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Non-standard Work: an Employer Perspective

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Introduction

This paper examines the issue of non-standard work from an employer/business perspective, beginning with a brief look at the development of international labour standards as a means of providing protections for an industrial work force. It goes on to consider the extent to which these labour standards (contained in International Labour Organisation conventions and recommendations) have been adopted and the effect they can have on local legislation. The paper notes how difficult it is to make international comparisons, and goes on to address some of the arguments made against non-standard work. It points out that in New Zealand, basic employment protections are now contained in a statutory code, and that the code, as such, relates to most forms of non-standard work. The paper refers to the increasing use made of non-standard forms of work and suggests reasons why this seems be so. The fact that non-standard forms of work are now far more common than they might once have been is acknowledged, and the paper suggests that this can be explained not only in terms of employer requirements, but by the reality that non-standard work forms are a way of meeting the needs of what is a now a very diverse labour market. The paper also examines the various forms of non-standard work and explains the extent to which these are covered by New Zealand's statutory code. Particular reference is made to the intermittent nature of many jobs and the consequent use of the triangular employment relationship – labour hire employees – as a means of accommodating lulls in workplace activity. The paper concludes by questioning the wisdom of constantly extending the reach of employment law, and suggests that non-standard forms of work is one consequence of making it rather too hard to employ on a full-time basis.

Times change, and the increasing use of non-standard forms of work simply reflects what might, paradoxically, be described as that immutable fact. The emergence of the ILO after the First World War was a response to calls for greater, even some, protections for workers. As its website states, the ILO: "was created … to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice" (ILO, n.d). It was, and still is, distinguishable from other international organisations not only by its longevity, but by its tripartite – Government, union and employer – structure. Essentially, however, from the beginning the ILO was, and continues to be, more worker than employer-focused. Today some consider a better balance is needed.

World wars tend to breed pious sentiments rather than concrete actions; the ILO's creation has not fulfilled its aim of achieving universal and lasting peace. But, what its standards' development process has achieved is a considerable improvement in the working lives of those in formal employment, almost to the extent that, once they have been taken on, employees enjoy something like a proprietary right in the jobs they are employed to do.

Of course, while ILO standards (conventions and recommendations) are thrashed out in debate, they remain, by nature, compromise documents; a compromise that is more likely to favour unions than employers, which is a reflection of the ILO's origins. Now, while Governments are not obliged to ratify conventions once negotiated, many will do so in the expectation of gaining ILO support to help achieve compliance, but with no necessary intention of implementing convention provisions,

or certainly not in the near future. For the ILO, there has always been a tension between those countries that effectively observe its standards, even if they do not ratify them, and those that, whether they ratify or not, are unable to comply with a convention's standard.

New Zealand, for example, does not ratify any conventions unless its domestic legislation is seen as being in strict compliance, which is not always the case given that many conventions are overly prescriptive and that, self-evidently, one size rarely fits all. But non-ratification does not prevent expanded ILO requirements from gaining acceptance. New Zealand now provides for 14 weeks' paid parental leave even though, along with very many other countries, it has not ratified the latest Maternity Protection Convention which requires that amount of paid leave to be granted.

The notion of paid parental leave has now gained general acceptance, but for anyone in business, an ever-expanding list of requirements for daring to employ can be quite daunting. For smaller business owners, who often have a great deal invested in their business, and are highly indebted, the effect can be particularly off-putting, and understandably, they will look for other ways to employ. In the process, their concerns help to encourage the growth of non-standard forms of work.

However, employer concerns are far from being the only reason for the development of non-standard forms of work. Some commentators see non-standard work forms as a product of globalisation and trade liberalisation. Thus, another possible reason for its growth is to assist countries with demanding labour standards compete more effectively against those with inferior standards.

This view assumes that protections applying to the full-time employment relationship will not extend to non-standard work, which for much non-standard work, at least in New Zealand, is far from being the case.

Those who decry the use of non-standard work as part of a competitive strategy are, in the writer's opinion at least, likely to be of a protectionist frame of mind both in relation to freer trade, and in the sense, that full-time employment is seen as the desirable norm. Such individuals are unwilling to recognise globalisation and freer trade as offering new employment opportunities, encouraging the development of new enterprises and new ways of working and facilitating the private sector growth that in turn facilitates economic growth and allows poorer countries to improve their standard of living. On the other hand there are many who believe the opposite to be true. What emerges is that the non-standard work issue is a question of balancing competing interests and outcomes, not of substituting one for another.

