

LEGAL IMPLICATIONS OF EMPLOYMENT CASUALISATION IN NIGERIA: A CROSS-NATIONAL COMPARISON*

Abstract

A review of existing labour laws in Nigeria reveals the vulnerability of the casual worker whose existence is neither contemplated nor regulated by law. Casual workers are not given the same benefits (such as compensation for injuries arising in the course of employment, right to belong to trade unions and bargain collectively and various social security benefits) that accrue to permanent employees. In addition, they are paid less and often subjected to unfair labour practices. Through content analysis and literature review this article undertakes an examination of the peculiar issues that have escalated the severity of casualisation on the Nigerian workforce. The work conducts a succinct cross-national comparison of legal frameworks regulating non-standard work in other jurisdictions and pinpoints apposite provisions for judicial and legislative emulation. It is made apparent from empirical survey that Government is caught between the economic necessity to support business investments and the agitation by organized labour to protect the workforce from exploitation. The work contends that casualisation is not bad in itself. By making equitable laws and policies, ensuring their vigilant enforcement, regulating labour-outsourcing companies and ensuring access to justice for aggrieved workers, it is possible to palliate its cruel impact on the workforce.

Key words: *Casualisation, employment, Nigeria, legal*

1. Introduction

Employment casualisation is the process by which employment shifts from a preponderance of full-time and permanent positions to casual and contract positions;¹ the altering of working practices so that regular workers are re-employed on a casual or short-term basis.² Casualisation is referred to in Europe and United States as Nonstandard Work Arrangements (NSWAs), and these work arrangements refer to fixed contract, contract work, on-call work, part-time and temporary work.³ Other categories include day work, outsourcing, sub-contracting, homework, self-employment, zero-hour employment and so forth.⁴ The common characteristic of nonstandard jobs are that they differ in terms of hours worked, job security, payment system and even location of work from the traditional full-time, permanent employment which has been a dominant feature of industrial relations in many developed economies and developing ones for much of the twentieth century. The traditional model of employment (permanent full time employment with one employer until retirement) is steadily giving way to less stable (and often vulnerable) forms of employment. Little wonder the traditional protections afforded to permanent employees are often waived for casual labour.

On the global scene, the increase in capital mobility and the deregulation of the labour market are some of the major causes of casualisation.⁵ In response to these challenges, employers tend to adopt cost-cutting measures, including downsizing/cutting back on employment and use of permanent employees; the offshoot being the current predominance of casual workers. On their own part, employers argue that this growth in the rate of casualisation is influenced by demographic changes in the composition of the labour force. Many women (and a handful of men) want to work part-time in order to combine family

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¹ *Collins English Dictionary – Complete and Unabridged*, (12th Ed, Glasgow: HarperCollins Publishers. 2014), p 366.

² A Rojot, 'Statistics for Growth in Contract and Casual Labour' in 'Working Time in Industrialised Countries: The Recent Evolution,' (1998) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, (7th ed) 452.

³ AL Kalleberg, 'Nonstandard Employment Relations: Part-time, Temporary and Contract Work.' *Annual Review of Sociology*. Vol. 26. 2000. p. 341.

⁴ EE Okafor, 'Nonstandard Employment Relations and Implications for Decent Work Deficits in Nigeria,' (2012) *African Research Review* 6 (3) 93.

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

care and work; this is the flexibility that NSW gives them. Also there is the feeling that labour laws make excessive demands to pay terminal benefits to employees. Many employers thus decide that they simply cannot afford to hire workers on permanent bases because they will have to pay huge pension benefits. However, the growth in irregular work has changed the nature of employment from a labour relationship to a commercial relationship, with the worker taking all the risks. There is now a sharp rise in the gap between wages and benefits of permanent and casual workers.⁶

In the African region, the absence of substantial infrastructure and enabling environment for businesses to successfully operate cannot be distanced from the cause, as organisations are forced to fend for such essential infrastructures as power, efficient transport system and a litany of others which ordinarily should not be the case. All these have an overbearing effect on an organisations' overhead cost, thus leading to harsh cost reduction approaches of which the welfare status of the workforce becomes unfortunately a prey.⁷ Outsourcing provides an easier way to cut costs and run off competition. Where an employer outsources labour or production components, less numbers of permanent employees are needed. The popular practice is to cut the number of permanent employees and replace them with casuals. The high level of unemployment and abundance or excess supply of labour also plays a major role in fueling casualisation as it aggravates the exploitative treatment meted to employees, as employers believe that they will always have people willing to work for them irrespective of the conditions.⁸

