labour on call). There is no legal protection to such workers since such subordination is not juridical but socio-economic (1990, 65-85).
2. Overview of the labour market

Trinidad and Tobago is located on the north-eastern tip of the South American continent, off the coast of Venezuela. This twin-island republic has a land area of 5 128 sq km2 (1 980 sq miles). The energy sector, on average, contributes between 20–25% of Gross Domestic Product (GDP), with construction, finance and services, together, contributing 20%. See figure 1 for a sector composition of GDP. While contribution to GDP in all sectors increased steadily over the period 1995 to 2000, growth was almost non-existent in the agricultural sector, including sugar.

Figure 1: GDP – 1998 sectoral contribution

Statistics reveal that as at 1999 the labour force comprised 0.56 million persons. The labour force grew by 20% in the period 1987–1999. The disparity in the growth of population and the labour force is reflected in the participation rate, which fluctuated from 56.3% in 1989 to 60.8% in 1999. This growth in the labour force from 1987 to 1999 can be attributed to a substantial increase in the female participation rate of 33% and, to a lesser extent, an increase in the male participation rate of 8.4%. The unemployment rate over the period 1987 to 2000 reflected a steady downward trend from 22.26% in 1987 to 10.8% in 2001.

Employment statistics disaggregated by gender reveal that the rate of male unemployment decreased over the period from 13.7% in 1987 to 10.2% as of 2000. The rate of female unemployment was reduced from 25.25% in 1987 to 15.2% in 2000.
Youth unemployment is a prominent feature of the labour market. An age analysis shows that unemployment is consistently highest among persons 15–24-years. The 15–24 age group experienced the highest rates of unemployment throughout the period, starting at 42.6% in 1987 and declining to 25% in the first quarter of 2000. This represents an overall decline of 17.6%. Even though the statistics indicate that unemployment in this cohort declined over the period 1987–1999, it still far exceeds the other age groupings. The 35–44, 45–54 and 55–64 age groups experienced the lowest unemployment rates—ranging from 5% to 15%—during the period 1987 to 1999.

The largest percentage of the employed labour force was found in the community, social and personal services sector which has steadily increased from 29.3% in 1987 to 31% in 1999. A substantial proportion of the labour force was employed in the manufacturing sector—from 9.6% in 1987 to 10.7% in 1999, and the wholesale and retail sector—from 15.6% in 1987 to 18.4% in 1999. Also of significance was the notable increase in the share of employment in the finance, insurance and real estate sector—from 6.0% in 1987 to 7.3% in 1999. Alternatively, the agricultural sector, in particular sugar, recorded a decrease in the proportion of employed persons.

Figure 2  Percentage employed of workforce disaggregated by industry 1987 and 1999
Figure 2 gives a breakdown on the sectoral composition of the labour force. While petroleum and gas contributed over 20% of the GDP (figure 1), it contributed below 5% in the way of direct employment. The bulk of the labour force (more than 30%) was found in community, social and personal services, with wholesale and retail trade, construction and manufacturing as the other leading employment sectors. Trinidad and Tobago can be categorized as an energy-based economy with job concentration in services. Table 1 gives a breakdown of the salient characteristics of the labour force. Data from a 1992 *Survey of Living Conditions* is still the source of the most recent statistics to be used in labour force analysis. Due to the relocation of the Central Statistical Office (CSO) in Trinidad and Tobago, the data from a 2000 survey is yet to be published.

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>All T&amp;T</th>
<th>Male</th>
<th>Female</th>
<th>Poor</th>
<th>Non Poor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour Force Participation</td>
<td>60.2</td>
<td>74.8</td>
<td>44.7</td>
<td>56.4</td>
<td>61.1</td>
</tr>
<tr>
<td>Employed:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Formal public sector</td>
<td>34.4</td>
<td>34.1</td>
<td>34.6</td>
<td>20.6</td>
<td>36.6</td>
</tr>
<tr>
<td>Formal private sector</td>
<td>42.5</td>
<td>39.6</td>
<td>48.0</td>
<td>50.0</td>
<td>41.3</td>
</tr>
<tr>
<td>Informal sector</td>
<td>23.1</td>
<td>26.2</td>
<td>17.6</td>
<td>29.4</td>
<td>22.1</td>
</tr>
<tr>
<td>Unemployed</td>
<td>20.8</td>
<td>19.0</td>
<td>23.4</td>
<td>36.0</td>
<td>17.1</td>
</tr>
<tr>
<td>Occupation:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional/sr.manager</td>
<td>8.8</td>
<td>9.4</td>
<td>7.7</td>
<td>2.0</td>
<td>9.7</td>
</tr>
<tr>
<td>Tech/Associate professional</td>
<td>9.5</td>
<td>6.6</td>
<td>14.9</td>
<td>3.2</td>
<td>10.5</td>
</tr>
<tr>
<td>Clerks/Service</td>
<td>25.4</td>
<td>19.5</td>
<td>49.1</td>
<td>19.2</td>
<td>26.4</td>
</tr>
<tr>
<td>Agriculture</td>
<td>4.5</td>
<td>5.7</td>
<td>2.4</td>
<td>7.2</td>
<td>3.9</td>
</tr>
<tr>
<td>Craft</td>
<td>15.9</td>
<td>21.5</td>
<td>5.4</td>
<td>21.7</td>
<td>14.8</td>
</tr>
<tr>
<td>Elementary</td>
<td>35.9</td>
<td>40.0</td>
<td>28.2</td>
<td>46.6</td>
<td>34.7</td>
</tr>
<tr>
<td>Mean wages:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Formal private</td>
<td>1500</td>
<td>1600</td>
<td>1300</td>
<td>700</td>
<td>1560</td>
</tr>
<tr>
<td>Formal public</td>
<td>2300</td>
<td>2300</td>
<td>2300</td>
<td>1320</td>
<td>2360</td>
</tr>
<tr>
<td>Informal</td>
<td>900</td>
<td>1000</td>
<td>700</td>
<td>520</td>
<td>1170</td>
</tr>
</tbody>
</table>


The above is a snapshot of the labour force in the early 1990s, including informal sector labour. Over 75% of the work force was found in the formal sector, with 34.4% in the public sector. The majority of informal sector workers were found in personal services, artisan and craft production and small business. Wages were the highest in the public sector, 60% more than in the private sector and as much as 150% more than in informal work.
On the question of employment, it must be borne in mind that unemployment has traditionally been high in Trinidad and Tobago. Before the oil boom of the early 1970s, unemployment was as high as 15.4% (1973) and under 10% only during the early 1980s. As the employment effects of adjustment policies began to take hold within the labour market in the late 1980s, the unemployment rate hit a high of over 22% in 1988–1989. Unemployment has remained acute, notwithstanding economic growth due to the traditional emphasis on investment in heavy industry and capital-intensive projects at the expense of investment in rural and smaller scale enterprises.

Within the past two years, the Central Statistical Office has reported sub-10% figures for unemployment, with an all-time low of 6.7% in the first quarter of 2006. While this figure is remarkable in its social policy dimension, preliminary analysis suggests that the unemployment rate is being artificially reduced by the plethora of temporary, low skill, low-paying, public-driven, ‘make work’ programmes. In fact, if the temporary work programmes are factored out of the unemployment figure, the real rate of unemployment is more in the vicinity of 12%. There has also been the implementation of temporary youth training programmes, akin to junior apprenticeship schemes, which are now leading to a form of white-collar insecurity.

