

The Changing World of Work and Further Marginalisation of Workers in South Africa: An Evaluation of the Relevance of Trade Unions and Collective Bargaining

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Abstract

The world is changing rapidly. The globalisation of economies and rapid technological change severely impact all nations. Trade unions, collective bargaining, and labour legislation in all states have struggled to keep pace with change, yet they must do so. Many workers will join the unemployment 'congregation' as some of the skills we need now and for the future do not yet exist. This poses serious challenges for the provision of employment and training. Several new research studies released by the ILO have examined the ramifications of globalisation and the effects of a fast-changing world of work on unemployment and the protection of vulnerable workers. A key finding is that policies to protect vulnerable workers more effectively will be fundamental if countries are to respond to the challenges raised by globalisation and, more recently the Covid-19 pandemic, to develop the new skills required to maximise economic potential. This article also interrogates the current role played by trade unions and collective bargaining in protecting marginalised and vulnerable workers in South Africa. It also finds that the role played by trade unions and collective bargaining in protecting marginalised workers is declining.

Keywords: Globalisation; Casualisation; Externalisation; Trade Unions; Vulnerable Workers; Collective Bargaining

Introduction

This article explores the challenges confronting trade unions and collective bargaining in a rapidly changing world of work and the further marginalisation of workers, predominantly as a result of globalisation. Globalisation and technological development pressures have intensified competition between enterprises and increased the need for business flexibility, resulting in changes in the global production system.¹ These developments and new work operations have resulted in the externalisation of enterprises, services and areas of production. These economic and technological developments have created serious changes in the world of work, especially in the labour market, resulting in different categories of non-standard work arrangements and practices.² The intensive use of non-standard work arrangements, which allows for a large measure of flexibility, has created greater uncertainty and vulnerability among the increasing number of workers who unwillingly engage in them.³ Industrial and employment relations have concentrated on this aspect for a considerable period. The increased use of non-standard work arrangements has accordingly created challenges for the application of regulatory regimes and the successful management of industrial relations systems and collective bargaining processes in practice.⁴ This structural and technological transformation, in turn, create challenges for the conventional procedures of representation and negotiation for both workers and employers.

South Africa has ratified the International Labour Organisation (ILO) Convention 87 on 'Freedom of Association and Protection of the Right to Organise' and Convention 98 on the 'Right to Organise and Collective Bargaining.'⁵ Furthermore, the form and content of most labour laws in South Africa conform in large measure to the requirements of the core labour standards of the ILO. However, there are several instances where important provisions of the laws that determine to whom they apply, significantly limit the extent to which workers enjoy their protection.⁶

South Africa has a Constitution⁷ that contains labour rights, such as the right to fair labour practices.⁸ This provision accords rights to workers, employers, and trade unions.

1 Theodore Levitt, 'The Globalization of Markets' (1983) *Harvard Business Review* 92–102.

2 See Arne Kalleberg, 'Precarious Work, Insecure Workers: Employment Relations in Transition' (2009) *American Sociological Review* 1–22.

3 Judy Fudge and Rosemary Owens, *Precarious Work, Women and the New Economy* (Oxford Hart 2006).

4 *ibid.*

5 Colin Fenwick, Evance Kalula and Ingrid Landau, 'Labour Law: A Southern African Perspective' in Tzehainesh Tekle (ed), *Labour Law and Worker Protection in Developing Countries* (Routledge 2007) 2–3.

6 *ibid.*

7 The Constitution of the Republic of South Africa, 1996 (hereafter Constitution).

8 Section 23 of the Constitution.

Therefore, every worker has the right to form and join a trade union⁹ to participate in the activities and programmes of a trade union,¹⁰ to engage in collective bargaining¹¹ and to strike.¹² Apart from this, the provisions of section 23 of the Constitution have been encapsulated and applied in a trilogy of important cognate as the Labour Relations Act (LRA),¹³ the Basic Conditions of Employment (BCEA),¹⁴ the Employment Equity Act (EEA).¹⁵ It is noteworthy, that this legislation protects every worker, regardless of whether the worker is permanently or casually employed.

The ratification of the ILO core Conventions by South Africa and the safeguards in the national legislation have not resulted in the protection and advancement of workers' rights, or the protection of non-standard work. Little progress has been made in reducing 'working poverty', in other words those who work and remain poor in vulnerable forms of work, such as informal jobs and undeclared work.¹⁶ Progress in reducing unemployment globally is not being matched by improvements in the quality of work.¹⁷ Poor quality employment is the main issue facing global labour markets, with millions of people forced to accept inadequate working conditions, according to a new report from the ILO.¹⁸ Furthermore, South Africa continues to experience gross violations of workers' rights.¹⁹ It is against this backdrop that this study seeks to determine how trade unions can extend their mandate to protect non-standard employees to reduce the 'working poverty' while observing the demands of the company in the age of globalisation. The following text focuses on the concept of non-standard employment and its prevalence in South Africa, the impact of globalisation on employment rights and collective bargaining and trade unions.

9 The Constitution.

10 The Constitution s 23(2)(b).

11 *ibid* s 23(5).

12 *ibid* s 23(c).

13 Labour Relations Act 66 of 1995.

14 Basic Conditions of Employment Act 75 of 1997.

15 Employment Equity Act 55 of 1998.

16 ILO, *Global Employment Trends for 2014* <<https://www.ilo.org/global/research/global-reports/global-employment-trends/2014/lang--en/index.htm>> accessed 20 June 2021.

17 ILO, *World Employment and Social Outlook: Trends 2019 Report* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_615594.pdf> accessed August 2021.

18 *ibid*.

19 See Chinese nationals arrested for alleged human trafficking and violation of labour laws. Jeanette Chabalala, 'Court Hears How Employees' "Basic Human Rights" Were Allegedly Violated at Joburg Factory' (*News24*, 12 May 2021) <<https://www.news24.com/news24/SouthAfrica/News/court-hears-how-employees-basic-human-rights-were-allegedly-violated-at-joburg-factory-20210511>> accessed August 2021.

Non-standard Employment in South Africa

Conceptual Framework of Non-standard Employment

Non-standard forms of employment (NSFE), as the expression implies, is described by what it is not. It is not standard employment,²⁰ a term that originated in the Fordist production system: job security, expectations of rising living standards through high wages, workplace participation of workers, the presence of strong trade unions, free collective bargaining, and a strong welfare state (ie welfare benefits provided by the state). Non-standard work is employment that differs from the conventional standard work relationship where work is usually full-time and anticipated to continue until normal retirement age, or until either party gives notice of termination. Non-standard work includes temporary employment, fixed term, part-time work, piece rate work, casual, seasonal, temporary agency work and other multi-party employment relationships, disguised employment relationships and dependent self-employment.²¹ These workers are often paid for results rather than time. Their vulnerability is linked in several instances to the lack of an employment relationship or the existence of an insubstantial one. Most of these workers are unskilled or work in sectors with limited trade union organisation and limited coverage by collective bargaining, leaving them vulnerable to exploitation.²²

Bendapudi and others, describe non-standard work arrangements as jobs that do not involve ‘explicit or implicit contracts for long-term employment.’²³ The characteristics of this form of work arrangement manifest in lower pay and benefits, and unequal protection under the law.²⁴

Temporary and part-time employment have always existed in labour markets and serve important purposes. Temporary work, including temporary agency work, gives enterprises flexibility to replace temporarily absent workers, to evaluate new potential workers before offering them open-ended contracts, and to respond to seasonal or other changes in demand. Part-time work allows employers greater flexibility in planning work, aligning schedules with peaks in customer demand and retaining workers who are not in a position to commit to full-time work. Workers seek non-standard arrangements to accommodate family, educational or other obligations, to supplement their income,

20 Jan Theron, Shane Godfrey and Margareet Visser, ‘Keywords for a 21st Century Workplace’ (2011) *Development and Labour Monograph Series* (UCT) 62.

21 Shereen Mills, ‘The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility’ (2004) *Industrial LJ* 1203–1235.

22 Department of Labour <<http://www.info.gov.za/>> accessed 27 November 2020. Minimum Standards Directorate Policy Proposals for New Employment Standards Statute Green Paper, February 1996.

23 Venkat Bendapudi, Stephen Mangum, Judith Tansky and Max Fisher, ‘Non-standard Employment Arrangements; A Proposed Typology and Policy Planning Framework’ (2003) 26(1) *Human Resource Planning* 26.

24 *ibid.*

or in the hope that the job might lead to permanent employment. Over the past several decades, however, there has been an increase in the use of NSFE, often for new purposes, although trends in the various types of contractual arrangements that have proliferated across countries have been uneven.

In general, a firm's decision to engage in non-standard work arrangements will be influenced by its specific attributes, such as size, the industry in which it operates, the skill level of its workforce, its proprietary knowledge, the practices of competing enterprises, and the regulatory framework of the country in which it operates. Some sectors have traditionally been associated with non-standard arrangements, such as temporary (or seasonal) employment in agriculture, construction (also highly seasonal and characterised by contractual arrangements involving multiple parties), and the arts (as the work is often for a specific project). However, NSFE have spread to industries that were not previously characterised by these arrangements, such as the airline industry²⁵ and the hotel industry.²⁶ Aside from seasonal fluctuations in production, there are three major reasons why organisations use non-standard workers: cost advantages, flexibility and technological change. These are not independent reasons and organisations may adopt non-standard work for anyone, or a combination, of these reasons.

Organisations value the lower costs associated with non-standard workers. Temporary labour is often cheaper because of either lower wage or non-wage costs.²⁷ In some instances, regulations may unintentionally—or deliberately—encourage the use of alternative arrangements, such as part-time workers falling below the threshold for social security benefits, or fixed-term workers being exempt from severance pay.²⁸ Organisations use non-standard workers to attain numerical or functional flexibility. Workers are brought in at short notice to help an organisation deal with seasonal demand²⁹ or with fluctuations in labour supply.³⁰ In this respect, temporary work has always existed.

25 Greg Bamber, Jody Hoffer Gittel, Thomas Kochan and Andrew von Nordenflycht, 'Contrasting Management and Employment-Relations Strategies in European Airlines' (2009) 51(5) *Journal of Industrial Relations* 635–652.

26 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014) 410.

27 Torstein Nesheim, Arne Kalleberg and Karen Olsen, 'Externalizing the Core: Firms' Use of Employment Intermediaries in the Information and Communication Technology Industries' (2007) 46(2) *Human Resource Management* 247–264.

28 *ibid.*

29 Bennett Harrison and Maryellen Kelley, 'Outsourcing and the Search for "Flexibility"' (1993) 7(2) *Work, Employment and Society* 213–235.