In the past, casual labour was mainly unskilled and required for seasonal work or short-term periodical jobs predominantly in the construction industry and the agricultural sector. But today both the skilled and the unskilled are engaged as casual workers in the informal sector, the organized private sector and even the public sector. The prevailing arrangement in most organisations in Nigeria is a situation where people are employed as casual and contract workers for many years and are paid less than their permanent counterparts in terms of wages and benefits even though they possess the same skills, work the same hours and perform the same tasks as permanent employees.⁹ Cases abound in some enterprises in Nigeria where workers have worked for six years and more as casual or contract workers without being given permanent status.¹⁰ This is discriminatory and contrary to section 17¹¹ of the 1999 Constitution which provides among other things that every citizen shall have equality of rights, obligations and opportunities before the law; that exploitation of human or natural resources in any form whatsoever for reasons other than for the good of the community, shall be prevented and most importantly, that there should be equal pay for equal work without discrimination on account of sex or on any other ground whatsoever (such as status of employment).¹²

⁶ TM Fapohunda, 'Employment Casualization and Degradation of Work in Nigeria,' (2012) 3(9) *International Journal of Business and Social Science*, 11

⁷ O Bodibe, 'The Extent and Effects of Casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe: Research Report for the Danish Federation of Workers, November, 2006.

⁸ E E Okafor, 'Globalizations, Casualization and Capitalist Business Ethics: A Critical Overview of Situation in the Oil and Gas Sector in Nigeria' (2007) 15, *Journal of Social Science*, 169-179.

⁹ O W Onemola, 'Employment Casualisation and Workplace Violation as in Nigeria', *Ventures Africa*, December 2 2012, <http://venturesafrica.com/employment-casualization-and-workplace-violations-in-nigeria/>, accessed 25 March, 2016.

¹⁰ AO Adewusi, 'Remuneration of Casual Workers in Selected foreign-owned Manufacturing Industries in Southwest Nigeria', (2015) Vol.7, No.22 *European Journal of Business and Management*, pp.184 – 192.

¹¹ Specifically, section 17(1) and (2) Constitution of the Federal Republic of Nigeria, 1999.

¹² CS Obi-Okoye Ibekwe, 'The Legal Framework for Workplace Discrimination in Nigeria', (2014) 1(1) *Juris Insight*, 69-90.

Casualisation abounds in the construction,¹³ manufacturing, banking and the oil and gas industries.¹⁴ The new development is that the term ‘casual’ worker has been replaced by ‘contract staff.’ For instance, in the oil and gas industry, they no longer refer to them as casuals but as contract staff, because most of them are now supplied by labour contractors to the User Company which makes them employees of the labour contractor and not the oil company.¹⁵ In some companies, it is possible for one to get as many as over one thousand five hundred workers on contract appointment out of a total of two thousand workers in the industry. Section 7 of the Nigerian Content Development Act 2010 which applies to the Oil and Gas Industry provides for a mandatory minimum percentage of local employees which must be hired by Oil Companies. The main object of the Act is to enhance job creation and the development of indigenous human and technical expertise. It is in my opinion a flagrant contravention of that law to seek to meet that minimum percentage quota with casual staff.

It is contended that with the exclusion of a few long-term benefits such as gratuity, pension and loan advance, workers in NSWAs should be entitled to the same rights as permanent employees after a reasonable duration in their employment provided that they do the same work and have the same qualifications and responsibilities as full-time employees. Of course, the flip side of this argument is that casual staff should not be paid higher salaries than their full-time counterparts. As a result of the precarious nature of their jobs, casual workers in many jurisdictions, like independent contractors, are often paid more than their full-time counterparts but in Nigeria, casuals have it bad at both ends – lower pay and less job-security.

2. Legal Protection of Casual Workers in Nigeria

Casualization is encouraged by the numerous loopholes that exist in labour laws, allowing employers to hire casual employees continuously to fill permanent positions. In this section, we shall review the loopholes in Nigeria’s labour laws and make recommendations for rectification.

2.1 Legal Protection under the Constitution

Section 40 of the Constitution states that “Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests”. And yet, casual workers are restricted from joining or forming trade unions and are therefore unable to engage in collective bargaining to improve their work conditions. They are treated as second-class citizens in the workplace and stand the risk of dismissal on the slightest pretext especially if they have the ‘temerity’ to participate actively in trade union activities. It is interesting to note that in spite of the trade unions campaigns against casualisation, not a single case has been successfully prosecuted in the law courts. One wonders at the dearth of case law on casualisation and why legal actions taken by workers and trade unions have been unsuccessful. An instance is the case of *Ajayi v Ofem Onun*.¹⁶ The claimant on 24th December 2010 filed a complaint against the defendant claiming the following reliefs: (i) A declaration that the activities of the defendant against the claimant leading to the purported suspension and or dismissal of the 11th day of April 2005 amounts to discrimination against his person as a Nigerian citizen contrary to the clear provisions of the Nigerian Constitution on account of his union and or association activities and that the suspension and or dismissal is wrongful, null, void and of no effect whatsoever; (ii) A declaration that the employment of Nigerians as ‘Casual Workers’ by the defendant is discriminatory, dehumanizing, unlawful and illegal; (iii) An order of mandatory injunction restraining the defendant from further employment of Nigerians as ‘Casual Workers’; (iv) A declaration that the employment of Nigerians without the defendant issuing a letter of employment to the said Nigerians, an intentional and willful

¹³ PU Okoye and YW Aderibigbe, ‘Comparative Assessment of Safety Climate of Casual and Permanent Construction Workers in South-East Nigeria’, (2014) 2(1) *International Journal of Health and Psychology Research*, 54-66.