3. Labour relations system of Trinidad and Tobago

Similar to that of other English-speaking Caribbean countries, Trinidad and Tobago’s system of labour relations is patterned on the British system of industrial relations with its model of trade unionism. Collective bargaining, on the whole, was conducted within the framework of voluntarism. In this model workers and employers are left to negotiate and determine terms and conditions of employment bilaterally. The laws on collective bargaining relate to the procedural aspects and not to the content or substance of bargaining. However, when the voluntary system fails to resolve disputes, compulsory arbitration mechanisms kick in to secure binding, if not consensual, resolutions.

In the immediate post-independence era, the State, in a bid to secure industrial stability towards the goal of rapid economic advancement, intervened heavily in the labour relations system to introduce legislation that legally defined and circumscribed the workings of the labour relations system.

The key actors are (1) the employers and their representatives, (2) the workers and their representatives and (3) the government. The institutional roles are prescribed by rules, regulations, procedures and labour laws. The system can be considered as “juridified”, whereby the conduct is guided by the existing laws. The term “juridification” refers to the process by which the state steers industrial labour relations in certain prescribed directions, whereby over time the society’s method of employment regulation and the role and freedoms of the actors in industrial relations become subject to comprehensive regulation. It occurs when collective labour relations is placed under a system of legal control, and labour relations become closely intertwined with legal norms resulting in the replacement of disruptive social processes (industrial conflict) with legal processes guided by established rules and principles. The process of “juridification” encompasses not just legislation but a set of regulatory mechanisms, including administrative and
systems are to be found in legislations such as the Trade Union Act, 1950 (Revised), the Trade Dispute and Protection of Property Act, 1940, the Industrial Relations Act (IRA), 1972 and the Retrenchment and Severance Benefit Act (RSBA), 1985. The most comprehensive and dominant piece of legislation is the IRA. It contains procedures for trade union recognition, procedures for reporting trade disputes, procedures for regulating industrial action, dispute settlement machinery and rules on collective bargaining.

Trade unions emerged as general or blanket unions and, for the most part, are modelled along British lines. However, while many of the unions have been associated with one or another of the major political movements, they have not been institutionally linked as obtains in the United Kingdom and other Caribbean territories. A more ‘business unionism” model has emerged in Trinidad and Tobago. In this framework the unions pursue strategic alliances with all the dominant political parties to secure the interest of workers.

The unionized workforce constitutes only about 22% of the total labour force. In the aftermath of the economic recession of the early 1980s and the introduction of austerity measures in the late 1980s, the trade unions became less influential. Between 1980 and 1998, the membership of the unions decreased, on average, by 44% in the traditional unionized sectors such as transport, the public service and the extractive industries (Moonilal 1998).

There are vibrant associations of employers in Trinidad and Tobago such as chambers of commerce, geographically-based businessmen associations and producers’ organizations. However, while they focus, in the main, on issues of trade and commerce, it is the Employers Consultative Association (ECA) that deals with labour law and industrial relations. The ECA provides guidance and consultative services on collective bargaining and work in tandem with the government on employment policy formulation. The employers work together with labour and government at industry and specific tripartite fora dealing with a wide range of labour-related policy matters.

In Trinidad and Tobago, there is a traditional adversarial and confrontational brand of industrial relations. The practice of labour relations is more of the “firefighting” and reactionary brand as opposed to proactive labour relations strategies. Collective bargaining is conducted according to the IRA. An Industrial Court is the final, legally-binding arbiter on all trade disputes. Judgments of the Court, in themselves, become legal authorities on labour relations principles and practices. The system is procedural and rule driven based on the numerous labour codes, Orders and legislation.

In the recent past, there was a movement away from the rule-bound type of labour relations to more alternative dispute resolution type strategies. This, however, is common in the larger private sector enterprises.

Ministerial decisions. For more discussion on the international context for the interaction between the state and labour law see Bellace 1994 and for the Caribbean situation see Bell-Antoine 1992.
4. Employment relationship in Trinidad and Tobago

Employment relations have undergone drastic changes over the past two decades in Trinidad and Tobago. The industrial shifts from heavy concentration of employment in the primary and public sectors to dispersed employment in financial services, hospitality and the technology sector, together with work reorganization in manufacturing have all led to various forms of newer employment strategies. Generally, there is a movement away from mass employment towards smaller core job categories (supervisory, integration and managerial) and wider peripheral work domains (production, marketing, services, etc.).

Contingent employment relationships have received comparatively more attention in Trinidad and Tobago than elsewhere in the Caribbean. Early works included a Commission of Enquiry Report by Henry (1972), which focused on the undesirable features, such as the exploitation of contract labour, largely a consequence of acute competition for contracts, especially among small contractors. This report dealt with contract, casual and seasonal employment in Trinidad and Tobago’s petroleum sector. While several recommendations were made, very few have actually been implemented.

It was not until the end of the 1990s that other empirical studies appeared, such as that by Thomas (1998), which analyzed employment trends after the recession and the accompanying industrial reorganization of the 1980s and mid 1990s. Thomas’s study revealed a renewed interest in non-standard employment practices. Many firms adopted strategies of reducing the size of the workforce. Privatization and further cuts in public expenditure hastened the reduction of permanent, full-time jobs. Thomas found that there was a high contract labour/total workforce ratio within the petrochemicals sector (mostly within the “high tech” entrants into the sector and among the service contractors); construction (all aspects—residential and commercial buildings and industrial plants); some sub sectors of miscellaneous manufacturing and of assembly-type industries, transport, distribution (retail sales), some pockets in services (e.g. janitorial and private security). Indeed, this study pointed to the reality that non-standard employment was at its highest in the construction sector (62%), followed by the petroleum industries (18%). Other research efforts included Moonilal (1998 and 2001), which confirmed the growing incidence of non-standard employment in the service sector, including the service contractors in the energy sector and within the expanding private security industry.

It must be remembered that the incidence of non-standard employment is also a function of the product and labour markets acting in unison. The data from 1998 research explained the dynamics of product and labour markets for non-standard employment with reference to the construction sector and the service-contracting sector affixed to the petroleum industry. The findings listed below are still relevant today and can even be observed in other sectors.

The central characteristics of the product market are:
1. Fierce competition among firms—this means that employers are prone to cost-reduction strategies in an industry where firm size ranges from multinational
subsidiaries to self-employed contractors. Newcomers in the industry lead to a greater need to use labour only on demand.

2. Demand is highly volatile—the level of foreign investment in the energy sector reflects the state of the service contracting sub sector. Investment levels have fluctuated sharply over the last decade and so have employment levels in construction and within the service-contracting sector.

3. Ease of entry—where the industry is characterized by ease of entry at the lower end resulting in a large number of small firms, this leads to price competition, pressure for cost reduction and an associated preference for using casual labour as opposed to permanent workers. The volatility of labour demand means that non-standard employment is well suited for these industries. Because of this ease of entry, new, inexperienced contractors can quickly register a firm, outbid traditional firms and make a quick profit. This condition encourages fly-by-night operators.