30 Jyh-er Roger Ko, 'Contingent and Internal Employment Systems: Substitutes or Complements?' (2003) 24(3) *Journal of Labor Research* 473–490.

Technological developments have enabled firms to assemble teams of employees who work around the globe in virtual contact with each other.³¹ The more recent development of online contracting services such as ‘eLance’ ‘o k’ and ‘Uber’ allows organisations to find individuals to whom work can be sub-contracted. As the work is often carried out in virtual mode, it involves both limited administrative and physical attachment to the organisation.

Further, working arrangements can affect workers in a variety of ways, including their ability to access the labour market and transition between jobs, their earnings, access to social security benefits, access to training, occupational safety and health, and their ability to exercise their freedom of association and collective bargaining rights. In addition, these new forms of work have been recognised by the ILO and in terms of its standard setting, it covers employees outside the traditional employment relationship.

During the last century, the ILO has played a very crucial role in developing labour standards and conventions. The changes in the traditional concept of work have not escaped the attention of the ILO, which has acknowledged the increase in the need for labour and social protection of non-standard work in the following ways:³²

- Conventions and recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;
- Support for micro-enterprises in the informal economy;
- Programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;
- Support for mutual health insurance schemes; and
- The continuance of work at its Social Security Department, commissioning research and investigating the extension of social security protection to non-standard workers.

The ILO has also adopted the concept of ‘decent work’ and has determined the four pillars of decent work for all; as employment opportunities, workers’ rights, social protection and representation. This concept of decent work should have an impact on the improvement of the precarious position of non-standard workers. Most core labour

31 Peter Brews and Christopher Tucci, ‘Exploring the Structural Effects of Internetworking’ (2004) 25(5) Strategic Management Journal 429.

32 Francis Lund and Smita Srinivas, *Learning from Experiences: A Gendered Approach to Social Protection for Workers in the Informal Economy* (International Labour Office Geneva 2000). Core rights include freedom of association, the right to collective bargaining, the elimination of forced labour, the elimination of discrimination and the abolition of child labour.

standards³³ apply to all workers or contain provision for extension to other categories of workers.³⁴

Most non-standard workers in South Africa are those previously disadvantaged by the apartheid regime, compromised women and unskilled black workers.³⁵ They should, in theory, have the protection of current South African labour legislation, but in practice the unusual circumstances of their employment render the enforcement of their rights problematic.

One of the challenges that South Africa faces in regulating the protection of non-standard workers is that the statutory protection provided by labour laws the world over and in South Africa is based on the common law contract of service.³⁶ Apart from members of the Defence Force, National Intelligence Services and the South African Secret Service,³⁷ existing labour legislation³⁹ in South Africa expressly excludes the independent contractor from the ambit of protection.

In *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure*,³⁸ the Commission for Conciliation, Mediation and Arbitration (CCMA) held that Uber drivers whose services were ‘deactivated’, were employees in terms of the LRA. However, in a disappointing development, the South African Labour Court upheld an application for review and concluded that the CCMA’s commissioner had conflated the roles of Uber SA and the foreign mother company, Uber BV. The drivers did not contract with the applicant in this matter (Uber SA), and hence they could not succeed with their case.³⁹ The question remains whether Uber drivers will be classified as employees of Uber BV.

33 Core rights include freedom of association, the right to collective bargaining, the elimination of forced labour, the elimination of discrimination and the abolition of child labour.

34 *ibid.*

35 Women and black unskilled workers.

36 Shereen Mills, ‘The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility’ 2004 Industrial LJ 1203–1235.

37 Labour Relations Act 66 1995 s 2.

38 *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure* 7 July 2017 WECT12537–16 unreported.

39 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers* (2018) 39 ILJ 903 (LC). See also the criticism against the decision in Stefan van Eck and Enerst Nemusimbori, ‘Uber Drivers: Sad to Say, But Not Employees of Uber SA’ (2018) 81(3) THRHR 473–483. Amongst others, the authors criticise the Labour Court for following the approach of the Labour Appeal Court in *Universal Church of the Kingdom of God v Myeni & Others* (2015) 36 ILJ 2832 (LAC), where the court at para 49 held that ‘the existence of an employment contract or a contractual working relationship was, in my view, still prerequisite for the creation of an employment relationship.’

Subsequent to this decision the Supreme Court of the United Kingdom, in *Uber BV v Aslam* held that Uber drivers were not self-employed or independent contractors as they had the status of ‘workers.’⁴⁰ It can be argued that it would have been appropriate for the South African Labour Court to adopt a broader approach. It could have explored ways of piercing the legal complexities associated with triangular relationships created by online platforms and it could have placed less emphasis on the existence of a contract of employment by recognising an employment relationship.

The South African government and the social partners investigated the need to amend the LRA considering these developments. This led to the adoption of the Labour Relations Amendment Act, 2014 (LRAA).⁴¹ At the heart of the LRAA is the understanding that work today is less secure. The amendments derive from the position that the labour laws and regulations introduced in the decades following World War II, when the standard work relationship was more widespread, no longer serve the needs of South African workers.⁴²

The three categories of employees covered are fixed-term employees, part-time employees, and those who work for a TES. In terms of the LRAA, such workers may not be subjected to discriminatory practices. For example, a fixed-term employee whose remuneration falls under the threshold and who is employed for longer than three months (without justifiable reason) will be deemed an indefinite employee and may not be treated less favourably than permanent employees doing the same or similar work. Such an employee must also be provided with the same work opportunities as permanent employees.⁴³ Similarly, a part-time employee, compensated under the legal threshold, may not be treated differently if there is no justifiable reason for doing so.

Furthermore, the new section 198A(1) of the LRAA introduces a deeming provision that applies only to employees earning below the prescribed earnings threshold⁴⁴ referenced in the BCEA.⁴⁵ These employees will only be regarded as employees of the TES if they are performing temporary services. The amendment now allows the employee or a labour inspector to act either against the TES, the client or both where joint and several liability applies or in instances where the client is deemed to be the employer.

40 [2021] UKSC 5.

41 Labour Relations Amendment Act 6 of 2014.

42 Michael Mitchell and John Murray, ‘Changing Workplaces Review: An Agenda for Workplace Rights’ Special Advisors’ Interim Report (Ministry of Labour, Canada 2017) 8.

43 Section 198B(4) of the LRA provides a guide as to what would be considered to be ‘justifiable’ in specific instances.

44 The amount is currently R211 596.30 per annum.

45 Basic Conditions of Employment Act 75 of 1997.

The rise of the platform economy and the new forms of work related to it are creating new challenges for labour relations—in addition to those that hitherto existed. In fact, technological and organisational changes, and globalisation and the growth of flexible forms of work have resulted in new forms of work. Yet good labour relations are vital to manage the transition to the future of work successfully.

The Impact of Globalisation on Employment Rights

Definitions and Elements of Globalisation

Over the past decades, a considerable amount of literature⁴⁶ on globalisation has emerged. Globalisation has created some challenges for the ILO with greater attention being paid to competition between states, rather than workers' rights, which seldom supports the ILO's orthodox objective of seeking social justice.⁴⁷

The word 'globalisation' first formally entered the Anglo-American lexicon in 1961, when the *New Oxford Dictionary* defined globalisation as 'to develop or be developed to make possible international influence or operation', and a global village as a concept in terms of which the 'world is considered as a single community linked by telecommunications.'⁴⁸ Scholars, too, have offered various definitions. McGrew states that:

globalisation constitutes a multiplicity of linkages and interconnections that transcends the nations, (and by implication the societies) which make up the modern world system. It defines a process through which events, decisions, and activities in one part of the world can come to have a significant consequence for individuals and communities in quite distant parts of the globe.⁴⁹

Globalisation as a Contributor to Non-standard Employment

According to ILO studies, the growth in the number of unprotected workers can be linked to elements such as globalisation,⁵⁰ technological change, and modification in the organisation and working of firms, often mixed with restructuring in a very

46 Roy Chowdhury, 'Globalisation and the Informal Sector in South Asia: An Overview' Eradication of Poverty and Quality of AID Eurostep South Asia Consultation (New Delhi, September 2000) Background Paper 27–29.

47 *ibid.*

48 See the *New Oxford Dictionary of English* (OUP 1998); Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (Harper Business 1990).

49 Anthony McGrew, 'A Global Society' in Stuart Hall, David Held and Anthony McGrew (eds), *Modernity and its Futures* (Polity Press 1990) 134.

50 Globalisation leads to casualisation, externalisation and informalisation of work. Casualisation is a challenge for various reasons. It fragments the work force into permanent and non-permanent employees. The latter group of employees is usually poorly paid and have little or no training and development opportunities. In addition, these workers have little or no industrial protection because their interests are not usually represented by trade unions.

competitive milieu.⁵¹ The focus here is globalisation. The effect of these elements is the same, and in some states such as China, India, and the South-East Asian tiger economies,⁵² they have revitalised labour markets and contributed to an increase in employment and new types of work. Businesses have organised their activities to use their workers in increasingly different and selective ways, including the use of diverse types of contracts and the use of sub-contractors, self-employed individuals, and temporary-employment agencies.⁵³

Globalisation is further responsible for the rise in non-standard work arrangements by increasing competition and uncertainty in product markets, which in turn have added to the need for companies to adopt greater flexibility in the running of their businesses.⁵⁴ This has led numerous enterprises to embark on strategies enabling them to concentrate on their ‘core activities’ by creating, according to Carley, ‘a “skilled” permanent labour force and a “peripheral” labour force of insecure and readily disposable employees.’⁵⁵

It is important to note that the development of a more flexible labour force is an essential aspect of many of the new approaches to management in today’s globalised economy.⁵⁶ Flexibility has become the employer’s new frontier in the management of labour.⁵⁷ In addition, globalisation and the resultant trade liberalisation has led to a more open economy. As more products become available at lower prices, there is less demand and a decrease in manufacturing, which in turn, has resulted in manufacturing job losses across the board. Markets that have been particularly affected include manufacturers of electronics, textiles, clothing, and furniture.⁵⁸ Productivity has increased, but without leading to job creation, or importantly increasing unskilled remuneration.⁵⁹ On top of the possible, relatively lower wages for unskilled workers, the change in the composition of employment do not favour unskilled workers either.⁶⁰

51 ILO, ‘Firms Demand for Temporary Labour in Developing Countries: Necessity or Strategy?’ <www.ilo.org/public/english/wcsdg/docs/rep2.pdf> accessed 25 January 2021.

52 See ‘Which Countries that have Benefited from Globalization?’ <<https://www.livemint.com/Money/cNmmQJZdnMhbk3Ydbs26wI/Which-countries-have-benefited-the-most-from-globalization.html>> accessed 24 August 2021.