¹⁴ A Ifedapo, ‘The Diffusion of Employment Flexibility in Nigeria’s Banking Industry: Its Nature, Extent and Causes’, (2011) 6 *International Journal of Business and Management*, 150.

¹⁵ R. A. Danesi, (2011) Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria. (Paper presented at the IIRA Regional Conference, Lagos, 2011) p. 3.

¹⁶ Suit No: NIC/LA/46/2010, judgment delivered: 2012-01-25 by Hon. Justice B. B. Kanyip,

act by the defendant which makes the concerned employees jittery and unsure of their standing on one hand, and on the other hand, makes it very easy for the defendant to dispense with the services of the employees with impunity and ignominy, is unlawful and illegal; and (v) An order of mandatory injunction restraining the defendant from further employment of Nigerians without issuing letters of employment to them.

The National Industrial Court found this suit to be incompetent stating that the main claims of the claimant necessitating coming to court are not claims relating to termination or dismissal. Consequently, it ruled that the Court had no jurisdiction over the case and dismissed it for want of proper party, locus and cause of action. With respect, I submit that even though the technical wordings of the claims did not comply with the stipulated form for presentation, I would think that the National Industrial Court, being a court empowered to hear and make findings on facts should downplay such technicalities. Even though the Petitioner lacks *locus standi* in grounds ii-iv above, the first claim is certainly within his standing. Nigeria has ratified all the international instruments on freedom of association.¹⁷ Nigeria is therefore bound by these international instruments and the National Industrial Court (NIC) has been empowered by the 2011 Constitutional Amendment to enforce international labour standards even where they have not been domesticated. The NIC is encouraged to override technicalities and embrace this opportunity to lessen the inequity between employers and employees.

2.2 Legal Protection under the Labour Act

The Nigerian Labour Act does not define what casualisation is and does not provide a legal framework for the regulation of the terms and conditions of this work arrangement. However, Section 7(1) of the Act provides that a worker should not be employed for more than three months without the formal recognition of such employment. After three months every worker, (and I believe ‘every worker’ includes a casual/contract worker) must be given a written statement stating the terms and conditions of employment by the employer. This obligation to provide a worker with written conditions of employment within three months of being employed was upheld by the National Arbitration Court in the case of *Management of Harmony House Furniture Company Ltd. v National Union of Furniture, Fixtures and Wood Workers*.¹⁸ Some companies have devised sharp means to undermine this provision by employing casual workers for three months or less, dismissing them, requesting for new applications and re-employing them again. They repeat this process for years and may continue *ad infinitum*.

The trade unions have interpreted section 7(1) to mean that if workers are employed for over three months then they cease to be casual or contract workers and should be made permanent employees.¹⁹ My interpretation of this section differs from the interpretation by the unions. What this section states is 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 organisations give the written statement to their contract or casual staff stating therein, the casual nature of the contract. So in my estimation, once an organisation does this they are not in breach of section 7 (1) of the Labour Act. The section and the Act do not expressly refer to casual and contract workers neither does it provide a minimum duration of time after which casual work must be regularised.

The lack of clarity and contemporariness in the Nigerian Labour Laws concerning legal categories of workers is a motivating factor for the adoption of casualisation by employers. There is only one category of worker defined in the Labour Act and that is a ‘worker’. The Act defines a worker to mean:

¹⁷ Freedom of Association and Protection of the Right to Organise Convention of 1948 (Convention No 87) and the Right to Organise and Collective Bargaining Convention of 1949 (Convention 98). Also relevant are the Equal Remuneration Convention of 1951 (Convention No 100) and Discrimination (Employment and Occupation) Convention of 1958 (Convention No 111).

¹⁸ NIC/3/86, Digest of Judgments of National Industrial Courts (NIC) 1978-2006, p.187

¹⁹ P Akpatason, (President of NUPENG) in an interview in Vanguard Newspapers on 26 June 2008. See also S Luwoye, ‘Casualisation and Contract Employment in Nigerian Oil Industry’, a paper presented at a Seminar of Stakeholders in the Oil and Gas Industry on November 5, 2011 in Abuja, Nigeria.

