THE EMPLOYMENT RELATIONSHIP
(Scope)

NATIONAL STUDY 2001
(JAMAICA)

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Introduction

The subject of this study, the scope of the employment relationship, has come to the forefront of national and international concerns in recent times. However, the issue of worker protection has been a salient feature of the employment relationship in Jamaica since the 1930s, when the first Labour Department was formed and the initial attempt at introducing minimum wage legislation was made. In fact, questions relating to the protection of workers were first pointed out by the Royal Commission which was sent to Jamaica in 1865, in the aftermath of the Morant Bay Rebellion and again highlighted in 1919 with the activism for a Trade Union Act.

After several decades of relatively little development in protective legislation for worker, a set of statutes was enacted in the 1970s, demarcating the present regime of protection for workers.

Yet, inasmuch as the statutes were enacted, giving basic rights to workers, there have been flaws in their design, many of which are now being exposed as the new era of globalization unfolds. At present, the typical worker in this country has standards related to his conditions of employment, which are generous as compared to most nations in the Third World. However, as the challenges to keep pace with international developments arise, a large group of persons within the labour force are finding less protection and access to the rights guaranteed under the legislation.

Much of the problem which workers in this country, are experiencing, relates to their exclusion from the statutory category of "worker" or "employee," or their inability to prove that they operate under contracts of employment. Where workers are either not defined as workers or employees under the relevant legislation, economic activity is carried on by these persons without the attendant benefits or requisite responsibility of the employer. As the phenomenon of "contract work" becomes more commonplace there is an increase in disguised employment with the worker in peril.

The overall impact of this is felt unequally by employers and workers. For the employer, there is a significant decrease in labour costs. On the other hand, the worker, even if he takes home more net pay, is unable to experience the range of benefits guaranteed to his counterparts, whose employment status is unequivocal. For workers to access the basic entitlements established by statute and common law, they need to be able to have machinery to prove their status as workers.

This study explores the legislative parameters within which the contract of employment is performed. It is intended examine the employment relationship scope, outlining the extent to which it accommodates the challenges presented by the increased prevalence of "contract work."

0.0 Brief Description of the Labour Force

0.1 *Labour Force Size and Composition*

At the beginning of the 1990s the Jamaican labour force was just over a million, with a figure of 1,065,500 in January 1990. Between period 1990 and 1998, the labour force grew by 7.0 percent, only to decline to 1,108,900 in 2000. Among the employed, there was a growth of around 6.6 percent and the unemployed by 9.1 percent between 1990 and 1998.

The actual size of the labour force is not particularly instructive, since it has remained relatively stable during the period. According to Anderson, this stability *"is reflective of the changing age-*

structure of the population as slightly smaller age-cohorts are now exiting the school system in search of employment."(Anderson 2000:6) This conclusion may seem to have positive implications

Table 1. Trends in Labour Force Participation (Per Cent) by Sex 1990 to 2000

	1990	1998	2000
Male	76	73.4	73
Female	62.4	58.2	54.3
Both Sexes	69	65.5	63.3

Source: STATIN The Labour Force 1991-2000

for the development of the national human resources, given that an increasing percentage of the population is accessing more education. Thus, more persons are moving away from unskilled work, thereby ultimately changing the profile of the labour force. This conclusion is supported by the fact that the most salient changes in the rates of participation have been in the under-25 age group. ((Anderson 2000:6)).

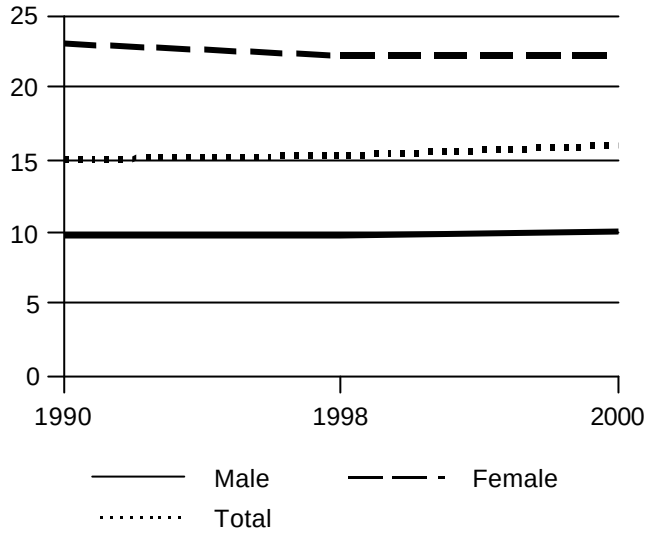
There is also the suggestion that a significant part of the trend is explainable by the relatively high rates of emigration. Given the lack of growth in the economy over the past three decades, migration has remained a viable option, exercised by a steady portion of the population.