53 *ibid.*

54 Michael Carley, ‘Non-standard Forms of Employment in Europe: Part-time Work, Fixed-term Contracts and Temporary Work Contracts’ (2008) 3 *European Industrial Relations Review Report* 28.

55 *ibid.*

56 John Benson and Nick Ieronimo, ‘Outsourcing Decisions: Evidence from Australia-based Enterprises’ (1996) 135 1 *International Labour Review* 59.

57 Guido Baglioni, ‘Industrial Relations in Europe in the 1980s’ in Guido Baglioni and Colin Crouch (eds), *European Industrial Relations: The Challenge of Flexibility* (Sage 1991) 1–41.

58 *ibid.*

59 *ibid.*

60 *ibid.*

According to Baglioni, many employers and enterprises seeking ways to reduce labour costs, have used globalisation as a justification for the use of non-standard work arrangements.⁶¹ Many firms experience variations in their workload and maintain full work practice by retaining a core labour force of skilled permanent employees and having access to a peripheral labour force of casual unskilled labour.⁶² Several organisations use employment or recruitment agencies to supply them with temporary casual workers to save costs on screening, training, termination benefits, and other aspects of employment.⁶³

However, in a global context, the differing nature and types of non-standard jobs make it difficult to attribute the increase to specific factors, or to identify a common explanation for their increase, both in absolute and in relative terms, since the growth of non-standard work is different in various states as some countries are bigger than others in terms of population, industries, and workforce. Certain researchers have associated this growth with massive unemployment, the impact of globalisation, the shift from the manufacturing sector to the service sector, and the development of information technology.⁶⁴ The effect of all these factors is that a new economy that demands flexibility has caused a decline in standard employment relations and given rise to non-standard work which benefits employers.

On the demand side, issues related to the desire for increased labour-force flexibility arising out of the globalisation of the economy are predominant, as demonstrated above.⁶⁵ On the supply side, on the other hand, there has been a considerable increase in the sectors of the labour force that are seeking alternatives to full-time work.⁶⁶ Many individuals in developed economies, for instance, seek the flexibility of non-standard work arrangements for personal reasons, such as women taking care of family members and students working part-time to pay bills or earn extra income.⁶⁷ In these instances, therefore, the flexibility offered by non-standard work arrangements is beneficial to this category of workers.

61 *ibid.*

62 *ibid.*

63 *ibid.*

64 Emmanuel Okafor, 'Sociological Investigation of the Use of Casual Workers in Selected Asian Firms in Lagos, Nigeria' (2012) 6(26) *African Journal of Business Management* 76–154.

65 Peter Brosnan and Louise Thornthwaite, 'Atypical Work in Australia: Preliminary Results from a Queensland Study' in Ron Callus and Michelle Schumacher (eds), *Current Research in Industrial Relations* (Industrial Relations Academics of Australia and New Zealand 1994) 136–185.

66 Peter Dawkins and Keith Norris, 'Casual Employment, Labour Regulation and Australian Trade Unions' (1990) 16 *Australian Bulletin of Labour* 156–173.

67 Catherine Hakim, 'A Sociological Perspective on Part-time Work' in Hans-Peter Blossfeld and Catherine Hakim (eds), *Between Equalization and Marginalization: Women Working Part-time in Europe and the United States of America* (New York Oxford University Press 1997) 22–70.

Feldman⁶⁸ contends that to guarantee equal treatment of primary⁶⁹ and secondary⁷⁰ workers in an organisation, a distinction should be drawn between ‘justified cost reduction’ attributed to flexibility and specialisation, and ‘unjustified cost reduction’ based on the exploitative arbitrary reduction of the remuneration and benefits of secondary workers,⁷¹ such as casual workers employed through contractors. However, in a developing country such as South Africa, the circumstances described by Feldman do not apply as most of those working in non-standard jobs are exploited by employers, receiving low wages and no benefits.⁷² This situation can be seen as related to the fact that there is a high unemployment rate globally, with South Africa having more than its fair share of unemployment.⁷³ Accordingly, workers have little or no choice, and usually, the alternative to casual or contract employment maybe unemployment.

While globalisation has brought higher levels of trade and investment, many developing states have seen little change in their volumes of trade and investment, and, at times, have even experienced a decline as trade and investment are redirected to states that are more able to engage in the global economy.⁷⁴ One of the most common arguments is that as a result of the increased specialisation that has come with globalisation, many developing states have a narrower export focus which is centred on essentially unattractive products.⁷⁵ More specifically, exports from developing nations are largely commodities that have shown declines in terms of trade and high levels of volatility with low growth prospects.⁷⁶ As such, these products are not in demand within the international economy.⁷⁷

Nevertheless, there is also the view that globalisation has been beneficial for developing nations, concerning the general benefits of trade such as providing access to capital, technology, managerial practices and production techniques, and bringing previously unemployed labour into production.⁷⁸ One of the main arguments in support of this view is that the trends associated with globalisation, for instance the breakdown of value chains, have afforded developing countries opportunities that would have otherwise not

68 Yuval Feldman, ‘*Ex-Ante vs. Ex-Post: Optimising State Intervention in Exploitive Triangular Employment Relationships*’ (2009) *Comparative Labor Law and Policy Journal* 29–66.

69 Indefinite employees employed directly by the enterprise.

70 Employees employed through agencies, such as contract and casual employees.

71 *ibid.*

72 Green Paper on Labour, Minimum Standards Directorate Policy Proposals for New Employment Standards Statute (n 2) 1.

73 Michael Porter, *The Competitive Advantage of Nations* (The Free Press 1990) 12.

74 UNCTAD, ‘The Least Developed Countries’ (United Nations Conference on Trade and Development Report 2002).

75 *ibid.*

76 *ibid.*

77 *ibid.*

78 Sven Arndt, ‘Globalisation and Economic Development’ (1990) 8 3 *Journal of International Trade and Economic Development* 309–318.

been present. Such opportunities include participating in international trade, earning export income, raising the national income, attracting foreign direct investment (FDI), and developing manufacturing sectors, which is recognised as a key step along the development path.⁷⁹

Collective Bargaining and Trade Unions

Collective bargaining lies at the centre of any industrial relations structure. In the words of Godfrey and others, collective bargaining has a distinct and vital role because it is the apparatus through which ‘regulated flexibility’ will be attained.⁸⁰ Collective bargaining also plays a significant role in diminishing the vulnerability of workers in non-standard employment. A review of the literature on collective agreements reveals many innovative practices that shed light on the role that collective bargaining may play in ensuring decent work for non-standard workers.⁸¹

Encouraging and promoting a just and equitable society, a more inclusive social discourse, and collective bargaining is a crucial way to ensure there is an equal voice for all workers, irrespective of their status, particularly in South Africa where poverty, unemployment, and inequality are rife. The challenge facing South Africa is how to unite non-standard workers, whose union representation and collective bargaining power are likely to be negatively impacted, and how to shift the workers towards a democratic and inclusive modern society in a collective and unified way. This entails elevating the labour market status of non-standard workers by ensuring that industrial relations’ institutions and practices are more receptive to the need to bridge the current gap between non-standard workers and standard employees.

Freedom of association and collective bargaining are basic conditions of employment for the ILO. Since the establishment of the ILO in 1919, these elements have been recognised as a vehicle for advancing and regulating terms and conditions of work and strengthening social justice.⁸² The contents of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949, are acknowledged as basic rights and

79 *ibid.*

80 Shane Godfrey, Jan Theron and Margaret Visser, ‘The State of Collective Bargaining in South Africa: an Empirical and Conceptual Study of Collective Bargaining’ <http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf> accessed 27 June 2021.

81 This review was conducted for the preparation of a report for discussion at the ILO Meeting of Experts on Non-S review of clauses on non-standard workers from thirty-nine collective bargaining agreements in eighteen countries. ILO, ‘Fundamental Rights at Work and International Labour Standards’ <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_087424.pdf> accessed 16 April 2021. Standard Forms of Employment held at Geneva from 16 to 19 February 2015.

82 ILO, ‘Fundamental Rights at Work and International Labour Standards’ <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_087424.pdf> accessed 15 March 2021.

principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁸³ The 1998 Declaration notes that, by freely joining the ILO, all member states are obliged to comply with, advance, and fulfil the principles concerning fundamental rights, irrespective of whether they have ratified the relevant Conventions.⁸⁴ It is also important to note that these two fundamental rights are indivisible and mutually fortifying—the realisation of freedom of association is an essential precondition for the effective achievement of the right to bargain collectively.

The ILO Declaration on Social Justice for a Fair Globalisation⁸⁵ also highlights the importance of freedom of association and the right to collective bargaining, as both rights assist in achieving the ILO's strategic goals. These goals include employment, job security, social protection, workplace rights, and decent work for all. These fundamental rights apply to all workers, in theory, although members of the armed forces, the police, and public servants active in the administration of the state are excluded, regardless of their employment arrangements or work status.⁸⁶ Increasing rates of non-standard types of work, nevertheless, create numerous challenges for the efficient operation of the conventional industrial relations structures and collective bargaining processes. It is against this background that collective bargaining, freedom of association, and trade unions are examined in this article.

Defining Collective Bargaining in South Africa

A collective agreement is defined as a written agreement governing the terms and conditions of employment or any matter of mutual interest, concluded by one or more registered trade unions, on the one hand, and, on the other hand, one or more employers, or one or more registered employers' organisations, or one or more employers and one or more registered employers' organisations.⁸⁷ A collective agreement binds the parties to the agreement, as well as the members of every party to the agreement. The right to bargain collectively is safeguarded by the South African Constitution, and one of the objectives of the LRA is to give effect to this right.⁸⁸ The LRA gives effect to the right to bargain collectively by allowing for the registration of trade unions and employers' organisations, by permitting 'representative' trade unions to exercise certain

83 See ILO, 'Declaration on Fundamental Principles and Rights at Work' <<https://www.ilo.org/declaration/lang--en/index.htm>> accessed 21 June 2021.

84 *ibid.*

85 ILO, 'Declaration on Social Justice for a Fair Globalization' adopted in 2008 by the representatives of governments, employers and workers from all ILO member states. The declaration expresses the contemporary vision of the ILO's mandate in the era of globalisation.

86 Gerhard Bosch, 'Low Wage Work in Five European Countries and the US' (2009) 148(4) *International Labour Review* 337–356.