Any person who has entered into or works under a contract with an employer, whether the contract is for manual labour or clerical work or is expressed or implied or oral or written, and whether it is a contract of service or a contract personally to execute any work or labour.²⁰

The above definition does not recognise workers in nonstandard work arrangements. This may be adduced to the fact that the current Labour Act was enacted in 1971 when NSWAs were alien to our industrial relations environment. It is apparent from this rather narrow definition of a worker that it is not every worker under the Act that can qualify as an employee at common law. Thus for the Act to apply to an employee under the common law, he or she has to fall within the definition of the term ‘worker.’ This legislation needs to be reviewed to address the current realities on ground as a teeming number of casual workers do not fall within the purview of the protection and rights available to permanent employees covered by the Labour Act and other employment laws.²¹

As the term ‘employee’ is not defined by the Labour Act, we rely on the Common Law definition which states that an employee is ‘a worker who has a contract of service’.²² This is distinguishable from an independent contractor or a self-employed person who are said to have a contract of service. This distinction is arrived at through the various test used under the common law such as control, mutuality of obligation, integration and multiple test.²³ Under common law an employee is a person who works under a contract of employment and so has a contract of service with the employer. Therefore, all the rights an obligation under common law should apply to him. This means the so-called contract and casual worker supplied by the agency to the user company remains an employee of the agency and must enjoy a normal employee/employer relationship with her employer with all the associated rights. On the other hand, a self-employed or an independent contractor is deemed to have a contract for service which affords him no protection. The consequence of the Common Law definition is that there is no distinction between permanent and casual staff provided they are engaged in a contract of service.

The Employees Compensation Act (ECA)²⁴ includes a casual worker in its definition of employee. In section 73 the ECA defines an employee as “...a person employed by an employer under [an] 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 including any person employed in the Federal, State, and Local Governments, and any of the government agencies and in the formal and informal sectors of the economy”.²⁵

It is suggested that even though there is no statutory protection for casual workers under the Nigerian Labour Act, the Employees Compensation Act should be relied upon to furnish a more encompassing definition of ‘employee’ so as to protect them. Indeed, the National Industrial Court of Nigeria (NIC) in the case of *Abel v. Trevi Foundation Nigeria Limited*,²⁶ relied on the definition of an employee under section 73 of the ECA to hold that the claimant who was employed by the defendant as a ‘contract staff’ is an employee of the defendant and therefore entitled to compensation for injuries sustained in the course of his employment with the defendant. The NIC held that the definition of who is an employee has been extended widely by the Act to include persons engaged temporarily or casual daily workers.

²⁰ Section 1 Labour Act; Cap L1, Laws of the Federation of Nigeria 2004.

²¹ A Worker is also defined by other Labour Legislations in similar terms, e.g. the repealed Workmen’s Compensation Act, Trade Unions Act, and Trade Dispute Act.

²² *Ready Mixed Concrete (South-East) Ltd v Minister of Pensions & National Insurance*: (1968) 2Q. B, 497; *Morren v Swinton & Pendlebury Borough Council* (1965) 2 ALL E.B. 349

²³ EE Uvieghara, *Labour Law in Nigeria* (Lagos: Malthouse, 2000).

²⁴ Cap W6 Laws of the Federation of Nigeria, 2004.

²⁵ *Ibid.*, Section 73.

²⁶ Suit No: NIC/PHC/55/2013, Digest of Judgements of National Industrial Court (2014) pp.288-289.

²⁶ Section 14, Trade Unions Act (TUA) Cap T14 LFN, 2004.

2.3 Legal Protection under the Trade Unions Act

In the Nigerian Industrial Courts' first reported case concerning casual workers: *Patovilki Industrial Planners Limited v National Union of Hotels and Personal Services Workers*,²⁷ the National Industrial Court (NIC) upheld that both permanent and casual workers have the right to form a trade union. The court concluded by saying that section 1 (1) of the Trade Unions Act, allows workers, whether permanent or temporary, to form a trade union and a relevant trade union can unionise workers who are casual daily paid workers. In this case, the Appellant Company was into the business of industrial cleaning. The Respondent was a registered trade union. The union sought permission to unionise the Appellant's workers, but the company refused on the basis that they were casual workers. The Respondent therefore declared a trade dispute. The Industrial Arbitration Panel (IAP) heard the dispute and gave an award in favour of the Respondent union. The Appellant being dissatisfied appealed to the NIC, which consequently upheld the ruling of the IAP in July 1990.

The above case created a precedent that casual employees have the right to unionise not only as a constitutional right but by virtue of section 1 (1) of the Trade Union Act. It is noteworthy that in this case, it was not the casual workers that went to court but the union of permanent employees which sought to organise them. Considering the high percentage of casual staff in the Nigerian workforce, one can confidently conclude that there is no future for the Nigerian worker if trade unions cannot organise or if casual/contract staff is prohibited from union membership. The right to organise is a fundamental right of every worker whether permanent or temporary. If a workers are denied this right, they will not have an avenue to bargain collectively with other workers to improve terms and conditions of employment his leaves them open to exploitation as is currently the situation with casual workers in Nigeria. The casual workers employed in the private sector who do not belong to unions should not be afraid to rely on the Trade Union Act to agitate for their rights.