The character of the work organization also lends itself to the use of non-standard employment. Furthermore, work organization and work processes dictate that non-standard employment practices are more suitable to specific sectors. The following features are noted:

1. The processes are highly sequential, differentiated and discrete, each requiring distinct trade skills and tools. The construction industry provides an excellent example. The building process begins with site preparation (excavation—demand for backhoe operators, heavy equipment drivers, very few labourers); moving on to construction (requiring builders, fabricators, masons, carpenters); then to electrical and instrumentation specialists all the way through to mechanical and piping works. Even when the construction phase is completed, many contractors retain agreements to do “shut downs” and maintenance operations. The production process requires the employment of each specialist tradesman only for a relatively short period of time. The completion of each phase makes way for the contracting of the next group of tradesmen for another specific role in the production process. This can also mean contracting an altogether new firm which specializes in the next production process, for example, from site preparation to plant construction. Consequently, workers remain employed by a firm only if more contracts are forthcoming.

2. Production processes are mainly skill intensive with the use of unskilled labourers limited to particular aspects of production such as dredging, loading materials and watchman services.

Features within the labour market also facilitate the use of non-standard forms of employment:

1. During boom periods, an industry attracts a host of new firms, each with the intention of making use of ties to the large contractors or State enterprises. Employment is transitory as workers move in and out of jobs in keeping with demand. A high labour

---

3 Referred to in the United States as “renovation and turnaround jobs”.

1. Turnover does not lend itself to stable and secure employment with any corresponding desire for worker organizations.

2. Low job security and fluctuations in wages also characterize non-standard employment.

3. Workers, by virtue of being transient, do not develop a collective consciousness.

4. Historically, the rapid mobility and isolation of the contract worker in the service contracting sector have contributed to the low level of unionization.

During the period 2000–2005, expansion in three areas led to an increase in non-standard employment practices. Firstly, a recent boom in construction (particularly the massive public programme of home construction) and the energy sector, led to the arrival of a host of foreign service related firms which feed into and off the global multinationals. Those firms, in turn, identified local subcontractors who then recruited domestic supervisory, skilled and, in smaller numbers, unskilled labour.

Secondly, in addition to the heavy investment in the energy sector, the Government embarked on a new policy of increasing the public sector ‘make work’, unskilled labour programmes. This policy measure, partly a social intervention strategy, resulted in the mushrooming of small labour recruiting firms which register and tender to supply labour to several programmes, the most notable being the Community-based Environmental Protection and Enhancement Programme (CEPEP). This programme has attracted new labour supply firms, however, there is very little research on the precise arrangements for work, the character of the new firms and labour relations practices. The budget for the CEPEP moved from TT$80 million in 2003 to $225 million by 2004. When expenditure of $313 million on another public works programme called the Unemployment Relief Programme (URP) was added, it meant that the state spent more than half of a billion dollars on only two works programmes in one year. Reports are forthcoming on the number of beneficiaries but not the character of the new labour supply firms and their labour practices. Suffice it to add that those workers involved in the CEPEP and URP are not represented by worker organizations, do not have written contracts and there appears to be little supervisory machinery in place to monitor the conduct of industrial relations and the implementation of protective legislation in this growing sector. The ease of entry and, indeed, the hidden process of entry of the new firms suggest that many may be outside the reach of labour institutions.

Thirdly, the State has sought to assist with the creation of small businesses and new entrepreneurial firms with the creation of a company, called the National Entrepreneurial Development Company (NEDCO), which promotes the establishment of new small businesses. There have been few public reports on the number and nature of these new firms. While many are one-person operations or own account workers (OAWs), there

---

4 The Government reported that in 2004 over 58 000 persons benefited from short-term employment via the URP programme. Social Sector Investment Programme 2005. Publication of the Ministry of Social Development.

5 The OAW is normally a person who operates his or her own economic enterprise or engages independently in a profession or trade, and hires no employees.
may be several new employers coming on stream who fall outside of the formal and
regulatory employment-relations institutions. It appears that by several integrated labour
programmes, the State is driving the creation of non-standard employment practices
which seek to generate employment outside of the coverage of the traditional industrial
relations machinery, or even the social security framework.

5. Case studies on newer employment strategies

Within the last decade, several reports have pointed to the escalating use of non-standard
employment practices via sub contracting networks used to avoid worker organizations
and the “restraints” or lack of flexibility associated with standard employment practices.
The trade unions have reported several cases of employers closing down sections or
departments within an enterprise and re-hiring or re-engaging the very employees (some
but not all) under individual contractual arrangements to undertake, ostensibly, work
similar to what they did before. This was reported by the union at the
Telecommunications Service of Trinidad and Tobago (TSTT) in the case of such
categories of jobs as technicians. However, the most classic examples of this
development are to be found at Caroni (1975) Limited, the National Broadcasting
Network (NBN) and the Public Service Transport Corporation (PTSC).

The Sugar Manufacturing Company
Caroni Ltd, the sole enterprise for the cultivation of sugar cane, and the manufacture and
refining of sugar, was closed in 2003. The Government made arrangements for enhanced
separation payments for approximately 8 000 permanent employees. Having closed the
company, the Government created another firm called the Sugar Manufacturing
Company (SMC) to produce sugar at one of the two mills in south Trinidad to ensure that
there would be at least production to meet local demand. The SMC then engaged the
services of four contractors to undertake various aspects of the sugar production process.
These contractors were themselves former middle to high-level managers of Caroni
Limited. These contractors, in turn, “re-engaged” a fraction of the displaced workers to
undertake skilled and unskilled, supervisory, production and technical functions. At the
sugar mill the workforce was reduced to 25% of its former level. In this scenario,
recruitment, placement, promotion, wage and benefits were agreed (or imposed) on an
individual basis with absolutely no involvement from the worker organizations. Many
workers gave stories of unfair terms and conditions of work, poor health and safety
conditions, discrimination, job insecurity, an authoritarian management culture and the
absence of non-wage benefits. Interestingly, since 2003 it has not been unusual for
Trinidad to import sugar from Guyana and Cuba to meet local demand.

National Broadcasting Network
A similar experience obtained at the NBN. Formerly the major state broadcasting entity,
it was also closed and selected former employees were re-engaged via contractors, who,
themselves, were either employees or associate consultants to the predecessor enterprise.
Workers were re-engaged as freelancers.
**Public Transport Service Corporation**

At the Public Transport Service Corporation (PTSC), a voluntary separation of employment (VSEP), initiated in 1994, saw the departure of over 1,500 employees, including drivers and conductors, who were quickly rehired on contract as part-time workers. However, all the non-wage benefits were removed from their individual contracts. The union (Transport and Industrial Workers Union - TIWU) has been able to negotiate to “regularize” about 150 part-time employees. At the PTSC, the Ministry of Labour officials have noted that the ratio of part-time to full-time employees is now 3:1.

**Other case studies**

The practice of having contract workers working alongside standard employees is quite frequent at the financial institutions. This can often lead to hostility and animosity as full-time workers feel threatened by the ever-encroaching presence of the temps. The Banking, Insurance and General Workers Union (BIGWU) shared data on employment practices at the Republic Bank.