87 LRA s 213.

88 Constitution of South Africa, 1996 s 27(2).

organisational rights, and by allowing for the creation of a bargaining council. However, the LRA does not impose a duty to bargain in South Africa.⁸⁹

The ILO defines the right to bargain collectively as a fundamental right. In Recommendation 91,⁹⁰ collective agreements are defined as:

all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by the following national laws and regulations, on the other.⁹¹

The text further states that collective agreements are binding on the signatories thereto and on those on whose behalf the agreements are concluded. Furthermore, a provision in a contract of employment that is more favourable to a worker than those provisions prescribed by a collective agreement should not be regarded as contrary to the collective agreement.⁹²

Collective bargaining may take place at various levels, namely: plant level; company (or enterprise) level, where there is more than one plant belonging to the same company or enterprise; and sectoral level, where there are different employers in the same industry or sector.⁹³

In the words of Davies and Freedland, 'the importance of collective bargaining can be explained by the fact that it has value for employers as well as workers—for employers, as a means of maintaining "industrial peace"; for workers, primarily as a means of maintaining certain standards of distribution of work, of rewards and stability of employment.'⁹⁴

Furthermore, it is worth noting that collective bargaining has been affected by the ramifications of the major changes impacting the world over the past three decades: the growth in non-standard forms of work, the general acceptance of the market economy, the discourse on the role and structure of the state, economic restructuring and globalisation, the growing autonomy of trade unions from political parties, and numerous other factors. However, collective bargaining in South Africa should not only be viewed in light of the proliferation of non-standard work, but in a context where the

89 *SANDU and Others v Minister of Defence and Others; Minister of Defence & Others v SA National Defence Union & Others* [2006] 11 BLLR 1043 (SCA).

90 ILO Recommendation 91, para 2.

91 ILO, *International Labour Conventions and Recommendations Vol 1 (1919–1951)* (ILO 1996) 656.

92 *ibid.*

93 Labour Relations Act 66 of 1995.

94 Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens 1983) 69.

labour market is characterised by extreme poverty, ‘stark income inequality,’⁹⁵ thirty to forty per cent unemployment, extremely low skills levels, an HIV/AIDS, and more recently, the Covid-19 pandemic, large-scale labour migration, and an extensive informal sector in which most working individuals eke out a living.⁹⁶ Labour law, therefore, influences only a small proportion of the population, while the surrounding social realities, combined with a lack of effective enforcement, further reduce its influence.⁹⁷ To be effective, it is argued, ‘labour law in South Africa needs to take into account the country’s particular socio-economic profile and develop an indigenous paradigm.’⁹⁸

While emphasising that the traditional concerns and goals of labour law, as developed in the industrialised world, are by no means irrelevant to employees in formal employment, nor irrelevant to ensuring ‘flexibility and efficiency to compete in global economic markets’, some authors⁹⁹ suggest that the ‘true and necessary domain of labour law is wider. Job creation, control of immigration, training and education of workers, and the provision of social security are all immediate concerns for the South African workforce.’¹⁰⁰

Aims of Collective Bargaining

The aims of collective bargaining may be outlined as:¹⁰¹

- The setting of working conditions and other matters of mutual interest between employer and employees in a structured, institutionalised environment;

95 Development Policy Research Unit (DPRU), *An Exploratory Look into Labour Market Regulation* (University of Cape Town 2007) 56.

96 Colin Fenwick and Evance Kalula, ‘Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives’ (2001) 21 2 *International Journal of Comparative Labour Law and Industrial Relations* 193, drawing on the analysis developed in Sean Cooney and others (eds), *Law and Labour Market Regulation in East Asia* (Routledge 2005) 204–211.

97 For instance, mass unemployment undermines minimum wages and conditions of employment. Thus, the argument in favour of market liberalisation in its most extreme form implies that wages should be allowed to drop to levels that are acceptable to the poorest of the poor.

98 *ibid.*

99 *ibid.*

100 As reflected, eg, in the policy of the South African Department of Labour. Its strategic objectives for 2004 to 2009 include: contribution to employment creation; enhancing skills development; promoting equity in the labour market; protecting vulnerable workers; and strengthening social protection. See <http://www.labour.gov.za/media/speeches.jsp?speechdisplay_id=5877> accessed 17 January 2021. One important outcome of this approach has been the Skills Development Act 97 of 1998.

101 Martheane Finnemore and Rhode van Rensburg (eds), *Contemporary Labour Relations* (LexisNexis Butterworths 2002) 276.

- Conformity and predictability through the creation of common substantive conditions and procedural rules;
- The promotion of workplace democracy and employee participation in managerial decision making; and
- The resolution of disputes in a controlled and institutionalised manner.

The key aim of collective bargaining is to reach a collective negotiation that regulates the terms and conditions of employment.¹⁰² What makes the bargaining ‘collective’ is the existence of a trade union that acts or speaks on behalf of the concerns of employees as a collective. The other participant to the collective agreement is customarily an employer, or multiple employers or an employer organisation.

Collective bargaining may be viewed in both a wide and a limited sense.¹⁰³ In the wider sense, collective bargaining is seen as different forms of binary and occasionally tripartite deliberations relating to employment and industrial relations that affect a category of workers.¹⁰⁴ The narrow view of collective bargaining is restricted to binary deliberations.¹⁰⁵

Trade Unionism Defined

The term ‘trade unionism’ traditionally ascribes to worker organisations a particular philosophy and function for collective representation to protect and advance the interests of the workers as producers within the economic system.¹⁰⁶ In turn, trade or labour unions can be described as ‘organised groupings of wage and salary earners to bring to bear the economic, social and political interests of their members in labour relations and the political system.’¹⁰⁷ The economic aspect differs in different countries. In developed countries, for instance, political action is indirect and usually used only as an extension of the economic function.

Webb defines a trade union as ‘a continuous association of wage-earners to maintain or improve the conditions of their employment.’¹⁰⁸ This definition, however, narrows the

102 Greg Bamber and Peter Sheldon, ‘Collective Bargaining’ in Roger Blanpain, Greg Bamber and Christian Angels (eds), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Kluwer Law International 2002) 1.

103 *ibid.*

104 *ibid.*

105 *ibid.*

106 Bruce Millen, *The Political Role of Labour in Developing Countries* (The Brookings Institution 1963) 148.

107 Hubert Schillinger, *Trade Unions in Africa: Weak but Feared* (International Development Cooperation: Occasional Papers 2005).

108 Beatrice Webb and Sidney Webb, *History of Trade Unionism* (Longmans 1920) 1.

role of trade unions to collective bargaining; in fact, the role of a trade union goes beyond dealing with workplace issues and simply representing wage earners. Trade unions' influence in broader society is manifested in the power they wield which comes from collectivism.

Significance of Joining a Trade Union

All around the world and throughout history, trade unions have fought for the protection and improvement of their members' remuneration, workplace security, and health and safety. Trade unions in South Africa have also always pursued these goals. Collective bargaining has been the main tool used at both the national and industry level. Trade unions also continually engage in lobbying governments for laws that benefit workers.

The rationale for forming or joining trade unions and so participating in collective bargaining is to balance, or at least limit the power imbalance between employers and workers.¹⁰⁹ In this way, unions can uphold social and economic justice, equality, fairness, and workers' rights. This is premised on an acknowledgement that, individually, workers are weak and cannot demand their rights from their employer. There is a further acknowledgement that workers have power when they are unified and act as a collective.¹¹⁰ Trade unions in South Africa have played a significant role in the socio-economic and political evolution of the region.¹¹¹ They were very active in the fight for independence and created a vital platform from which ordinary people could voice their concerns. Post-independence, trade unions in South Africa have remained at the forefront of the fight for social and economic justice, democracy, equality, workers' rights, fairness, and good governance. Nonetheless, the labour movement in South Africa has been confronted by many challenges in its endeavours to protect the rights of workers—and the most vulnerable.¹¹²

As indicated above, the capacity of trade unions, especially in South Africa, to secure better remuneration and working conditions for their members is dwindling. This is linked to, among other things, a shrinking formal sector from which unions have customarily drawn their membership, and the increasing numbers of informally employed workers.¹¹³

109 See Sonia Bendix, *Industrial Relations in South Africa* (4th edn, Juta 2004) 55; Otto Khan-Freund, *Labour and the Law* (Stevens & Sons 1972) 8; Bob Hepple and Sandra Fredman, *Labour Law and Industrial Relations in Great Britain* (Kluwer Law and Taxation Publishers 1992).

110 Kahn-Freund (n 109) 8.

111 Fenwick and others (n 5) 2–3.

112 Jonathan Crush, Vincent Williams and Sally Peberdy, 'Migration in Southern Africa' (2001) *Journal of Southern African Studies* 5–31.

113 Darcy Du Toit, 'What is the Future of Collective Bargaining (And Labour Law) in South Africa?' (2007) *International Labour Relations Journal* 1406–1435.

Workers in non-standard forms of employment, such as fixed-term workers, temporary workers (hired through labour brokers), and part-time workers, are often regarded as ‘outsiders’ who may not participate in union activity. They are also widely viewed as a threat because they replace workers with standard jobs.¹¹⁴ Therefore, many non-standard workers find themselves in tenuous and vulnerable situations. Non-standard workers may simply not be able to join a union, or they may fear reprisal for joining a union, or they may not be able to afford union membership due to their unstable income.¹¹⁵

However, in several countries, unions as social actors fight on behalf of the entire labour force and not only their members and have become increasingly concerned with the situation of non-standard workers. This is propelled by an interest in protecting vulnerable workers and a concern that the rise in non-standard work will undermine existing remuneration and working-time standards. Many unions have made it a priority to recruit such workers.¹¹⁶ For example, in the Netherlands, the Confederation of Dutch Trade Unions (FNV) has identified sectors in which workers face particular risks as a consequence of non-standard forms of work, including ‘the postal sector, the cleaning sector, meat processing, domestic aid, the taxi sector, construction and temporary agency work, and actively recruited members in these sectors.’¹¹⁷

Furthermore, new unions have emerged to represent the special concerns of non-standard workers. In some cases, they have subsequently joined national federations. For instance, in the Republic of Korea, the Korean Federation of Construction Industry Trade Unions (KFCITU) which ‘represents construction machinery operators (tower crane operators, concrete mixer truck drivers and dump truck drivers, and so on) grew out of a merger between the specialised National Association of Construction Day Labourers Union (initially a union of day labourers) and the Korean Federation of Construction Trade Unions.’¹¹⁸ In Nigeria the refusal of employers in the oil industry to negotiate terms and conditions for employment of contract workers with the regular union, resulted in the creation of contract workers’ branches to represent these workers.¹¹⁹ Despite the challenges involved in organising workers in non-standard work

114 *ibid.*

115 *ibid.*

116 Rebecca Gumbrell-McCormick, ‘European Trade Unions and “Atypical” Workers’ (2011) *International Relations Journal* 293–310.

117 Maaten Keune, ‘Trade Union Responses to Precarious Work in Seven European Countries’ (2013) *International Journal of Labour Research* 59–96.

118 Aelim Yun, ‘Curbing Precarious Informal Employment: A Case Study of Precarious Workers in the South Korean Construction Industry’ *Global Labour University Working Paper No 49* (2017).