There are a few legal restrictions to trade union membership such as that no employee of a company who is recognised as a projection of the management structure of a company can be a member or hold any office in a trade union.²⁸ This proviso is to ensure that there are no conflicts of interest in the administration of the trade union. Again, the Trade Disputes Act banned workers under essential services from unionizing.²⁹ It is contended that the scope of 'essential services' in Nigeria is too broad as it includes not only the armed forces but also public and air transport, the Central Bank of Nigeria, health, education, water, energy, communications and other services beyond the ILO definition of essential services.³⁰ Furthermore, national labour laws do not fully apply in Export Processing Zones (EPZs) and the Nigeria Export Processing Zones Act³¹ states that disputes between employers and employees should be handled by the zones managing authorities and not through dialogue between employers and workers organizations (trade unions). The Act also prohibits strikes and lockouts for a period of ten years after a company begins its activities in a given Zone.³² EPZ's manifest the most frequent discriminatory practices against trade unions and their members.³³ All these negate the International Labour Standards set out by the International Labour Organization (ILO) in Convention No. 87 on Freedom of Association and Protection of the Right to Organize 1948 (Articles 2, 3, 4 and

²⁷ Suit No. NIC/12/89, Digest of Judgements of National Industrial Court (1978-2006) pp.288-289.

²⁸ Section 14, Trade Unions Act (TUA) Cap T14 LFN, 2004.

²⁹ S.47(1) T.D.A. cf: S.1(a) & (b) Trade Dispute (Essential Services) Act Cap 433, LFN 1990

³⁰ Report for the WTO General Council Review of the Trade Policies of Nigeria (Geneva, 28 And 30 June, 2011) International Trade Union Confederation (ITUC), <http://www.ilo.org/public/english/ITUC/CEARC/report/imp.pdf> accessed 12 March 2016. *Hon. Attorney-General of Enugu State v National Association of Government General and others* Suit No: NIC/EN/16/2010, Delivered: 2011-06-20 by Hon. Justice B. B. Kanyip Presiding Judge, Hon. O. A. Obaseki-Osaghae Judge, Hon. J. T. Agbadu-Fish.

³¹ Cap N107 Laws of the Federation of Nigeria (LFN) 2004.

³² *NEZPA Act, s.63*

³³ Human Rights Watch, World Report 2011 - Nigeria, 24 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d3e80220.html>, accessed 23 March 2016.

11) and Convention No. 98 on the Right to Organize and Collective Bargaining 1949 (Articles 1, 2 and 4). Nigeria ratified both Conventions in 1960.³⁴

3. Comparison of Legal Protection of Casual Workers in some other Jurisdictions

3.1 The United States

In the United States, current labour laws and the design of social security insurance programmes were based on the traditional industrial relations notion that most workers have regular full-time employment with a single employer. However, in the present economy, as many as 36% of Americans are said to work in nonstandard employment as temporary, part-time, contract and independent workers.³⁵ Nonstandard workers are excluded from protections given to traditional workers in terms of pay, benefits, overtime premiums, unemployment and disability insurance, health insurance, pension and legal protections regarding employment discriminations because they are not considered employees under the law. In addition, they had little expectation of job security, training, upward mobility and benefits. However, court decisions have shown that the Fair Labour Standard Act (FLSA) could be applied to temporary workers. An employee according to the Act is ‘any individual employed by an employer.’³⁶ In other words the onus of proof lies on the temporary worker to show that he or she is an employee and not an independent contractor. In *Rutherford Food Cop. V McComb*,³⁷ 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.

Concerning freedom of association, the US National Labour Relations Act (NLRA) provides that employees have the right to form or join unions of their own choice and bargain collectively with their employers.³⁸ The National Labour Relations Board (NLRB) is the body that determines the appropriate unit for collective bargaining purposes and also conducts an election in order to determine whether a majority of the employees in the unit want to be represented by the union.³⁹ In a ruling in 1990, the NLRB declared that long-term temporary employees could not be included in a bargaining unit with regular employees of a user-employer unless both the provider agency and the user-employer consented.⁴⁰ This decision was said to have made it impossible for temporary workers to organize. However, the NLRB reversed itself in 2000 in the case of *Sturgis v Textile Processors*⁴¹ and held that both regular and temporary employees could be in the same bargaining unit as long as ‘they shared a community of interest.’ It also held that temporary employees could unionise in a bargaining unit of all the employees of a single temporary work agency. This resulted in the NLRB permitting the inclusion of temporary employees in bargaining units that comprised of temporary and regular employees of a single employer, or employees of a single temporary agency. This ruling was hailed as having expanded the possibilities for temporary workers to claim the protection offered by the labour law.⁴²

Four years after the above ruling, the NLRB reversed itself again in the case of *Oakwood Care Center v N & W Agency*⁴³ and reinstated its earlier ruling of dual consent requirement from both the user

³⁴ M Daniel, ‘Protecting Workers’ Rights in a Labour Environment Dominated by Nonstandard Work Arrangements and Unfair Labour Practices: An Empirical Study of Nigeria,’ (2015) 3(1) *International Journal of Interdisciplinary Research and Innovations*, 65-83.