The Bank adopted a policy of an employment freeze on new hiring in 2000. The union claimed that the bank operated with 600 contract workers out of a total workforce of 2,500. Those contract workers were in clerical positions. It is not unusual for employees working at the Bank for over eight years to remain without regularization and, therefore, without such benefits as clothing allowance, uniforms, medical or health plans. The Bank also contracts in or outsources several ancillary services such as cleaning and printing to low wage contractors who, it claimed, might be paying sub-minimum wages to staff. The emerging trend here is to restructure the work organization, make workers redundant, pay associated benefits, then re-hire former staff via small firms which, in some cases, are facilitated by the former employer. Informants suggest that this strategy is cost effective and appears to be irreversible in the longer term. A growing concern is the occurrence of workplace accidents, normally in the category of slip and fall with muscle and back damage. The concern here is that outside of minimal national insurance claims, contract workers are not covered by workplace negotiated medical plans that provide for medical equipment and longer term care. While the union could not bargain collectively for the non-standard employees they were able to press the employer to regularize such workers. By 2004 about 90% of those workers were able to receive many non-wage benefits.

The landscape of public sector labour relations is set to become even more complicated with the introduction of foreign medical doctors; pharmacists and British police officers. Their contracts of employment will become the subject of scrutiny by the unions and associations. Conflict will also brew since over 700 medical doctors have recently failed to obtain recognition for their registered union (Medical Practitioners Association of Trinidad and Tobago (MPATT). The Recognition Board’s decision meant that the doctors must remain within the fold of the Public Service Association (PSA). The medical doctors have been expressing dissatisfaction with the PSA for several years. This matter may well go to the ILO as a case of at least ethical violation of a freedom to associate. In any event, even if the law supported this course of action, such laws must be reviewed.
6. Changes in hours of work

Another key indicator of changes in the nature of the employment relationship can be gauged by the changing hours of work within the labour market. This is an indication of the various arrangements taking place at the workplace and the sector specific character of those changes.

Figures 3 and 4 present data on the hours worked weekly by employed persons (both sexes) for 1991 and 2000. In Trinidad and Tobago, the normal working day is comprised of eight hours a day with a 40-hour week. This changes for certain categories of employees in essential services and those workers engaged in shift work. Additionally, employees, particularly in the utilities, often work overtime hours under conditions spelt out in their collective agreements. What is striking is that the number of persons working over 41 hours increased from 22% to 33.6% of the labour force.

When we looked at the categories of workers working excessive hours, we found that in 2000, 38% were in elementary occupations and within the service and sales occupational group (28% for 1991), while 50% of those working excessive hours were found in the industrial categories of community, social and personal services such as the wholesale and retail trade, restaurants and hotels (54% for 1991). This industrial category coincides with the occupational category. It is safe to assume that many of those working over 41 hours are outside of the formal sector and without the protection of collective bargaining institutions. Indeed, the data suggest that in 2000, 58% of those working over 41 hours were non-government paid employees (46% for 1991) as opposed to own account workers at 22% (26% for 1991).

Figure 3: Hours worked weekly by employed persons (both sexes) 1991 (CSO)
Alternatively, when one looks at the figures, it is also noteworthy that those persons (as a percentage of the employed labour force) working 33–40 hours per week decreased by 6% between 1991 and 2000, suggesting that the trend is for longer hours.

7. Status of Labour Protection

National legislation covering illness, injury and death, taxation and insurance are in place. However, enforcement and application are lacking. In this situation terms and conditions of work are left to be decided between parties to the contract. In the absence of worker organizations this allows for exploitation and vulnerability. One union official interviewed complained about the frequency with which companies victimize workers who are supporting any recognition claim by the union. Victimization of union sympathizers was singled out as a major problem in the new firms. Contract employees, the union argues, are treated as “second class workers”. The Ministry of Labour and the Labour Inspectorate\(^6\) are typically short staffed, immobile and therefore constrained in response to the complaints of the casual workers.

In general terms, workers in non-standard employment situations are protected by four bodies of regulation, (i) stipulations laid out in collective agreements, (ii) precedents and judgments of the Industrial Court, (iii) national labour legislation and (iv) ILO Conventions and Recommendations, upon which labour relations regulatory machinery is often constructed (Thomas 1998). But, in practice, a large section of the non-standard workers are outside the ambit of labour organizations and unprotected by collective bargaining. Many workers also lack awareness of state regulations which are there to protect them from abuse.

\(^6\) A body within the Ministry of Labour and Small and Micro Enterprise Development.
8. Non-standard employment practices: Views from the tripartite community

Interviews were conducted with representatives from the three corners of the industrial relations triangle, along with selected informed professionals in the field (see list of interviewees at the end of this paper). This data was obtained using a pre-determined survey format. It was compared to a roughly similar exercise undertaken for another purpose in 1998 by the author (Moonilal 1998). Attempts to compare and update the analysis are instructive. In addition, the author received relevant data from a recent report of the national standing tripartite committee which looked in some detail at several issues, identified in the research objectives of this study. The following table highlights the views of representatives of the employer community.

**Table 2: Employers’ views regarding non-standard employment practices**

<table>
<thead>
<tr>
<th>Areas of concentration and increase of non standard employment</th>
<th>Trends</th>
<th>Explanations</th>
<th>Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy, chemicals, manufacturing, construction</td>
<td>Prepared to cut full-time staff, reduce bureaucratic and costly obstacles, avoid managerial lost time, contract all except core business, avoid trade unions (particularly in family businesses). More and more individual contracts to come on stream with a focus on freedom NOT to associate</td>
<td>Efficiency, to find ways to get around increasing wage bill, minimum wage, increase flexibility, reduce costs associated with the legal labour environment. Finds old work organization too sluggish and unresponsive</td>
<td>Need for labour market-wide umbrella legislation to cover violations (particularly within small firms), cover health and safety policy; remove time and procedure delays at industrial court, greater focus on mediation than trials at the Industrial Court; introduce employment rights laws to cover both formal and non-standard employment situations but leave civil and commercial contracts alone</td>
</tr>
</tbody>
</table>

**Table 3: Manufacturers’ association views regarding non-standard employment practices**

<table>
<thead>
<tr>
<th>Areas of concentration and increase of non standard employment</th>
<th>Trends</th>
<th>Explanations</th>
<th>Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private security, food and beverage manufacturers, hospitality, services</td>
<td>Maintain core labour with some contracting out, cost reduction, high turnover in manufacturing sector, employers risk loss of workers by training</td>
<td>Social/state policy undermining recruitment of low skill labour, work ethic destroyed by state policy</td>
<td>Enforce laws dealing with health and safety</td>
</tr>
</tbody>
</table>

**Table 4: National Trade Union Centre’s views regarding non-standard employment practices**
When the above data are compared to responses and trends obtained in 1998, a few new areas emerge. It is the purpose of this paper to flag the new issues and areas for future research rather than present an exhaustive treatment of these emerging trends.