Other commentators cite new technology as a contributor to the growth of non-standard forms of work, and certainly, in many countries, new technologies have helped significantly to change the way work is done. Due to technology, many of the unpleasant and dangerous jobs that were perhaps the original impetus for the ILO's creation no longer exist.

All else aside, in light of the changing nature of work it is hardly surprising that those who see themselves as technicians rather than 'workers' often now look for more flexible employment arrangements than might once have been available.

The word flexibility has become something of a buzz word with calls for workplace flexibility increasingly heard. But objections to non-standard work and demands for flexibility will often conflict, since to decry non-standard work – or certainly some of its manifestations – is to decry flexibility. Essentially, flexibility and non-standard employment go hand in hand since without the

ability to work in a non-standard way many individuals would have no opportunity at all to work in paid employment. Non-standard work has its advantages - for employers and workers alike.

What constitutes non-standard work will vary from country to country and its advantages and disadvantages will differ from person to person, depending on the non-standard work arrangement in place, and whether it is the only form of work available or whether it was specifically chosen. It is also the case, Danesi (2011: 4) pointed out, as a speaker at a recent ILO regional conference in Lagos, that while the term is used globally, "… there is no internationally agreed definition of [non-standard work arrangements]"

While standard work is full-time employment, what constitutes full-time employment is not strictly defined. In some countries it will be 30 hours a week, in others 40, with doubtless many possible variations. For instance, work and its various permutations are heavily defined in the European Union whereas in the Pacific they are minimally regulated. The variations are less to do with general categorisation of different economies and whether they are developed or developing, and more to do with the proportions of the viable workforce that work in the formal and informal economies of their respective countries. So it will rarely be a matter of comparing like with like and attempts at international comparisons are fraught with difficulty from an accuracy point of view. In some places, for example, anything under 30 hours may be seen as non-standard while in others, fewer than 40 hours will attract the non-standard label.

Then, there is temporary, casual and fixed term employment and employment in a contracting capacity, all non-standard. Yet all provide jobs that might otherwise not be on offer, giving those who take them on the opportunity to participate in the labour market when without such jobs, they might not have been able to do so.

Put another way, whenever employers look for more accommodating employment arrangements there are always individuals seeking employment who are happy to work for fewer than full-time hours, however defined. Maternity protection legislation (parental leave) requires employers to keep open the job of anyone who takes the leave. But if the job was full-time then it is the full-time job that must be kept open, something that not all women returning from parental leave want. Frequently the employee would prefer the employment to be part-time or, in other words, non-standard, and that can present the employer with a difficulty. It needs to be recognised that it is to non-standard work that the pressure for workplace flexibility most often leads. It will be interesting to see whether, in due course, the courts will decide that an employer, in the parental leave return situation, can be required to provide reduced work hours if that is what the employee is seeking.

So, a conflict operates here. And not just in relation to part-time work. Apart from looking for part-time work, many persons will work on a casual basis, frequently willingly so. As with part-time work, causal work this will sometimes be a way of accommodating caring responsibilities, sometimes to supplement household income or a student allowance, sometimes in order to cope with benefit abatement rates. Whatever the reason, labour force attachment is maintained or, for younger persons, valuable work experience gained. There is no doubt that work experience, at whatever age it is obtained, is a valuable asset. Employers looking to take on new employees will frequently use lack of work experience as a factor when deciding who to, or rather who not to, employ.

At the other end of the working life spectrum there will be employees who want to reduce their hours but still keep their hand in. Non-standard employment also offers the possibility of achieving that aim.

Casual work is sometimes referred to as 'precarious' employment but due to employment relations protections in New Zealand, casual work cannot be seen within the precarious category. Although at common law, a strictly casual employment relationship involves a new contract on every occasion, therefore, the employee has no record of continuous service with the employer, with most employing organisations permanent casuals are more the norm than the exception.

It is sometimes thought that casual work is not 'good' work, particularly if it is lower paid, and the same derogatory terminology is often used of any lower paid employment. But lower paid work is a better choice than life on a benefit, with no work experience to offer the hope of a 'better' job. And lower paid jobs are there to be done. Shouldn't anyone be asked to do them?

Then there is fixed term employment. Fixed term employment, too, maintains workforce attachment with the advantage that it can be fitted in around other activities. For many people it is an ideal way of working, allowing individuals to engage in whatever other needs or interests they may have or to accommodate other responsibilities.