³⁵ S Horowitz, ‘New Thinking on Worker Groups: Role in a Flexible Economy’. in Carre F. *et al* (eds), *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements* (University of Illinois at Urbana-Champaign: Industrial Relations Research Association Series, 2000) 393.

³⁶ S Horowitz, (n 35) p 394.

³⁷ 331 U.S. 722, 728-29 (1947). See also, *Nationwide Mut. Ins.v Darden*, 503 U.S. 381, 326 (1992).

³⁸ KVV Stone, ‘Legal Protections for Workers in Atypical Employment Relationships in the United States’, (UCLA School of Law: Law & Economics Research Paper Series, Research Paper No. 06-12, 2006),15.

³⁹ *Ibid*.

⁴⁰ *Lee Hospital Case*, 300 N.L.R.B. 150 (1991).

⁴¹ 331 N.L.R.B. 1298, 165 L.R.R.M. (BNA) 1017 (2000).

⁴² Stone, *op cit*.

⁴³ 176 L.R.R.M. (BNA) 1033 (2004)

employer and the provider-agency for temporary workers to organise. This ruling has therefore brought to an end the practice of temporary workers being able to organise in bargaining unit with the permanent workers they work hand in hand with as they can only unionise in the same union with the workers employed by their temporary agency. This in the true sense of the word has curbed the right to freedom of association of temporary employees in the United States.

3.2 Legal Protection of Casuals in the European Union

There is no harmonisation of the law on formation of contract of employment under the European Union (EU). However, each Member States under their individual laws are expected to supply employees, shortly after hire, with a written document noting the terms and conditions of employment. Concerning full-time and nonstandard workers, Member States are under obligation to ensure that they get equal treatment concerning individual employment rights.⁴⁴ The European Parliament voted to support the European Council's common position – adopted in June 2008 – and approved the proposal for a directive on Temporary Agency Work without amendments so it is now legally enforceable.⁴⁵ Following this European Parliaments' approval, the EU countries are now required to incorporate the provisions of the Directive in their national law. It will then come into effect within three years.⁴⁶ The Temporary Agency Workers Directive ensures: (i) Equal treatment from day one for temporary agency workers compared to permanent workers in terms of basic working and employment conditions (including pay, holidays, working time, rest periods and maternity leave) unless social partners agree otherwise; (ii) Equal access to collective facilities (such as canteens, child care facilities, or transport services); and (iii) Better access for agency workers to training both when working on an assignment, and in between assignments.

The approval of the EU proposal on Temporary Agency Work and the consequent adoption by all member states is certainly a laudable development as concerns equality among workers in the region. Employers may now have to employ temporary workers for purposes other than cost cutting since they will be treated equally with permanent employees in terms of pay, holiday, maternity leave, collective facilities, training etc.⁴⁷ The EU model looks ideal but can it be transplanted on the Nigerian system? Considering the fact that it has taken more than a decade for this development to be realised in the EU, and considering the fact that Nigeria has a different socioeconomic and political environment it may not be possible to superimpose this model for now.

3.3 Legal Protection of Casual Workers in Ghana

Ghana is a developing country in the western part of Africa with a similar economy to Nigeria's. They also share the same history of British colonisation and became independent at about the same time. Recently, it discovered crude oil in commercial quantity and exploration has already begun which has attracted foreign direct investment (FDI) to the country like in Nigeria's oil and gas industry. The bulk of its workforce can also be found in the informal sector like that of Nigeria where there is a race to the bottom in terms of labour standards.

The legal framework of NSWAs in Ghana is important here because it will help to propose a framework that could work in Nigeria since it has a similar economy and level of development. All its various legislations on labour law were harmonised in 2003 into one Act known as the Labour Act No. 651 of 2003. Ghana as a signatory to the ILO Convention reflected its provision in the new Act. The Act 'covers all employers and employees except those in sensitive positions such as the Armed Forces, Police Service, Prisons Service and Security Intelligence Agencies. Major provisions of the Act include establishment of public and private employment centres, protection of the employment relationship, general conditions of employment, employment of persons with disabilities, employment of young

⁴⁴ J Kenner, 'The European Union' in Keller WL and Darby TJ (eds-in-Chief), *International Labour and Employment Laws*, Vol. 1 (2nd ed.) (Washington: BNA Books, 2010) P. 1-68.