119 Baba Aye, ‘Combating Precarious Work in the Nigerian Oil and Gas Industry: “NUPENGASSAN” and the Struggle for Transition from Informality to Formal Employment and Labour Relations’ *Global Labour University Research* (2017).

and representing their collective concerns,¹²⁰ trade unions in France, for example, have developed strategies to deal with the specific vulnerabilities of these workers. These strategies include ‘lobbying for changes in laws and policies; various forms of coordinated action involving the building of alliances with other organizations; and collective bargaining.’¹²¹

Apart from the legal rights of freedom of association and trade unions to organise to acquire recognition in the workplace as representatives of the workers, the trade union mobilisation process is built on the principle of collectivism. Workers generally mobilise because they believe that with a ‘collective voice’, about their employer, they will have more power to address perceptions of injustice or feelings of dissatisfaction in their current employment situation.¹²² Workers also join trade unions because such membership adds value and because of the workers’ political ideologies.¹²³

Non-standard Work and Trade Unions

The question that arises is why union membership would be noticeably lower among non-standard workers than standard workers. One answer is that the compositional shift in employment is related to a change in the attitude of workers, which makes them less willing to join a trade union.¹²⁴ Workers’ attitudes towards trade unions, particularly among the youth, may have changed because of an increasing individualistic orientation resulting in less interest in union representation, and so eroding the basis for collective mobilisation and organisation. It is also argued that interests within unions are more diverse and divided nowadays than during the period when standard employees formed the core of union membership. Unions have long been inclined to recruit and represent predominantly male manual workers who are employed in the manufacturing and public sectors.¹²⁵

Trade unions are inclined to ignore or oppose several non-standard types of employment, especially ‘own-account self-employment, fearing that these types of

120 Rachid Belkacem, Cathel Kornig, Christophe Nosbonne, ‘Mobiliser, défendre les intérimaires. Les difficultés de l’action syndicale’ (2014) 83(4) *La Revue de L’ Ires* 3–28.

121 Janice Fine, ‘Alternative Labour Protection Movements in the United States: Reshaping Industrial Relations?’ (2015) 154(1) *International Labour Review* 15–26.

122 Barney Erasmus, Jenni Gobind, Maggie Holtzhausen and others, *South African Employment Relations: Theory and Practice* (Van Schaik 2020) 48.

123 Yitchak Haberfield, ‘Why do Workers Join Unions? The Case of Israel’ (1995) 48(4) *Industrial and Labour Relations Review* 658.

124 Daniel Gallagher and Magnus Sverke, ‘Contingent Employment Contracts: Are Existing Employment Theories Still Relevant?’ (2005) 26(2) *Economic & Industrial Democracy* 189–203.

125 Phil James, ‘Trade Unions and Non-standard Employment’ in HM Harcourt and G Wood (eds), *Trade Unions and Democracy: Strategies and Perspectives* (Routledge 2017) 82–104.

employment will erode existing rewards and working conditions.¹²⁶ Subsidiary employment and full-time work on indefinite contracts are regarded as the standard. Accordingly, non-standard workers have ‘blamed’ the unions for primarily representing the concerns of the ‘insiders’ and not considering their specific concerns in collective bargaining arrangements, employment regulations, or bargaining on social insurance coverage.¹²⁷ Thus, because of the absence of comprehensive representation for non-standard workers within the unions, the conventional wisdom is that they are less concerned with union membership.

Further, trade unions have always had the onerous task of coordinating and reuniting the different concerns of opposing groups of workers as these arise from their various positions in the labour market. Currently, most unions have accepted, although to differing degrees, the specific needs of non-standard workers. They have also acknowledged, though somewhat unenthusiastically, that non-standard work may represent not only an employment opportunity but also a stepping-stone to regular employment, particularly for younger and female workers.¹²⁸

Moreover, one should bear in mind that some of these workers may have experienced collective organisation in the course of previous employment (on a standard contract basis) and are therefore likely to be more accepting of a collective orientation than others, among whom union membership is less well-known. Hence, the under-representation of non-standard workers in unions arguably mirrors, in the main, structural constraints or barriers encountered by trade unions in organising these workers.¹²⁹

Furthermore, union organising expenses are higher for non-standard workers. They are often more difficult to contact directly, than their counterparts in standard employment. However, in some economic sectors where large enterprises are dominant, non-standard workers are mainly confined to small workplaces, with a high rate of labour turnover, as is the case in some South African enterprises. It is noteworthy that in keeping with South Africa’s labour policy of ‘regulated flexibility’,¹³⁰ the LRA seeks to provide for a

126 ILO, ‘Policies and Regulation to Combat Precarious Employment’ (Background Paper, International Workers’ Symposium on Policies and Regulations to Combat Precarious Employment Geneva, 4–7 October 2011 Geneva, ILO 2011b).

127 Bernhard Ebbinghaus, ‘Trade Union Movements in Post-industrial Welfare States Opening Up to New Social Interests?’ in Klaus Armingeon and Giuliano Bonoli (eds), *The Politics of Post-Industrial Welfare States: Adapting Post War Social Policies to New Social Risks* (Routledge 2006) 123–143.

128 *ibid.*

129 Robert Mackenzie, ‘Union Responses to Restructuring and the Growth of Contingent Labour in the Irish Telecommunications Sector’ (2010) 30 *Economic and Industrial Democracy* 539.

130 Stefan van Eck, ‘Regulated Flexibility and the Labour Relations Amendment Bill of 2012’ (2013) *De Jure* 600.

balance between the interests of employers and those of employees.¹³¹ Provision is made for differentiated levels of protection in respect of defined categories of non-standard workers.

Trade Union Approaches to Non-standard Work

Trade union recruitment strategies have made little impact, especially where non-standard workers are not seen to be in direct competition with full-time, permanent workers.¹³² Many formidable barriers impede the recruitment and retention of non-standard workers. These barriers include:

- Their varied, unsocial and limited hours of employment;
- the distinctive, often unfamiliar problems associated with non-standard employment;
- the extensive demands on the time of organisers make it almost inevitable that collective issues will gain precedence over individual complaints;
- the reluctance by some non-standard employees to become union members for fear of victimisation by employers;
- the divergence in the needs and interests of standard and non-standard employees;
- an ambivalence towards trade unions due to their perceived reluctance to cater for the needs of non-standard workers; and
- union dues are often viewed as an excessive deduction from meagre wages; and high labour turn-over undermines the continuity of union structures in the workplace.¹³³

The effective organisation and representation of non-standard employees raise several notable and broader concerns, which include the following:

- The difficulties associated with the proper inspection of non-standard employment;

131 Craig Bosch, 'The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?' (2013) 34 *Industrial L J* 845–847.

132 Gilton Klerck, 'Trade Union Responses to the "Flexible" Workforce in Namibia' (2002) 6 *African Sociological Review* 114.

133 *ibid.*

- the creation of a second-class workforce undermines the foundations of collective industrial relations and dilutes the social values and legitimacy of labour law;
- unfair competition from non-standard employment threatens formal employment; the individualised forms of conflict associated with non-standard labour are not readily amenable to established dispute-resolution procedures;
- traditional forms of employee representation are often inadequate to meet the distinctive needs of non-standard workers; the established mechanisms for employee participation are usually unsuited to non-standard employment;
- the social security systems designed to cover the risks inherent in regular, full-time employment are ill-suited to precarious and intermittent forms of employment; and
- complications that often arise in determining which employer is liable for the health and safety and other statutory entitlements of non-standard workers in cases that involve triangular employment relationships.¹³⁴

Addressing Challenges of Non-standard Employment

Ensuring that these work arrangements represent ‘decent work’ needs an array of policy interventions, as well as legislative reforms plus the strengthening of other institutions that control the labour market. The following paragraphs set forth the different policies that are required, drawing on guidance from international labour norms and national practices. It explains the role and goal of the recommended policies and provides some examples from different states around the globe.

Organisation

Organising non-standard workers is vital for their protection. Freedom of association is a crucial precondition for the successful awareness of the right to collective bargaining. The effect of collective bargaining is impressive where trade union coverage is high. Organising non-standard workers, thus, serves as a precondition for strengthening and encouraging collective bargaining. In some states, organising non-standard workers has become a compelling factor for trade unions and associations. In Japan, for example, trade unions have been intensively addressing and organising non-standard workers.¹³⁵

134 *ibid.*

135 Hamaguchi Keiichiro and Ogino Noboru, ‘Non-regular Workers: Legal Policy, Social Dialogue and Collective Bargaining. The Study of Japan’ (Geneva ILO 2011).

Through research and advocacy, non-standard workers can be given a voice. Voice and representation for vulnerable workers in the labour market are of prime importance in attaining labour and social protection for these workers, without which the idea of substantive equality and decent work will remain an illusion. Collective action can usher the required change that is needed to bestow protection through the broadening of existing measures and other new regulatory models and appropriate measures. The absence of representation adds to the reality that these workers are caught in a cycle of poverty and are powerless to fight for good living conditions and decent work.¹³⁶ Non-standard workers, especially in the informal sector, are frequently without voice and representation as they are far away from the reach of traditional ways of organisation and mobilisation.¹³⁷ The absence of representation further means that they have very little collective representation with public authorities and employers.¹³⁸ Strategies for successful organising may differ for various occupational groups. A variety of organisational forms adds to the voice and representation of vulnerable workers in the informal economy and may include other NGOs,¹³⁹ cooperatives,¹⁴⁰ and associations.¹⁴¹

Dialogue

Social dialogue has a vital role to play in harmonising and facilitating the practical concerns of all workers and designing and application of policies mutually agreed upon. The public strategy should thus continue to support the continuity, power, and standard of tripartite social dialogue to ensure tangible outcomes for the welfare of all workers. In pursuing a more comprehensive social dialogue, a public strategy could bestow an enabling environment for national tripartite dialogue to operate effectively in addressing the concerns of unorganised workers. In this respect, some states have instituted a tripartite-plus social dialogue to mirror the voices of non-standard workers in e all-inclusive policy-making processes for better labour market governance that will benefit all workers.

136 ILO, 'Resolution Concerning Decent Work, and the Informal Economy' Conclusion 4 (2002) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms_098314.pdf> accessed 28 August 2021.

137 Department of Labour, 'Green Paper on Labour: Minimum Standards Directorate Policy Proposals for New Employment Standards' Statute Green Paper (1996) <<http://www.info.gov.za/greenpapers/1996/labour.htm>> accessed 28 August 2021.

138 ILO, Res (n 136) Conclusion 9.

139 Non-government organisations often operate as an outside entity without a membership base.

140 Cooperatives are often defined in national legislation and are described as enterprises that assist members through cooperation to solve mutual problems.