Table 5: Labour officers’ (Ministry of Labour) views regarding non-standard employment practices

<table>
<thead>
<tr>
<th>Areas of concentration and increase of non standard employment</th>
<th>Trends</th>
<th>Explanations</th>
<th>Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Services, telecom sector, construction, government departments</td>
<td>Freeze on hiring of permanent staff, companies using low wage and sub minimum wage contractors, restructure and rehire Workers using contracts via small firms, poor attempts to organize contract workers by unions, leading to the “individualization” of labour relations, conflict between human resource management and industrial relations, same job descriptions for all, team focus erodes bargaining units.</td>
<td>The employers are permitted to exploit by practices of the state, Ministry focusing on “stakeholders” and not tripartite dialogue via established and internationally accepted fora.</td>
<td>Greater focus on trade union education dealing with new health and safety laws, OSHA administration, strengthen labour administration, need more professional and experienced industrial relations practitioners at the Ministry, completely revamp and restructure the Recognition Board to establish organization for unprotected workers, add more resources to the Industrial Court, link labour rights to human rights at the court</td>
</tr>
</tbody>
</table>

Table 5: Labour officers’ (Ministry of Labour) views regarding non-standard employment practices

<table>
<thead>
<tr>
<th>Areas of concentration and increase of non standard employment</th>
<th>Trends</th>
<th>Explanations</th>
<th>Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Services, telecom sector, construction</td>
<td>Employment policy is following corporate strategies, movement to reduce numbers in fewer core competencies (for coordination) and make all others ancillary workers, worker reorganization due to new technologies, greater casualisation of professional workers</td>
<td>Move to reduce overheads, escape regulation for wages and health and safety, in some cases avoid unions, ignore industrial court judgments, coordinate levels of productivity, new workers not interested in unions, market driven flexibility requirement to change numbers and move towards part-time status.</td>
<td>Develop national policy on new employment relationships, greater collaboration between trade unions, Industrial Court and the Ministry of Labour, enforce laws relating to strikes and industrial action, need to reform labour laws to meet new challenges of labour market, greater protection for workers who testify against delinquent employers.</td>
</tr>
</tbody>
</table>
Some explanatory points are useful based on the above data. The representatives of the manufacturers’ association suggested that the increases in the minimum wage and the plethora of make-work, unskilled public programmes had a cumulative effect of further destroying the work ethic in the country. Workers preferred to work with state-run programmes at relatively higher wage rates than to work at factories for eight hours at lower rates. In this way state policy was not only destroying the work ethic but also crowding out workers from the productive sector and creating a shortage of unskilled labour for private firms. The unions were concerned that the Ministry of Labour had embarked upon meeting and treating with what they call “stakeholders” rather than the established and institutionally-recognized tripartite partners. This meant that the tripartite work agenda was marginalized in favour of ad hoc and single-issue consultations. It is instructive to note that the unions complained of contracting work in the government departments, when a Legal Notice No. 134 of 11 July 2000 expressly states that such contracting must be a last resort, undertaken under specific conditions and not to be abused. The officials of the Ministry of Labour noted that there was a move to introduce the several variants of flexibility such as wage, numerical and functional (Rosenberg, 1989).

Regarding new trends gleaned from the interview data, it appears that the unions are having some success bargaining for specific contract workers on an individual basis. This was the case at several leading banks where there was already a union presence. The unions seem to be able to force employers to make such workers “regular” and bring them within the protective and regulatory framework for collective bargaining. Given the examples identified earlier and the interview data it appears that the strategy of worker separation with later “re-engagement” is more widespread as a preferred strategy in both the private and public sectors. This was not visible on the employment radar until very recently. The tale of exploitation and escape from liability by adoption of non-standard employment practices is enduring. The 1998 study explained such observations in the private security sector, while the 2001 research on worker protection saw similar occurrences in the transport and construction sectors. There seem to be a greater “power deficit” than before as workers find themselves without recourse to the law and protective institutions to uphold their rights to organize and freedom to associate. It was interesting that all tripartite parties acknowledged that the State’s labour administration machinery was weak and either ineffective or certainly not as effective as it should be.

Another recent trend, which has arisen within the last decade, is for workers to increasingly go to the civil courts to assert employment rights. It is possible that this a result of the inherent weaknesses of the formal labour administration system and the unwillingness of industrial relations institutions (trade unions, Ministry of Labour, Industrial Court) to capture such grievances and advance justice. The unions suggest that even at the Industrial Court, there has been a reluctance to consider global employment relation trends and new thinking on applying international labour standards and ILO

---

7 This practice was also observed by the Commission of Enquiry into Contract Labour (Henry Report 1972). It is revealing that the very abusive practices are still prevalent today after they were pointed out to the authorities over 30 years ago.
jurisprudence in considering local trade disputes. A call by the unions for the court to interpret labour rights as human rights has been issued. This seems to suggest that in Trinidad and Tobago, as elsewhere, there is still that tension in practice as to whether such labour rights are “constitutional rights” or “fundamental rights” and the implications of this distinction.

The level of injustice, as suggested by the movement to locate inequality in employment matters to the civil court may not have risen but the option of pursuing such disputes have been facilitated by legislative changes which made it possible since 2000 to take judicial review action against hitherto protected institutions of the State. While white-collar professional and managerial workers, understandably, have used this option, it does suggest that discrimination and injustice at the workplace may not be marginal to mainstream workplace culture. This method of obtaining legal redress has been used by persons both within trade unions and those outside of the union. This is indeed another area for future research.8

Another new trend is an increasing move towards the recruitment of more professional workers from outside of Trinidad and Tobago. In the recent past the state has recruited doctors from Cuba, pharmacists from The Philippines, and will shortly recruit a small number of police officers from the United Kingdom. This has labour relations implications as its sets up intra-worker hostility and it disrupts the industrial relations system by placing foreign (and linguistically distinct) workers within the public service under differential terms and conditions of employment.

9. Data from the Tripartite Committee

In July 2005, the Standing Tripartite Committee, established in accordance with ILO’s Convention on tripartite consultation, set about to report on two related matters relevant to this paper, namely:

(1) an examination of the industrial relations system in Trinidad and Tobago in light of international economic trends with a view to recommending ways of strengthening it; and
(2) an examination of contemporary trends and practices in human resources management and industrial relations and their impact on industrial relations in Trinidad and Tobago.

The Committee identified the following nine new trends that impact upon the industrial relations system and made corresponding recommendations that embraced legislative, policy and operational amendments.

(i) Formation of companies without assets
(ii) Mass retrenchment in state enterprises

---

8 The work of South based attorney at law Anand Ramlogan is illustrative of the incidence of employment discrimination. Several high profile cases involving senior public officers have the subject of High Court rulings.
Greater adoption of voluntary separation of employment packages

Increased use of contract labour

The equating of human resource management to other organizational functions

Suppression of collective bargaining

Delays in trade union recognition

The politicization of the Industrial Court

Non-remittance of statutory deductions

It is quite instructive on the state of industrial relations that representatives of employers and government concluded that there is a problem with the suppression of collective bargaining, the politicization of the Industrial Court and the apathetic, even counterproductive, character of government institutions. The establishment of “assetless companies” reflects the observation spotted earlier of new small firms coming on stream to obtain contracts from energy-related investment. Union informants report that it is not unusual for firms to tender successfully for multi-million dollar contracts but may not own a wheelbarrow or one vehicle, when they tender. It is after securing a contract that firms then purchase or lease equipment for such contracts. This approach can benefit the employer who retains core functions, reduces labour costs and improves efficiency. On the other hand, the worker faces short-term employment opportunities and insecurity of tenure.