⁴⁵ <http://ec.europa.eu/employmentsocial/labourlaw/indexen.htm> accessed 09/01/2013

⁴⁶ *Ibid*

⁴⁷ RA Danesi, 'Casualisation and International Labour Standards: The Role of Trade Unions in Nigeria', (2010) 7(2) *US/China Law Review*, 33-44.

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 a National Tripartite Committee, forced labour, occupational health and safety, labour inspection and the establishment of the National Labour Commission.⁴⁸

Part X⁴⁹ of the Labour Act provides a legal framework for the regulation and protection of employment of casual and temporary workers in Ghana. It defines 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.

i. Casual Worker: 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.'⁵⁰ The Act also provides that the contract of a casual worker need not be in writing and must be employed continuously or intermittently for less than 6 months per year.⁵¹ A casual worker must be given equal pay for work of equal value.⁵²

ii. Temporary Worker: A temporary worker on the other hand is defined as someone who works continuously for 6 months per year. Where however she is employed for a continuous period of 6 months and more for the same employer she shall be treated as a permanent worker.⁵³

In the event that 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.

As regards freedom of association, the Ghanaian policy makers have shown through the reform in the labour laws in the country that they are deeply committed to the protection and promotion of workers' rights in the workplace. Part XI of the Labour Act covers freedom of association of both employers and employees and the right to form or join a union. It provides that 'Every worker has the right to form or join a trade union of his or her choice for the promotion and protection of the worker's economic and social interests.'⁵⁴ It provides further in compliance with the ILO that 'two or more workers employed in the same undertaking may form a trade union. This is in sharp contrast to the Nigerian Trade Unions Act which requires up to 50 workers to form a trade union and the amendment of 2005 did not correct the previous provision.'⁵⁵

Going by Ghanaian law, casual work ought not to be a permanent employment just as temporary employment is not meant to be permanent either. Despite the law, many studies and critics have shown that casual and temporary employment in Ghana has taken on a permanent form like the situation in Nigeria. Many of these categories of workers have been in employment for more than a year continuously without their status being regularised as permanent employees as provided by the law.⁵⁶ Most casual workers are employed in the informal sector under deplorable conditions and low wages which are usually lower than the minimum wage of the country. The argument for the employment of casual workers in Ghana is the same as what obtains everywhere it exists. Entrepreneurs are concentrating on their core business and contracting out the arms they believe is not core to their business to contractors and the result of this is casualisation which has resulted in the race to the bottom of labour standards. And as was stated earlier the need of the casual worker to remain in employment and earn a living supersedes the need to make a complaint to the Commission for fear of losing the job completely. From the foregoing it can be seen that casual and temporary workers in Ghana are most vulnerable despite the protection offered by the Labour Act. Employers observe the law more in breach than in compliance.

⁴⁸ Ghana National Labour Law Profiles – Information Resources. International Labour Organisation. p.1. <http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ghana>, accessed 19 March, 2016.

⁴⁹ Special Provisions Relating to Temporary Workers and Casual Workers of the Ghana Labour Act 2003

⁵⁰ Section 77 of Ghana Labour Act 2003.

⁵¹ Section 74 (1).

⁵² Section 74 (2) (a).

⁵³ Section 75 (1).

⁵⁴ Section 79 (1) Ghana Labour Act 2003

⁵⁵ See section 3 (1) (a) of the Trade Unions Act Cap 437 LFN 1990

⁵⁶ J Barrientos *et al*, 'Social Protection for Migrant Labour in the Ghanaian Pineapple Sector', Working Paper T-30, September 2009, pp.5 and 31.

What is obvious here is that although Ghana has a more detailed legal framework for protection of its nonstandard workers, there is lack of enforcement of the provision of the law and these workers, in order to remain employed and earn an income would rather receive low wages and work under precarious conditions than to seek remedy through the Commission as provided by the law.⁵⁷ Reference to an industrial country with a massive workforce and comparable socio-economic conditions that has made headway in overcoming the problem of casualisation may be a better option now. Hence we move on to China.