141 Associations can promote empowerment and can also be used as a generic term to include all other membership-based organisations. A group of persons joined together by agreement, rules or a constitution with a common object can also be described as an association [Jan Theron, *Options for Organising Waste Pickers in South Africa* (WIEGO 2010) 14, 15].

Occupational Health and Safety

Another issue is that of occupational health and safety, which is a necessity for non-standard workers since these workers often work in places where there is little or no health care. Trade unions can strengthen their image as collectives by underscoring the health and safety problems faced by non-standard workers. Challenges in this respect can further be attributed to the reality that occupational health and safety are managed at the national level and the various nature of non-standard work would often need strategies at the local level to deal with the specific challenges appropriately.¹⁴² The occupational health and safety of vulnerable workers will need innovative solutions concerning coverage, as a mere broadening of existing legislative provisions will not be adequate due to the diverse nature of non-standard work. It is often required to consider alternatives to the conventional occupational health and safety framework together with the participation of other role players.¹⁴³ Non-standard work often poses several health risks and the principal asset that workers contribute is their labour; nonetheless, they do not enjoy sufficient protection in this respect.¹⁴⁴ For non-standard workers such as waste pickers, protection must incorporate among others the strengthening of strategies at local levels. If we are considering a specific rule of the occupational health and safety of these workers, we need a paradigm shift from those policies designed to provide only for those in standard employment to include non-standard and other vulnerable workers.

Fragmentation of Work

It is important to mobilise union members to oppose the fragmentation of work and to develop strategies to ensure that workers can acquire training and experience and have career options—fragmentation has resulted from an increase in forms of work and employment that differ from the standard employment relationship of permanent, full-time, socially secure employment. Complementing the standard form of employment is the growth of part-time work, fixed-term contracts, temporary agency work, working from home, self-employment, casual work, seasonal work and other ‘non-standard’ forms of employment. It is difficult to organise workers in fragmented workplaces and fight for their protection, although South Africa has attempted to come to terms with the fragmentation of the workforce in several ways. In particular, it has extended the frontiers of labour regulation beyond the contract of employment to incorporate a wider range of employment relationships.¹⁴⁵

More so, industrial democracy is pivotal for the opposition of fragmentation of work. Union campaigns against outsourcing, for example, would test the extent to which

142 Laura Alfery, Francie Lund, and Rachel Moussié, ‘Extending Occupational Health and Safety to Urban Street Vendors: Reflections from a project in Durban, South Africa’ (2016) *NewSol* 285.

143 These role players can include among others, nurses and other role players who show an interest to work with workers in the informal economy.

144 Francie Lund and Rajen Naidoo, ‘The Changed World of Work’ (2016) *NewSol* 145–154.

145 See *Wyeth SA (Pty) Ltd v Manqele & Others* [2005] 6 BLLR 523 (LAC).

management's prerogative is genuinely open to joint regulation, union education and vocational training by way of education work for members, and their involvement in training programmes. Unions need to campaign for a wider definition of knowledge that extends beyond narrow technical requirements, to include a critical reflection of the nature of work in a capitalist society.¹⁴⁶

Human Resources Development for Non-standard Workers

Furthermore, employers are occasionally reluctant to invest in human resources development and training or social welfare for non-standard workers, whose attachment to a single employer is fragile. Yet such workers require skills upgrading to remain competitive in the external labour market and need suitable social protection and security provision which are not provided by their employer or workplace. The different ways in which unions can address the challenges above include research and advocacy. Non-standard workers may be given voice through a series of research and educational programmes. Trade unions may also use lobbying to influence political parties toward labour law reforms beneficial to non-standard workers. In India, for instance, the Self-Employed Women's Association (SEWA) has operated as a trade union, cooperative and pressure group, even though it was registered as a trade union. Although organising workers in the informal economy, it was actively involved in the design of international networks such as: Women in Informal Employment: Globalizing and Organizing (WIEGO), and further in developing networks such as StreetNet and the National Centre for Labour (NCL). SEWA began the National Alliance of Street Vendors of India (NASVI). Mostly because of the lobbying work of SEWA and NASVI to influence national social policymaking, along with pressure applied by organizations of workers in the informal economy, the government established the National Policy for Street Vendors.¹⁴⁷

Staffing Levels

Another area of focus for unions should be staffing levels. Since every job lost due to 'flexibility' is another source of division, unions are required to re-develop their role as protectors of jobs through policies targeting redistribution of work, fighting unemployment, and strengthening the social control of the labour market. A key concern among non-standard workers is job security. The end of a temporary contract frequently means the termination of an employment relationship, without a guarantee or an expectation that a new contract, whether temporary or permanent, will be offered. Re-entry into permanent employment remains limited in several parts of the world and are especially compromised at times of economic crisis. In many developing countries, and especially in states where the law does not restrict the number of renewals of temporary

146 *ibid.*

147 Shyman Sundar, *Non-regular Workers in India: Social Dialogue and Innovative Practices* (Geneva, ILO 2011).

contracts, temporary workers may work for the same firm for several years without ever obtaining an open-ended contract. However, in South Africa, the most significant consequence of employing a worker beyond three months without justification is that such employment is deemed to be indefinite employment.¹⁴⁸ While this is a positive development, more needs to be done to protect vulnerable workers.

Trade Union Attitudes to the Casualisation of Work

There is a need to move beyond the neat dichotomy of ‘traditional’ versus ‘new’ in accounting for the variety of trade union responses to the casualisation of work. Common to a great deal of the literature on non-standard employment is the claim that unions can adopt one of four approaches to non-standard workers: ignore them; exclude and oppose them; limit their numbers and regulate them; and recruit and integrate them.¹⁴⁹ This customary classification of union responses fails to account for the interaction between different approaches and cannot explain why a trade union adopts a particular strategic orientation. The implication that unions simply ‘choose’ a particular orientation or approach ignores the structural determination of viable options and downplays the contradictions that may arise between structure and strategy.¹⁵⁰

The ‘traditional’ trade union approach to non-standard employment has been centred on the defence of full-time employment and hostility towards all non-standard forms of employment. This is because unions seek, among other things, to increase job quality and to protect the job security of their members.¹⁵¹ Since most, if not all, unions consist of members who are engaged in standard employment contracts, the unions seek to resist the use of non-standard workers who are seen as a threat to unionised workers.¹⁵² Unions view the growth of flexible employment as a barrier to their efforts in improving the conditions of standard employees, and the rights and benefits that have been inherited by unions from past struggles, are seen to be compromised.¹⁵³ This poses a threat to the quality of working life in the workplace.

Furthermore, Klerck¹⁵⁴ notes that since union membership has experienced a decline with the expansion of a flexible labour market, the use of non-standard labour is seen as a symptom of employer greed, a threat to the numbers and conditions of permanent employment, and any attempt to undermine the unions. Therefore, all non-standard employment is initially rejected, irrespective of its employment conditions, whether it

148 Section 198(5) of the LRA.

149 *ibid.*

150 *ibid.*

151 Karen Olsen and Arne Kalleberg, ‘Non-standard Work in Two Different Employment Regimes: Norway and the United States’ (2004) 18(2) *Work, Employment & Society* 328.

152 *ibid.*

153 Ian Campbell, *Trade Unions and Temporary Employment: New Initiatives in Regulation and Representation* (University of Melbourne 2011) 14–33.

154 Klerck (n 132) 114.

is voluntary or not, and whether it is structured in terms of permanent or casual status.¹⁵⁵ Non-standard workers may not feel represented by unions who reject flexible employment, and they will be discouraged from joining such unions. This has contributed to the decline in trade union membership across several labour markets globally.¹⁵⁶

Furthermore, the exclusion strategy reveals the presence of a fundamental belief among unions that non-standard work presents a threat to traditional jobs.¹⁵⁷ This can be seen in the social distance that tends to exist between standard workers and non-standard workers.¹⁵⁸ The defining feature of this social distance is the identification of opposing interests between standard workers and non-standard workers, and a determination to protect the jobs and pay levels of the standard employees. However, exclusion, as a strategy may have the effect of weakening the unions. This is because employers are increasingly leaning towards employing more non-standard workers, so the protected standard workforce is dwindling and is being replaced by unprotected, non-standard workers.

Strategies for Unions to Assist Non-standard Workers

Unions may adopt a strategy of recognising the representational needs of non-standard workers and may assist in providing collective access to benefits for non-standard workers. This is what Heery and Abbot¹⁵⁹ refer to as the servicing approach. Attempts of this kind, which are aimed at drawing non-standard workers into trade unionism through the provision of individual services, may, however, present some difficulties. This is because collective representation may be difficult to achieve for non-standard workers, due to the varied nature of their employment contracts and the differences in non-standard employment that exist in different sectors.

Another approach to non-standard employment and the insecurities it presents is the formation of partnerships between unions and management. These are entered into to provide existing union members with guarantees of future employment through 'labour-24 management partnerships.'¹⁶⁰ The degree of employment security offered by partnerships is said to vary, and examples of such agreements include abolishing the practice of laying off employees during downturns and providing guarantees that workforce reduction will not be achieved by compulsory redundancies.¹⁶¹

155 *ibid.*

156 Campbell (n 153) 14–33.

157 *ibid.*

158 Edmund Heery and Brian Abbot, 'Trade Unions and the Insecure Workforce' in Edmund Heery and John Salmon (eds), *The Insecure Workforce* (Routledge 2000) 155–180.

159 *ibid.*

160 *ibid.*

161 *ibid.*

Unions may also attempt to influence government policy and secure changes in employment law to conserve the jobs of existing union members and reduce the insecurities experienced by non-standard workers.¹⁶² Such changes are aimed at promoting worker security. The primary objective of this exercise is to extend the employment rights enjoyed by standard employees to non-standard workers.

Lastly, unions may adopt the approach of assuming the characteristics of a social movement¹⁶³ and maintain that a defining feature of social movements is that they seek to mobilise members and supporters in pursuit of justice. Thus, a fifth response has been to mobilise union members, other workers, and wider public opinion against injustice at work. Social-movement unionism is described as having two connected aspects: on the one hand, there are attempts to re-create trade unions as social movements, while on the other, there are attempts to subsume trade unions within a broader social movement.

Structure of Trade Unions

Regardless of the strategy unions may adopt, how they are structured and organised plays a significant role in determining whether they will be able to cope with the dramatic changes in the labour market. The structure of the union refers to the representational basis upon which the union is premised.¹⁶⁴ This refers to the identification of unions as craft, industrial, or social unions. The organisation of a union refers to the institutions and processes that form its internal administrative, representative, and authority systems.¹⁶⁵

Representation refers to the extent to which union members control their union directly or through representative government, such as union structures. Administration refers to how efficient and effective unions are in achieving their goals.¹⁶⁶ In terms of the representation debate, most trade unions are said to have a strong democratic tradition and members can influence the decisions taken at a workplace or shop-floor level, which are filtered through to the highest decision-making bodies. Given this scenario, one may assume that members should be able to lobby for the organisation and representation of non-standard workers. However, given the tensions between standard (and unionised) employees and non-standard (and un-unionised) workers, it may be difficult for the unions to decide to organise non-standard workers.