And it must not be forgotten that in New Zealand all non-standard work as an employee – and all the jobs so far referred to involve an employment relationship – is covered by the same employment protections that full-time employees enjoy. Often it seems there is some confusion on this point. But whether employees work standard or non-standard hours or in a standard or non-standard capacity, they are nevertheless entitled to the holidays and leave for which the Holidays Act provides, and to at least the minimum wage. They can also take a personal grievance if things go wrong, must have a safe and healthy working environment and are covered by ACC.

Non-standard employees are free to join unions and to work under collective agreements. This is true even for those who work for a fixed period of time unless they have chosen to enter into a contract for services relationship.

Working in a contracting capacity is far from new, nor are the arguments about the nature of contracting arrangements. Self-employment, in the form of so-called dependent contracting where there is only one employer involved, has frequently led to controversy. As other writers will have doubtlessly pointed out, should a dispute arise, long-established indicia will determine whether someone (or keep 'the person concerned') is an employee or a contractor.

The difference, since the Employment Relations Act 2000, is that while the court and the Employment Relations Authority are required to look at what the parties intended, somewhat confusingly, they must not treat "… as a determining matter any statement by the persons that describes the nature of their relationship" (ERA s6(3)(b). In other words, if challenged, what was contractually agreed is likely to mean very little.

Dependent contractor arrangements are often, for a business, a matter of economic necessity, just as are other non-standard work arrangements. They may even reflect the nature of the industry. There appears to be very little general understanding of the need firms can have to keep costs down if they are to remain viable and continue to offer paid work. Legislative requirements make employment a considerable cost over and above wages payable, so that direct employment relationships are beyond the means of some firms, to the detriment of many without paid work. Unfortunately there are individuals who would prefer anyone working as a dependent contractor to be unemployed rather than engaged in a gainful activity, and one with its own tax benefits. Again, the term precarious employment will frequently be heard and yet self-employment is more often than not a genuine choice, another aspect of the desire for flexibility.

And, as indicated, dependent contracting can always be subject to scrutiny by the courts or the Authority. The Employment Relations Act subscribes to the belief that from the beginning has driven the ILO, namely that there is an imbalance between employer/employee bargaining power. But that was then and this is now. Today, there are many occasions when the reverse applies.

So there should be a modicum of sympathy for employers who having legitimately entered into a contract can find it undone because one party's intentions have changed since the contract was signed. At the same time, it is accepted that the ability to challenge the nature of a contractual relationship is a significant safeguard should real exploitation occur.

Contractors with more than one employer are another matter, entirely. These self-employed individuals sink or swim on their own unless, if a contract goes wrong, they can afford expensive litigation.

If contracting is not always a contentious activity, rather more contentious is the growing use of just-in-time workers engaged via labour hire firms. Again, such developments do not happen out of the blue; they are a response to a specific need. Labour hire arrangements come about when the cost of employing makes it no longer feasible to offer permanent, full-time employment.

Many jobs are by nature intermittent. The construction industry is full of examples of jobs that need to be done but can be done only in the right weather conditions. This industry is one to which managing overall costs is critical. Prospective new home owners are unlikely to be happy, for instance, with having to pay wages to idle builders, electricians and so forth when the weather is wet and no work is performed.

And retailers, cafés and restaurants all have peak times and times where customers are scarce on the ground. Some firms experience lulls when the work just does not arrive. All such businesses need people to work in them, just not all those people all of the time. After all, to be able to employ a firm must have the ability to pay but if the work dries up and there is no money coming in then, quite soon, finding the means to pay can be difficult, impossible even. But that does not relieve employers of their employee obligations. Whether or not clients, customers or contractors pay *their* bills, the liability to employees does not go away.

Consequently, for many businesses the answer is entry into what is referred to as a triangular employment relationship, usually with a labour hire company. A relationship of this kind means individuals can be taken on when work is available but without becoming the firm's direct responsibility. When the job finishes so does the labour hire contract. The system does not guarantee permanent employment but it does offer work and, therefore, pay. And as a basis for working it can suit many people. It also allows anyone hired in this way to assess a variety of workplaces and possibly to gain a variety of skills. It is another way to gain useful work experience.

The labour hire relationship relieves the hiring firm of direct responsibility for the person hired although there is now some concern that an arrangement of this kind will not hold good in all circumstances. One such relationship has recently come under the Full Employment Court's scrutiny.

In the case of *McDonald v Ontrack Infrastructure Ltd and Anor,* a trainee track worker worked for the defendant for eight months before his assignment came to an end. He sought to argue that Ontrack was his employer rather than Allied Work Force, the labour hire company that had placed him with Ontrack, and, therefore, the end of his assignment constituted unjustifiable dismissal.