3.4 The Stance of China on Casualisation

In China the temporary staffing industry is also on the rise due to the country's economic reform and opening up of its economy to the outside world. The Chinese government supports and encourages flexible work arrangements (NSWAs) as an answer to the problem of unemployment created by layoffs from the State sectors. However it must be noted that the system is much more organised and less informal with more government intervention than equivalent employment in many other developing countries like Nigeria.⁵⁸

The intervention of the Chinese government in the regulation of the temporary staffing industry has given it legitimacy and increased the protection of workers' rights in the workplace. It also provides more detailed and enforceable regulations to protect worker's rights and entitlements through the Labour Contract Law of 2008.⁵⁹ Casual workers are hired for user firms through labour dispatch firms and are engaged under fixed term contracts for duration of not less than two years. The labour dispatch firm remains the employer of the dispatched worker and shall pay the worker the remuneration due to 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.⁶⁰ The 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.⁶¹ 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.⁶²

This intervention by the Chinese government through legislation is a laudable development and 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. Recommendations for tackling Casualisation in Nigeria

The issue here as we have seen from the foregoing is not only lack of local legislations or international instruments guaranteeing the freedom of association and the right to organise, but a general lack of enforcement of labour laws by the government and its agencies and by extension, failure to extend these rights to casual workers. Therefore, the main problem is in the area of enforcement as employers are allowed to breach labour laws with impunity while the Government turns a blind eye. Another major problem is the need for balance between Government's employment policy and its desire to attract foreign direct investment. The Government employment policy is to ensure that more jobs are created through the process of attracting foreign direct investments (FDI). Its concern with economic growth and development is often prioritized above compliance with global labour standards. This in my view has made government complacent in not ensuring that the local and foreign investors in the Nigerian economy operate lawfully.

⁵⁷ Ghana Labour Act 2003, ss. 5 and 6.

⁵⁸ F Xu, 'The Emergence of Temporary Staffing Agencies in China', (2012) 30 *Comp. Labor Law & Pol'y Journal*, 440.

⁵⁹ The Labour Contract Law was enacted on 29 June 2007 and came into effect on 1 January 2008

⁶⁰ Article 61, Labour Contract Law (LCL).

⁶¹ Article 62 & 63 LCL

⁶² Article 64 LCL

Government has nonetheless, made some effort to redress the plummeting labour standards. For instance, in the Oil and Gas Industry wherein the scourge of casualisation is most pronounced, the Federal Government in August, 2010 constituted a technical working group with a clear mandate of working out guidelines for the protection of the right of workers in the Oil and Gas industry and all sectors of Nigeria. The committee identified and addressed unfair labour practices connected with casualisation and contract staffing in Nigeria and recommended guidelines for contract staffing in Nigeria derived from international practices, previous MOUs studied and outcomes of stakeholders meetings, as well as emerging issues in the sector observed during the sittings of the committee.⁶³ The Committee also came up with the guidelines and conditions for issuance of licenses to outsourcing firms in order to ensure the creation of decent employment and adoption of best practices in workplaces. Consequently, the Minister of Labour and Productivity issued Guidelines⁶⁴ on Labour Administration Issues in Contract Staffing/Outsourcing in the oil and gas sector dated 25th May 2011.⁶⁵

Finally, there is need for more detailed legislative protection of casual workers. The new legislation should state clearly the tenure of a casual worker so that employers will be discouraged from keeping them permanently under precarious conditions with no rights as casual workers. We can draw from the example of Ghana where the new Labour Act of 2003 clearly defines the status of casual and temporary workers and the remuneration they are entitled to as well as remedies for breach of their terms and conditions of service. The Ghana Labour Act is an indication that the Ghanaian government is committed to worker's freedom to organise in conformity to international labour standards. We can also draw from the Chinese labour law which provides that dispatched workers (workers supplied by labour agencies) are entitled to join the labour union or to organise such unions in the labour dispatch service provider or in the accepting entity according to law, in order to safeguard their lawful rights and interests. Labour contractors or agencies that supply workers to user firms in Nigeria should be made by this proposed reform to ensure that their workers are entitled to form or join a union of their choice in order to promote and protect their interest at work. This right in international labour law has become a fundamental right which cannot be compromised.⁶⁶ Casual staff whose employers have prohibited from joining or forming trade unions or who are being victimised/discriminated against because of union activities have recourse to the National Industrial Court. Once again, the Industrial Court is urged to step into its role as the last bastion of hope for the common man to vigorously condemn exploitative labour practices.

⁶³ J Moses, 'Finding an End to Casualisation in Nigeria', *Leadership Nigeria Newspaper*, July 3, 2011, available at http://leadership.ng/nga/articles/1415/2011/07/03/finding_end_casualisation_nigeria.html, accessed March 13, 2016.

⁶⁴ Pursuant to section 88 (1) (e) of the Labour Act, the minister is empowered to make regulations by "prescribing anything which is to be prescribed under the Act and is not otherwise provided for" and to further make regulations "containing such procedural or ancillary provisions as he considers necessary or convenient to facilitate the operations of the Act."

⁶⁵ G Tom-Lawyer, 'Contract Employment and the Guidelines on Contract Staffing/Outsourcing', available online at <http://www.ainergy-group.com>, accessed on March 21, 2016.

⁶⁶ CS Obi-Okoye, "The Creation of International Labour Standards by the ILO and their Enforceability in Nigeria," (2013) 4 *UNIUYO Journal of Commercial and Property Law*, 54-68.