162 *ibid.*

163 *ibid.*

164 Jack Fiorito and Paul Jarley, 'Trade Union Morphology' in Paul Blyton, Nicolas Bacon, Jack Fiorito and Edmund Heery (eds), *The Sage Handbook of Industrial Relations* (Sage 2008) 190.

165 Klerck (n 132).

166 See Valerio de Stefano, 'Smuggling-in Flexibility: Temporary Work Contracts and the "Implicit Threat" Mechanisms: Reflections on a New European Path' (2009) 24 <https://www.ilo.org/labadmin/info/pubs/WCMS_116294/lang--en/index.htm> accessed 29 July 2021.

Decline of Trade Unionism

The role of trade unions has changed significantly over the past three decades. Global competition, a growing outsourcing trend, legal constraints, and employer-sponsored forms of employee participation have combined to cause a significant fall in union membership and the use of collective bargaining. The coming decade promises to be equally challenging for the trade union movement. Nonetheless, how trade unions respond to the challenges and opportunities over the next few years will be crucial in determining their future level of influence in the world of work.

Trade unions play a significant role in directly shaping people's working lives in South Africa and the world, although their influence has declined in recent times and is a worldwide phenomenon. The proportion of workers who are members of unions fell in the first decade of the twenty-first century. However, this decline was modest, and far less dramatic than the decline of the preceding two decades. For instance, in Britain, the following factors have all contributed to a sharp decline in membership: the exposure of firms and industries to greater market pressures; growing outsourcing trends; a growth in non-standard employment; employer-sponsored forms of participation and representation among others.

As Gladstone¹⁶⁷ states:

The changing patterns of world production, the decline in the industrialised economies of basic manufacturing and extractive industries and the changing employment patterns between major economic sectors, as well as continuing and even more revolutionary technological developments, and a change in the nature, composition and aspirations of the labour force are all exercising and will continue to exercise pressures and constraints on industrial relations systems. These pressures are considerable in respect of the industrial relations actors – in particular the trade unions.

These changes have a pivotal effect on the collective organisation of labour relations and the legal mechanisms governing worker representation, action, and collective bargaining.¹⁶⁸

Trade Unions in South Africa

Although trade unions in South Africa have made significant gains in the workplace, they are still confronted with several challenges. Some of the key issues include lack of transformation in certain sectors where the union organises employees, casualisation,

167 Alan Gladstone, 'Reflections on the Evolving Environment of Industrial Relations' in Roger Blanpain and Manfred Weiss, *Changing Industrial Relations and Modernisation of Labour Law* (Kluwer Law International 2003) 151.

168 Alain Supiot, *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001) 94.

informalisation of jobs, outsourcing of services, deployment of union leaders outside the union, corruption in the workplace, the threat posed by rival unions and many more issues.¹⁶⁹ In addition, a lack of capacity among trade unions limits the extent to which they can effectively protect and serve members' interests at the workplace level. The limited capacity of trade unions also affects the extent to which they can perform their role within the formal peak-level tripartite structures, particularly in the formulation of labour laws and economic policy.¹⁷⁰

Further, a weak trade union movement also impacts the enforcement of labour laws. Only trade unions with sufficient capacity can play an important role in monitoring compliance with labour laws. The capacity of trade unions to perform these various roles depends, in many respects, on whether they can achieve a sufficient level of union density to serve as a base from which they might have some influence. However, unions frequently find it difficult to achieve significant levels of union density in the South African labour market. A key challenge for unions in this regard is the spread of informalisation, casualisation, and externalisation: all leading to non-standard work relationships under which workers are difficult to organise.¹⁷¹ The declining level of formal employment in the labour market in South Africa poses further challenges, as do retrenchments and other structural factors that result in a loss of employment. Where unions do not adopt flexible strategies to respond to these labour market realities, their capacity to attract members and to represent them is significantly diminished,¹⁷² particularly with regard to non-standard workers, who are often vulnerable.

Another institutional factor affecting the capacity of some trade unions in South Africa is their close affiliation to the ruling political party. Such relationships are largely the legacy of cooperation between the two organisations during the struggle for independence. In South Africa, the Congress of South African Trade Unions (COSATU) is allied with the African National Congress (ANC) and the South African Communist Party (SACP). Being closely affiliated to the ruling party is not necessarily a problem for the trade union movement or workers—indeed, such alliances may facilitate union input into government and thus influence the policy-making process in

169 See Gerald Monyatsi, 'The Role and Challenges of Trade Unions in Post-Apartheid South Africa: The Case of the National Education Health and Allied Workers Union' <https://dspace.nwu.ac.za/bitstream/handle/10394/17303/Monyatsi_G.pdf;sequence=1> accessed 26 August 2021.

170 Marius Olivier and Evance Kalula, *Social Protection in SADC: Developing an Integrated and Inclusive Framework: South Africa* (University of Cape Town 2012) 8.

171 Fenwick and others (n 5) 2–3.

172 *ibid.*

favour of organised labour.¹⁷³ However, these affiliations may also mean that workers' interests are easily subordinated to other priorities of the ruling party.¹⁷⁴

Generally, despite the adoption of various internal strategies and the introduction of laws encouraging employers to recognise unions, the downward trend in union membership has continued in recent years, albeit at a slower pace. How unions respond to the challenges and opportunities presented by the changing nature of work and employment relations, will be decisive in determining their level of influence in the workplace in the coming years.

Conclusion

This article discussed trade unions and collective bargaining which are widely recognised as important tools for improving working conditions and labour relations.

It is suggested that the role played by collective bargaining and trade unions in a globalised era, is crucial since one of the major issues for non-standard or vulnerable workers is their inability to unionise and voice their concerns collectively. As indicated in this article, unions have always depended on collective bargaining and on union fees to deliver services and benefits to members. Diminishing union membership, as examined above, is negatively impacting the finances of trade unions, leaving them unable to provide services and benefits outside of the collective bargaining structure. This article contends that social justice and the democratisation of the workplace cannot be achieved while workers in non-standard or vulnerable employment remain outside of collective bargaining and trade union structures.

This article also examined challenges associated with promoting collective bargaining for non-standard vulnerable workers, the significance of joining a trade union, and non-standard workers' attitudes and interests were also considered. This included an evaluation of trade unions' approach to non-standard employment with particular attention to trade unions in South Africa.

173 *ibid.*

174 *ibid.*

References

- Alfers L, Lund F, and Moussié R, 'Extending Occupational Health and Safety to Urban Street Vendors: Reflections from a project in Durban, South Africa' (2016) *NewSol* <<https://doi.org/10.1177/1048291116642711>>
- Arndt S, 'Globalisation and Economic Development (1990) 8(3) *Journal of International Trade and Economic Development* <<https://doi.org/10.1080/09638199900000018>>
- Aye B, 'Combating Precarious Work in the Nigerian Oil and Gas Industry: "NUPENGASSAN" and the Struggle for Transition from Informality to Formal Employment and Labour Relations' *Global Labour University Research* (2017).
- Baglioni G, 'Industrial Relations in Europe in the 1980s' in Baglioni G and Colin C (eds), *European Industrial Relations: The Challenge of Flexibility* (Sage 1991).
- Bamber G and Sheldon P, 'Collective Bargaining' in Blanpain R, Bamber G and Angels C (eds), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Kluwer Law International 2002).
- Bamber G, Hoffer Gittel J, Kochan T and Von Nordenflycht A, 'Contrasting Management and Employment-Relations Strategies in European Airlines' (2009) 51(5) *Journal of Industrial Relations* <<https://doi.org/10.1177/0022185609346185>>
- Belkacem R, Kornig C and Nosbonne C, 'Mobiliser, défendre les intérimaires. Les difficultés de l'action syndicale' (2014) 83(4) *La Revue de L' Ires* <<https://doi.org/10.3917/rkli.083.0003>>
- Bendapudi V, Mangum S, Tansky J and Fisher M, 'Non-standard Employment Arrangements; A Proposed Typology and Policy Planning Framework' (2003) 26(1) *Human Resource Planning*.
- Bendix S, *Industrial Relations in South Africa* (Juta 2005).
- Benson J and Ieronimo N, 'Outsourcing Decisions: Evidence from Australia-based Enterprises' (1996) 135(1) *International Labour Review*.
- Bosch C, 'The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?' (2013) 34 *Industrial Law Journal*.
- Bosch G, 'Low Wage Work in Five European Countries and the US' (2009) 148(4) *International Labour Review* <<https://doi.org/10.1111/j.1564-913X.2009.00067.x>>
- Brews P and Tucci C, 'Exploring the Structural Effects of Internetworking' (2004) 25(5) *Strategic Management Journal* <<https://doi.org/10.1002/smj.386>>

- Brosnan P and Thornthwaite L, 'Atypical Work in Australia: Preliminary Results from a Queensland Study' in Callus R and Schumacher M (eds), *Current Research in Industrial Relations* (Industrial Relations Academics of Australia and New Zealand 1994).
- Campbell I, *Trade Unions and Temporary Employment: New Initiatives in Regulation and Representation* (University of Melbourne 2011).
- Carley M, 'Non-standard Forms of Employment in Europe: Part-time Work, Fixed-term Contracts and Temporary Work Contracts' (2008) 3 *European Industrial Relations Review* (EIRR) Report.
- Chabalala J, 'Court Hears How Employees' "Basic Human Rights" Were Allegedly Violated at Joburg Factory' (*News24*, 12 May 2021)
<<https://www.news24.com/news24/SouthAfrica/News/court-hears-how-employees-basic-human-rights-were-allegedly-violated-at-joburg-factory-20210511>> accessed August 2021.
- Chowdhury R, 'Globalisation and the Informal Sector in South Asia: An Overview' Eradication of Poverty and Quality of AID Eurostep South Asia Consultation (New Delhi, September 2000) Background Paper.
- Cooney S, Lindsey T, Mitchell R and Ying Z (eds), *Law and Labour Market Regulation in East Asia* (Routledge 2005).
- Crush J, Williams V and Peberdy S, 'Migration in Southern Africa' (2001) *Journal of Southern African Studies*.
- Davies P and Freedland M, *Kahn-Freund's Labour and the Law* (Stevens 1983).
- Dawkins P and Norris K, 'Casual Employment, Labour Regulation and Australian Trade Unions' (1990) 16 *Australian Bulletin of Labour*.
- De Stefano V, 'Smuggling-in Flexibility: Temporary Work Contracts and the "Implicit Threat" Mechanisms: Reflections on a New European Path' (2009)
<https://www.ilo.org/labadmin/info/pubs/WCMS_116294/lang--en/index.htm> accessed 20 June 2021 <<https://doi.org/10.2139/ssrn.1433350>>
- Development Policy Research Unit (DPRU), *An Exploratory Look into Labour Market Regulation* (University of Cape Town 2007).
- Du Toit D, 'What is the Future of Collective Bargaining (And Labour Law) in South Africa?' (2007) *International Labour Relations Journal*.
- Ebbinghaus B, 'Trade Union Movements in Post-industrial Welfare States Opening Up to New Social Interests?' in Armingeon K and Bonoli G (eds), *The Politics of Post-Industrial Welfare States: Adapting Post War Social Policies to New Social Risks* (Routledge 2006).