The Tripartite Committee also noted the increased incidence of contract work, along the lines of labour only contracting and job contracting. The benefits of this strategy have been outlined in the relevant table above. The Committee suggests that employers cut the cost of their liabilities (non-wage benefits) and reduce overheads, thereby protecting a favourable profit margin. The report also noted that employees may prefer this type of arrangement since it brings flexibility, multi skilling (gaining experience in several fields), allows for more family time, increases productivity levels, and may allow employees to do several jobs at the same time and obtain greater self-advancement. Professionals, on the higher end of the salary scale, it was observed may get as much as 20% more salary as bonuses on short-term contracts. While this painted a rosy picture for some, the Committee noted that the downside meant that the strategy promoted job insecurity, sub standard quality of service by some contract workers, workers are excluded from non wage benefits (sick leave, vacation leave, maternity leave, severance benefits), and it may lead to friction in the workplace between full-time employees and non-standard contract labour.

The Committee further noted that a conflict exists in the practice, as opposed to the theory, of industrial relations in confrontation with human resource management (HRM). The HRM movement has sought to link human resource planning with corporate strategy. While the objectives of quality, efficiency and competitiveness are laudable for HRM,
there was a risk that the distributive and equity-based principles of industrial relations were being side-lined. Additionally, HRM strategies can also be used as a tool for “union busting”. Employers may use participation and consultative fora to undermine the role of trade unions and remove loyalty from the union to the enterprise. The traditional industrial relations grievance procedures were being undermined by strategies which allowed workers to bypass the union procedure and go directly to management. The trade union remains the legal representative of workers and cannot be undermined by a management fad, it is argued. The fundamental challenge at industry, it was felt, is to harmonize industrial relations practices with newer HRM strategies.

As far as recommendations go, the Tripartite Committee report dealt with all the agenda items. For our purpose we focus on those related to the non-standard employment debate.

It is recommended that the Government take decisive action to fully implement laws that have been passed, and progressive and protective legislation that have been drafted in some cases, over many years. To this end the Committee called on Government to:

- fully implement the OSHA, passed since 2003, and the Basic Conditions of Work and Minimum Wages Bill, 2000 (which provide for national minimum standards and codes of practices to protect all workers);
- introduce, with amendments if necessary, the Employment Injury and Disability Benefits Bill, 2002 (which introduces a more progressive system of workmen’s compensation, inclusive of employment injury and disability);
- amend the Retrenchment and Severance Benefit Act, 1985;
- give full effect and adhere to the Legal Notice No 134 of 11 July 2000 which provides guidelines for contract labour for all government ministries, departments and statutory authorities; and
- amend the Industrial Relations Act (No. 23 of 1972).

There were, of course, a host of other recommendations dealing with structural changes to the labour-administration machinery, re-defining the roles of critical high level office holders and cultural changes to the practice of industrial relations.

Interviews with specific workers in situations of non-standard employment from the earlier research output found the following suggestions:

1. Non-standard employment workers should be regulated by a Fair Wage Clause in all collective agreements whereby workers get at least the minimum wage scale of regular workers as per classification.
2. All other terms and conditions applying to regular workers, as in a collective agreement, be applied to non-standard employment workers as a basic Floor of Rights, such as medical benefits, holidays, overtime payments, etc.
3. Contractors should have an on-going training programme for all workers to upgrade their skills in such areas as the use of modern electronic heavy equipment, defensive driving and safety measures.

4. All payments to contract workers should be given in an envelope, showing the name of the worker, his classification, wage rate, amount of straight time, any overtime payment, amount of pay and the exact amount of and reasons for all deductions.

5. These workers were also adamant that contractors must respect the labour laws of Trinidad and Tobago and have a legal responsibility to the society. Furthermore the contractors should be regularly inspected by the Ministry of Labour and a system of punitive measures should be introduced to punish all who violates the labour laws.

6. Finally, there should be no institutional restraints on workers rights to organize themselves.

10. The Legal Status of workers in non-standard employment situations

There is a current debate over non-standard employment workers and the ambiguity of their status in labour law. The burning question has been: When is a contract worker or atypical worker recognized in law as a worker? In the Caribbean, legal definitions of both employee and employer are based on nineteenth century British common law i.e. the master and servant relationship and the formulation of legal concepts arising out of that bond.10 This is wholly unrelated to contemporary employment relationships in the Caribbean and elsewhere. Indeed, labour law has been slow to change in relation to the changes in the composition of the labour market and the structure of firms. This, in turn, has had a serious impact upon trade union law and the relationship between employer and worker. Veneziani notes that:

Labour law, in fact, has been built up slowly as a complex of protective legal provisions predominantly aimed at covering workers in subordinate employment relationships regulated by employment contracts of unspecified duration... The contract of employment deriving from this state of affairs was fairly straightforward: it covered the working life of an adult male who worked in the firm belonging to his employer, who required that the worker should perform a specific task for an unspecified length of time (1990, 63).

The contract of employment has been described as the cornerstone of labour law. It is the means by which the law rationalizes and legitimizes the relationship between a unit of labour and the employer. The collective agreement struck between a union and an employer has played a defining role in collective labour relations. In turn, the system of collective bargaining, arbitration and resolution depends upon whether there is an employer-employee relationship giving rise to collective rights. In respect of Caribbean labour law, Marcelle (1997, 2-3), notes that a relationship also determines who can be a

---

10 Veneziani takes us back further and suggest that in the old framework the contract of employment resembles the “Aristotelian rules of labour law” of pre technological society, which represent the unities of place and work (work performed on the premises of the firm); of time and work (work carried in a single temporal sequence) and action and work (a mono-professional activity). These are the myths he argues upon which contemporary labour law and collective bargaining are constructed (1990, 64).
party to a trade dispute as defined under industrial relations law, such legal relationships also determine whether an employer can be found liable for tortious acts committed by an employee on a third party. This points to the critical need for the legal definition of the terms *worker* and *employer*. Contemporary employment relationships challenge most of the concepts (or tests) used historically by the Courts to arrive at a legally-binding employer-employee relationship. However, the most elusive question to challenge the Courts since time immemorial surrounds the distinction between the *contract of service* and a *contract for service*. Or, put another way: When is a contracting arrangement an employment relationship? The implications are significant. This determines whether an individual is a worker or not, in the eyes of the law, and his/her entitlement to legal and statutory protection by way of benefits, rights and obligations at work.