The Full Employment Court noted that there could be no argument about the plaintiff's status (he was clearly an employee), and that the question of whether the employment relationship was with Ontrack or with Allied was one of fact to be determined by a single judge. Had there been a point when the plaintiff entered into a contract of service with Ontrack, making Ontrack thereafter the employer? The Court was of the view that it would be unhelpful to formulate any list of rules or factors into which account must be taken. In the end, all relevant matters would need to be considered.

As the Full Court indicated, this was the first case it was aware of that had addressed the issue of triangular relationships, therefore,

> ...Courts should move cautiously in developing doctrines such as implied triangular employment relationships, especially where, as in this case, only very broad principles can be stated. As in many such cases, the inquiry will be intensely factual and the result of the case determined accordingly (NZEmpC 132: 51).

Therefore, for the future, any firm wanting to enter into a labour hire relationship will need to be very careful to ensure the relationship is properly managed. Firms hiring someone on a temporary basis do not, subsequently, want to find themselves the object of a personal grievance. Unjustifiable dismissal claims are generally a source of unpleasantness for everyone involved. A recent Department of Labour (2010) study found that the personal grievance process was stressful for both parties and that the stress, and the fear of costs had been exacerbated by the thought that the process might be drawn out. Entering into a labour hire relationship, apart from its usefulness in allowing firms to cope with varying workforce needs, has hitherto spared them the drama of a personal grievance. Possibly, that immunity may not last.

In conclusion, this is the where the wisdom of constantly extending the reach of employment law needs to be reconsidered. No-one doubts the need for employee protections but as noted, these now appear in the form of a statutory code. Nor are most employers out to take advantage of their workforce. That is not the way to get the best from an employee. As an aside, the introduction of a 90-day grievance-free probationary period received much adverse comment. But employers do not employ to dismiss, that is far too expensive an exercise, and to suggest that they do is to misunderstand completely what the hiring process involves. The 90-day period (now severely restricted by the Employment Court) was intended as an incentive to hire, not to fire.

Unfortunately statutory obligations can impose a cost that an organisation cannot bear. When that happens, businesses will look to labour hire contracting or to directly hiring contractors in place of employees. The work is there to be done and to be done to an acceptable standard. Treating anyone in a contractual relationship badly, whatever form the contracting takes, will not achieve those outcomes.

As well, labour hire employees have the right to take claims against the labour hire company. And like other non-standard employees, they are covered by relevant statutory provisions. Coverage under collective agreement terms and conditions is also possible.

Therefore, to use a currently popular phrase, the only real elephant in the room is work that is contracted out to a self-employed person who works only for the one firm. Tax benefits to the contractor have been mentioned but there is a need for greater understanding of the reality that without the ability to contract work out in this way, that work would not likely be done at all. Is it really better to deny individuals paid work because the way they choose to work does not conform

to preconceived ideas of what employment should involve? Dependent contracting is not informal work as that term is known overseas. The informal sector has no connection whatsoever with mainstream employment.

Most non-standard work in New Zealand is not, as is so often the case overseas, removed from the formal employment sector; it is very much a part of it. And non-standard work forms are increasingly used to accommodate the needs of employees, perhaps more so than employers, given there is now a statutory right to request flexible, non-standard hours.

We have come to recognise that full-time employment does not suit everyone. More women are employed than was once the case, improvements in technology allow increasing numbers of disabled persons to be in paid work, individuals reaching retirement may want reduced employment hours, young people want work experience, people with caring responsibilities want to work when they are able to, the list goes on. Any or all such individuals may require a form of non-standard work, including work as a dependent contractor. Why deny them? Non-standard work is as much a response to supply side as to demand side factors. We are no longer at the start of the twentieth century and times do change.

References

Danesi, R.A. (2011). *Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria*. Paper presented at the IIRA Regional Conference Lagos. Retrieved from http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/5thsession/sessiona/nonstandardwork.pdf

Department of Labour. (2010). *Employer & Employee Views of the Personal Grievance Process: a Qualitative Study, April 2010.* Retrieved from http://www.dol.govt.nz/publications/research/personal-grievance/personal-grievance-process.pdf

ILO. (n.d). *Origins and History.* Retrieved from http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm

NZEmpC 132 McDonald v Ontrack Infrastructure Ltd And Anor. Retrieved from http://www.justice.govt.nz/courts/employment-court/documents/2010-%20NZEmpC%20132%20McDonald%20v%20Ontrack%20Infrastructure%20Ltd%20And%20Anor.pdf/view