- Erasmus B, Gobind J, Holtzhausen M and others, *South African Employment Relations: Theory and Practice* (Van Schaik 2020).
- Feldman Y, 'Ex-Ante vs. Ex-Post: Optimising State Intervention in Exploitive Triangular Employment Relationships' (2009) *Comparative Labor Law and Policy Journal*.
- Fenwick C and Kalula E, 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' (2001) 21(2) *International Journal of Comparative Labour Law and Industrial Relations*.
- Fenwick C, Kalula E and Landau I, 'Labour Law: A Southern African Perspective' in Tekle T (ed), *Labour Law and Worker Protection in Developing Countries* (Routledge 2007).
- Fine J, 'Alternative Labour Protection Movements in the United States: Reshaping Industrial Relations?' (2015) 154 1 *International Labour Review* <<https://doi.org/10.1111/j.1564-913X.2015.00222.x>>
- Finnemore M and Van Rensburg R (eds), *Contemporary Labour Relations* (LexisNexis Butterworths 2002).
- Fiorito J and Jarley P, 'Trade Union Morphology' in Blyton P, Bacon N, Fiorito J and Heery E (eds), *The Sage Handbook of Industrial Relations* (Sage 2008).
- Fudge J and Owens R, *Precarious Work, Women and the New Economy* (Oxford Hart 2006).
- Gallagher DG and Sverke M, 'Contingent Employment Contracts: Are Existing Employment Theories Still Relevant?' (2005) 26(2) *Economic & Industrial Democracy* <<https://doi.org/10.1177/0143831X05051513>>
- Gladstone A, 'Reflections on the Evolving Environment of Industrial Relations' in Blanpain R and Weiss M, *Changing Industrial Relations and Modernisation of Labour Law* (Kluwer Law International 2003).
- Godfrey S, Theron J and Visser M, 'The State of Collective Bargaining in South Africa: an Empirical and Conceptual Study of Collective Bargaining' <http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf> accessed 27 June 2021.
- Gumbrell-McCormick R, 'European Trade Unions and "Atypical" Workers' (2011) *International Relations Journal* <<https://doi.org/10.1111/j.1468-2338.2011.00628.x>>
- Haberfield Y 'Why do Workers Join Unions? The Case of Israel' (1995) 48(4) *Industrial and Labour Relations Review* <<https://doi.org/10.2307/2524349>>

- Harrison B and Kelley M, 'Outsourcing and the Search for "Flexibility"' (1993) 7(2) *Work, Employment and Society* <<https://doi.org/10.1177/095001709372003>>
- Heery E and Abbot B, 'Trade Unions and the Insecure Workforce' in Heery E and Salmon J (eds), *The Insecure Workforce* (Routledge 2000) <<https://doi.org/10.4324/9780203446485.ch8>>
- Hepple B and Fredman S, *Labour Law and Industrial Relations in Great Britain* (Kluwer Law and Taxation Publishers 1992).
- ILO, 'Firms' Demand for Temporary Labour in Developing Countries: Necessity or Strategy?' <www.ilo.org/public/english/wcsdg/docs/rep2.pdf> accessed 25 January 2021.
- ILO, 'Fundamental Rights at Work and International Labour Standards' <https://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_087424.pdf> accessed 15 March 2020.
- ILO, *Global Employment Trends for 2014* <<https://www.ilo.org/global/research/global-reports/global-employment-trends/2014/lang--en/index.htm>> accessed 16 July 2021.
- ILO, *World Employment and Social Outlook: Trends 2019 Report* <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_615594.pdf> accessed August 2021.
- ILO, *International Labour Conventions and Recommendations Vol 1 (1919–1951)* (ILO 1996).
- ILO, 'Resolution Concerning Decent Work, and the Informal Economy' (2002) <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/meetingdocument/wcms_098314.pdf> accessed 28 August 2021.
- James P, 'Trade Unions and Non-standard Employment' in Harcourt HM and Wood G (eds), *Trade Unions and Democracy: Strategies and Perspectives* (Routledge 2017) <<https://doi.org/10.4324/9781351301442-5>>
- Kalleberg AL, 'Precarious Work, Insecure Workers: Employment Relations in Transition' *American Sociological Review* (2009) <<https://doi.org/10.1177/000312240907400101>>
- Keiichiro H and Noboru O, 'Non-regular Workers: Legal Policy, Social Dialogue and Collective Bargaining. The Study of Japan' (Geneva ILO 2011).
- Keune M, 'Trade Union Responses to Precarious Work in Seven European Countries' (2013) *International Journal of Labour Research*.
- Klerck G, 'Trade Union Responses to the "Flexible" Workforce in Namibia' (2002) 6 *African Sociological Review* <<https://doi.org/10.4314/asr.v6i2.23216>>

- Ko JR, 'Contingent and Internal Employment Systems: Substitutes or Complements?' (2003) 24(3) *Journal of Labor Research* <<https://doi.org/10.1007/s12122-003-1009-y>>
- Levitt T, 'The Globalization of Markets' (1983) *Harvard Business Review*
- Lund F and Srinivas S, *Learning from Experiences: A Gendered Approach to Social Protection for Workers in the Informal Economy* (International Labour Office Geneva 2000).
- Lund F and Naidoo R, 'The Changed World of Work' (2016) *NewSol* <<https://doi.org/10.1177/1048291116653053>>
- Mackenzie R, 'Union Responses to Restructuring and the Growth of Contingent Labour in the Irish Telecommunications Sector' (2010) 30 *Economic and Industrial Democracy* 539 <<https://doi.org/10.1177/0143831X09342626>>
- McGrew A, 'A Global Society' in Hall E, Held D and McGrew A (eds), *Modernity and its Futures* (Polity Press 1990).
- Millen BH, *The Political Role of Labour in Developing Countries* (The Brookings Institution 1963).
- Mills SW, 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility' (2004) 25 *ILJ* 1203.
- Mitchell M and Murray J, 'Changing Workplaces Review: An Agenda for Workplace Rights' Special Advisors' Interim Report (Ministry of Labour, Canada 2017).
- Monyatsi G, 'The Role and Challenges of Trade Unions in Post-Apartheid South Africa: The Case of the National Education Health and Allied Workers Union' <https://dspace.nwu.ac.za/bitstream/handle/10394/17303/Monyatsi_G.pdf;sequence=1> accessed 26 August 2021.
- Nesheim T, Kalleberg A and Olsen K, 'Externalizing the Core: Firms' Use of Employment Intermediaries in the Information and Communication Technology Industries' (2007) 46(2) *Human Resource Management* <<https://doi.org/10.1002/hrm.20159>>
- Ohmae K, *The Borderless World: Power and Strategy in the Interlinked Economy* (Harper Business 1990).
- Okafor E, 'Sociological Investigation of the Use of Casual Workers in Selected Asian Firms in Lagos, Nigeria' (2012) 6(26) *African Journal of Business Management*.
- Olivier MP, 'Social Protection in the SADC Region: Opportunities and Challenges' (2002) 18(4) *International Journal of Comparative Labour Law and Industrial Relations* <<https://doi.org/10.1023/A:1021371806830>>

- Olsen K and Kalleberg A, 'Non-standard Work in Two Different Employment Regimes: Norway and the United States' (2004) 18(2) *Work, Employment & Society*
<<https://doi.org/10.1177/09500172004042772>>
- Porter M, *The Competitive Advantage of Nations* (The Free Press 1990)
<<https://doi.org/10.1007/978-1-349-11336-1>>
- Rogerson C, 'Globalisation or Informalisation? African Urban Economies'
<<http://www.unu.edu/unupress/unupbooks/uu26ue/uu26ue0q.htm>> accessed 27 January 2021.
- Rubiano C, 'Precarious Workers and Access to Collective Bargaining: Are there Legal Obstacles?' (2011) *International Journal of Labour Research*.
- Schillinger HR, *Trade Unions in Africa: Weak but Feared* (International Development Cooperation: Occasional Papers 2005).
- Sundar S, *Non-regular Workers in India: Social Dialogue and Innovative Practices* (Geneva, ILO 2011).
- Supiot A, *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001).
- Theron J, *Options for Organising Waste Pickers in South Africa* (WIEGO 2010).
- Theron J, Godfrey S and Visser M, 'Keywords for a 21st Century Workplace' (2011) *Development and Labour Monograph Series* (UCT).
- Van Eck S and Nemusimbori E, 'Uber Drivers: Sad to Say, But Not Employees of Uber SA' (2018) 81(3) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg.*
- Van Eck S, 'Regulated Flexibility and the Labour Relations Amendment Bill of 2012' (2013) *De Jure*.
- Webb B and Webb S, *History of Trade Unionism* (Longmans 1920).
- Weil D, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014)
<<https://doi.org/10.4159/9780674726123>>
- Yun A, 'Curbing Precarious Informal Employment: A Case Study of Precarious Workers in the South Korean Construction Industry' (Global Labour University Working Paper No 49 2017).

Cases

Minister of Defence & Others v SA National Defence Union & Others [2006] 11 BLLR 1043 (SCA).

SANDU and Others v Minister of Defence and Others 2007 (5) SA 400 (CC).

Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure 7 July 2017 WECT12537-16 unreported.

Uber BV v Aslam [2021] UKSC 5.

Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers (2018) 39 ILJ 903 (LC).

Universal Church of the Kingdom of God v Myeni & Others (2015) 36 ILJ 2832 (LAC).

Wyeth SA (Pty) Ltd v Manqele & Others [2005] 6 BLLR 523 (LAC).

Legislation

Basic Conditions of Employment Act 75 of 1997.

The Constitution of the Republic of South Africa, 1996.

Employment Equity Act 55 of 1998.

Labour Relations Act 66 of 1995.

Labour Relations Amendment Act 6 of 2014.