Various concepts and objective tests have been invoked in the legal debates over the definition of a worker. The earliest test was the *control test*. This was developed in England in the nineteenth century, at a time when the employer was regarded as the master and the employee as the servant. The decisive factor in determining whether a master and servant relationship existed was the measure of control the former exercised over the latter. Control was interpreted to mean that the master commanded the servant not only in relation to *what* he should do but also *how* the work was to be done. The Court of Appeal stated that “a servant is a person subject to the command of his master as to the manner in which he shall do his work”.\(^{11}\) In the early twentieth century the law responded to changes in work organization and the inability of the master to exercise absolute control over the work of his servant. Later the Courts reflected upon not only absolute control but also the *right to control*.\(^ {12}\) This led to the deconstruction of the control test to include a set of indicators of control such as the power to select employees, the payment of wages, the right to control the method of work and the right to suspend or dismiss the employee.\(^ {13}\) Additional criteria relating to control arose, for example, the power to delegate. This led further to what is referred to as the *organization or integration test*. Soon, the ability to exert absolute control over a worker as in a more agrarian context gave way to the understanding that employers now exercised bureaucratic and managerial control. The British legal luminary Lord Denning best propounded this test in the case of *Stevenson, Jordan and Harrison Ltd. v MacDonald and Evans* (1952) where he said:

\[\ldots\text{Under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his work although done for the business is not integrated into it but is only accessory to it…(quoted in Bacchus 1992, 294).}\]

The integration test never quite caught on and soon the courts turned to the *multiple or mixed test*. This sought to bring together control plus a series of other tests based on business consideration. In the United States, the Supreme Court (in *US v Silk* (1946)) applied factors such as the degree of control, the opportunities for profit or loss,

---

\(^{11}\) Yewens v Noakes (1880), quoted in Bacchus (1992, 290).

\(^{12}\) Ibid., p. 291.

\(^{13}\) *Short v J. & W. Henderson Ltd.* (1946) quoted in Bacchus (1992, 292).
investment in facilities, permanency of relation and skills required to establish an employment relationship. The British Privy Council (in *Montreal v Montreal Locomotive Works Ltd.* (1947))\(^{14}\) also began to apply a more complicated test based on control, ownership of tools, chances of profit and risks of loss. This became integral to a new *economic reality test*. This limited overview of the evolution of the legal concepts surrounding the definition of a *worker* suggests that, as industry develops, the more complex conditions of the business environment will force the law to alter its perspective on identifying and defining an *employer* and an *employee*.

11. Recent common law developments concerning non-standard employees

It must be borne in mind that the legal practice of labour law in Trinidad and Tobago, and the wider Commonwealth Caribbean, still follows in large measure the common law authorities from the United Kingdom and other leading Commonwealth jurisdictions. Therefore, the case law and precedents set abroad will have persuasive authority, if not deterministic bearing, on rulings and adjudication at labour fora in Trinidad and Tobago.

The Privy Council ruling in *Lee v Chung* (1990), which itself approved of the approach in *Market Investigations v Minister of Social Security* (1969) and *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* (1968), made it clear that control alone will not suffice, but a wider checklist that includes the business test, organizational integration, investment risk and capacity to hire his own helpers. The issue of whether a worker can provide a substitute to do his/her work was central in *Express and Echo Publications Ltd v Tanton* (1999) where the “irreducible minimum” of obligation was to provide services personally. However, in *McFarlane v Glasgow City Council 2001* the Employment Appeal Tribunal (EAT) held that limited (as opposed to unlimited in *Tanton*) delegation of duties or having limited power of substitution would not be inconsistent with a contract of employment.

With regard to *casual* workers, the key issue has been to establish the *mutuality of obligation* (*O'Kelly v Trusthouse Forte plc* (1983) CA). While it is generally established in law that an employer is under no obligation to provide work (*Collier v Sunday Referee Publishing Co Ltd* (1940)), there are exceptions in cases where the employee may work on a piecework or commission basis (*Deonald v Rosser & Sons Ltd* (1906)). In this way a worker may not be under a contractual but an implicit obligation to accept work. Generally, no employee can have employee status if they work on an irregular or casual basis. Within some form of casual work, employees can claim that although their service is regularly broken, they have a “global contract or an umbrella contract” which suggest continuity of employment to acquire rights, notwithstanding the casual nature of their employment. The British House of Lords has ruled on this matter of employee status in the recent case of *Carmichael v National Power plc* 1999 in which they identified two essential factors that led to a finding of employee status. Firstly, there must be sufficiency

of control (the old Yewens test referred to above) and mutuality of obligation (O’Kelly test). However, the mutuality of obligation must be **contractual** in nature.

A new development that must have some impact upon Caribbean labour law is the latest move by the UK courts to “imply” the existence of a contract of employment based on past actions and practices of the parties. In *Nethermere (St Neots) Ltd v Taverna and Gardiner (1984)* the Court of Appeal held that although home workers did not have mutuality of obligation, they were indeed employees since there was a well founded expectation of continuing employment.

With regard to agency workers, this is the classic triangular relationship discussed earlier. What is the legal side of this dispute? The early ruling was that because of an absence of care and continuity, agency workers were not employees of the agency (*Wickens v Champion Employment 1984*). Later it was held that an agency worker can be an employee of an agency, but only for the duration of the contract (*McMeechan v Secretary of State for Employment (1997)*). Following *Montgomery v Johnson Underwood (2001)* CA, which adhered to *Carmichael*, it was found that a worker might have the mutuality of obligation with an agency, but might be under the control of an end user. This meant that workers were unlikely to be deemed employees with either agency or principal employer. This line of reasoning was approved in *Dacus v Brook Street Bureau (UK) Ltd & Wandsworth LBC (2004) CA*, where it was held that there must be mutuality of obligation and control to equal contract of employment. The Court was determined, through a purposive approach, to find that someone must be the employer in triangular agency situations; it considered it undesirable for agency workers to be classified as non-employees (and consequently denied basic employment rights, such as protection in unfair dismissal and redundancy situations, which apply only to "employees"). Here, the Court concluded, that the end-user was the employer and it steered tribunals in future cases, subject to a review of all the evidence and a thorough analysis of the overall working relationship, to reach a similar conclusion.

The approach of *Nethermere* to find an implied contractual employment relationship based on actual dealings, actions and practices of the parties has received very recent impetus. The British courts are now awarding employment rights to temporary and contract workers where their rights under statute are limited. In *Frank v Reuters 2003 CA*, a temporary worker, working for five years for Reuters, with hours fixed by Reuters, was paid by an employment agency. He was deemed to be an employee since “dealings between parties over an extended period of time may generate an implied contract”. The most recent case is that of *Cable & Wireless v Muscat 2006 CA* where an agency worker

---

15 *McMeechan* was eventually distinguished by the Court of Appeal in *Bunce v Postworth Ltd (l/a Skyblue) 2005*, when *Dacus* (above) was applied.

16 This split is problematic and suggests that legislative action might be necessary to resolve this dilemma.

17 This case involved a claim by a temporary cleaner, who had worked for six years at a council via an employment agency. A situation that can readily be found at several firms in Trinidad.
was found to have an implied contract of employment with an end-user in a triangular worker/agency/end-user relationship.\textsuperscript{18} This case must be of concern to the tripartite partners as it reinforces a recent trend for the Courts to award employment rights to temporary and contract workers where their rights under statute are uncertain or limited. In this case, employment rights were awarded despite the interposition of a service company between the worker and the end-user (and despite the fact that Mr Muscat received a tax benefit from his “salary” being paid to his service company).

In order for employers to escape liability for employment-related rights and benefits, it is felt that given the recent mood of the Court to find an employment contract, even working backwards to do so, it is for the employer to make express or explicit that an agreement must not be construed as a contract of employment as advised in \textit{Stevedoring and Haulage Services v Fuller, 2001 CA}. This is authority from the Court of Appeal that holds that it is not possible to imply a contract of employment where the parties had entered into an express agreement which is wholly inconsistent with there being such an implied contract. Where there is an express term that is inconsistent with an implied contract of employment, the Court should follow the express term on the basis that the parties’ intentions cannot have been in direct conflict with the terms agreed at the time the contract was concluded. It may therefore be possible to deal with this situation by including a clause expressly excluding the possibility of the formation of an employment relationship in a contract between the temporary worker and the end-user, no matter the duration of the relationship or any other factors.

In terms of local jurisprudence, the interview with former President of the Industrial Court, His Honour Addison Khan, presents useful data. Since the ILO study in 2001, which highlighted the legal issues involved in determining employment status, the Head of the Court has identified four new areas in which employers have sought to conceal the employment relationship. In fact, the officials of the Ministry of Labour interviewed also noted that a lot of time was spent in determining the legal status of the worker.

The following four noticeable areas of continuing attempts to disguise the employment relationships are:

(i) Employment in which the employer alleges that the employee is excluded from the definition of worker in accordance with section 2. (3) (e) of the IRA, i.e. on the ground that the employee is responsible for policy making or has an effective voice in the formulation of policy in an undertaking.

(ii) Employment in which the employer alleges that the employee is an independent contractor.

(iii) Employment in which an employer alleges that the employee is employed under a labour only contract within the meaning of section 2. (4) (b) of the IRA.

\textsuperscript{18} It upheld the Employment Appeal Tribunal’s decision that Cable & Wireless should compensate Mr Muscat for unfair dismissal, despite Cable & Wireless’s contention that he was not an employee.
Employment where there has been a change of name of a company and the employer alleges that the employee is employed by a new entity, i.e. the company with the changed name.

The court believes that the motivation for seeking to exclude the employees seem to stem from a desire on the part of some employers to avoid paying workers their just entitlements. The under-mentioned recent cases aptly illustrate how some employers in Trinidad and Tobago have continued to attempt to disguise employment relationships in order to defeat employees’ entitlements to important employment benefits like vacation leave, sick leave, severance and pension benefits and protection under labour legislation.

A few key cases highlight the salient issues raised in the local courts over employment relationships, the status of a worker and the emerging view of the Industrial Court on these disputes.

Trade Dispute No. 81 of 2001

In Trade Dispute No. 81 of 2001 between Seamen and Waterfront Workers’ Trade Union and Port Authority of Trinidad and Tobago, the employer hired the workers as ‘port followers’ on a day-to-day basis to supplement the registered labour force. While the workers were on a training programme for crane operators, they were requested to board a vessel to assist in discharging its cargo. At that time, there was a climate of industrial unrest on the port. The workers expressed fears for their personal safety since they had received threats while entering the employer’s premises. The employer suspended them for insubordination but the Industrial Court ordered that their suspensions be revoked. While the Industrial Court did not deal with this issue, the case shows that these port followers were hired to supplement the regular work force and were paid only for days worked even though they did the normal work of port followers.

Trade Dispute No. 39 of 2002

One of the issues that the Industrial Court was required to determine in Trade Dispute No. 39 of 2002 between Banking, Insurance and General Workers’ Union and Daily News Limited was whether or not “freelancers” of a daily newspaper were workers within the meaning of the IRA or were independent contractors. The Industrial Court approached the question by asking itself whether the freelancers were employed on contracts of service or were independent contractors. The Court found on the evidence that the freelancers were independent contractors and not workers.

Trade Dispute No. 181 of 2004

In Trade Dispute No. 181 of 2004 between Banking, Insurance and General Workers’ Union and Maraj and Sons Limited, the employer and the Union entered into an arrangement whereby the worker was to render ‘auditing services’ to the employer. The arrangement was that at the end of each month, the worker
would submit an invoice to the employer for services rendered whereupon the employer would pay her the sum of $5,000.00. The employer argued that the worker was an independent contractor. The Industrial Court held that the worker was in fact employed as a supervisor and that the employer dismissed her because she was alleged to be a diabetic.

**R.S.B.D. No. 7 of 2002**

In R.S.B.D. No. 7 of 2002 between National Union of Government and Federated Workers and Trevor Nicholas, the Industrial Court disagreed with the employer’s submission that the worker was a casual worker within the meaning of section 2 of the Retrenchment of Severance Benefit Act (RSBA) and held that he was entitled to be paid severance benefits consequent upon his retrenchment from the company’s services.

**Trade Dispute No. 154 of 2004**

In Trade Dispute No. 154 of 2004 between Banking, Insurance and General Workers’ Union and Antilles Credit Union Co-operative Society Limited one of the issues the Industrial Court had to decide was whether the dismissed persons were workers employed under continuous fixed term contracts. The Court held that the service of such workers were to be aggregated and deemed continuous for the purpose of determining their entitlement to damages or compensation consequent upon their dismissal contrary to the IRA.

**Trade Dispute No. 204 of 2002**

In Trade Dispute No. 204 of 2002 between Oilfields Workers’ Trade Union and Super Industrial Services Limited, the attorney for the company submitted inter alia that a trade dispute concerning the employee’s dismissal should be dismissed because the named employer did not employ the employee but that another company employed him. The named employer had changed its name to that of the new company. The Industrial Court rejected the submission on the ground that the employee had not been informed of the change.

The former President of the Court noted that the above cases show how vigilant the Industrial Court must be in detecting cases in which there are attempts to defeat the purposes of the various Acts of Parliament that have been enacted for the protection of workers. In doing so, he advised that the Industrial Court is not misled by labels or titles used by the employers but examines the whole of the evidence to discover the true substance of the relationship between the parties. This is akin to the helpful jurisprudence from the United Kingdom (Nethermere; Massey v Crown Life Insurance Co (1978); Levy McCallum Ltd v Middleton 2005 EAT19).

19 In this case Serota J noted that the intentions of the parties cannot be the deciding factor but the reality of the circumstances, it was said that “if the parties agree to create a horse but instead create a camel, the fact that they intended to create a horse and even call what they created a horse is of little assistance in determining whether it is in fact a horse”.

28
Issues arising out of the discussion on non-standard employment practices and labour law affect not just the status of such workers in cases of retrenchment and redundancy but involve a wide range of labour relations issues (such as health and safety) arising from the anomaly of the law.
References


List of Interviews

1. Interview with His Honour Addison Khan, Attorney at Law and Former President of the Industrial Court of Trinidad and Tobago, 16 February 2006.

2. Interview with representatives of the Trinidad and Tobago Manufacturers’ Association (TTMA), Andrew Aleong, Paul Quennel, 10 March 2006. 3. Interview with representatives of the National Trade Union Centre (NATUC), 10 March 2006

4. Interview with Walton A. Hilton Clarke, former President of the Employers Consultative Association (ECA), ECA Representative to the ILO Governing Council, Industrial Relations Consultant, 17 March 2006.

5. Interview with labour administration officials of the Ministry of Labour, Harry Sooknanan, Rudolph Boneo, Betrand Wilson, 21 March 2006.