The labour force participation rate raises other types of questions however. For the purposes of this report, the percentage of persons engaged in economic activity is important. It is therefore important to look at unemployment figures in order to obtain a clearer picture of what is occurring in the labour market.

From absolute figures of 893,800 persons in 1990, the employed labour force grew to 964,500 in 1997 and declined to 952,700 in 1998. By 2000 this had reached 933,500. Overall, the trend had been towards a decrease in employment levels. The unemployment rate hovered between 15 and 17 percent over the period, with the job-seeking rate showing a similarly narrow range, fluctuating between 6 and 8.3 percent.

Much of the unemployment, is 'gendered' with male unemployment being significantly lower than female. In 1990, female unemployment was 23.2 per cent as compared with 10.2 per cent for males. The figures for 1998 and 2000 indicate a general decline in the numbers, with figures of 22.6 and 22.9 respectively. For males, the figures show an overall increase in unemployment, even though the data for both sexes showed a slight decrease. Thus, it is female unemployment which is accounting for the reduction. Notwithstanding this, female unemployment remains high relative to that of males.

Figure 1. Unemployment Rate by Sex 1990 to 2000



Source: STATIN The Labour Force, 1990 to 2000

0.2 General Profile and Changes in the Labour Force

When one examines the data regarding the Jamaican labour market, a clearer picture may be gained by reviewing the distribution of employment by industry. Table 2 demonstrates the main changes in the distribution of jobs between 1991 and 2000, and outlines the trend along gender lines.

What is noticeable is that there has been a sizeable net loss that agriculture is experiencing to other sectors. This is true for both males and females. Within the garment industry there has been the largest reduction of employment of all sub-groups in the manufacturing sector. Understandably, most of the impact has been felt in female employment given that this industry tends to be female dominated. A portion of this reduction in of employment is attributable to the fall-out related to the loss of jobs due to the closure of a number of operations in the Export Processing Zones (EPZ).

The public sector has also experienced an overall net loss in employment. This sector, the largest single employer of contracted labour, with 11.4 per cent of total employment in 2000, showed a net loss of 14,000 jobs between 1990 and 1998. However, there was a slight reversal of this trend, in 1999 with an increase of 8,100, followed by a further increase of 3,800 in 2000. It should be noted however, that the category of public sector employee is wider than the "paid government employee" category. The group actually incorporates workers such as, those in social and community services, and includes teachers and health workers who work in public institutions. This category has experienced an impressive expansion of jobs to the tune of over 50,000 (Anderson 2000:10-15 and STATIN).

Table 2. Occupation by Employment Status for the Employed labour Force, 1991-2000

Major Occupational Group	Year	Public Sector Employee	Private Sector Employee	Self or Family Worker	Total	
					Percent	Number
Professionals,	1991	50.7	38.5	10.8	100	70,400
Senior	1995	30.0	38.5	31.5	100	124,200
Officials and	1998	32.9	37.1	30.0	100	148,700
Technicians	2000	n.a.	n.a	n.a	100	150,300
Clerical Workers	1991	25.4	66.0	8.7	100	75,900
	1995	20.6	77.6	1.8	100	79,900
	1998	22.4	75.2	2.4	100	83,000
	2000	n.a	n.a	n.a	100	84,200
Service Workers	1991	25.6	70.2	4.3	100	56,800
	1995	14.7	72.5	12.8	100	84,500
	1998	15.7	64.1	20.2	100	86,300
	2000	n.a	n.a	n.a	100	87,310
Sales Workers	1991	1.1	52.2	46.7	100	52,300
	1995	**	28.3	71.3	100	48,600
	1998	1.1	38.9	60.0	100	56,900
	2000	n.a	n.a	n.a	100	n.a
Skilled	1991	0.3	0.9	98.8	100	190,900
Agricultural &	1995	0.6	6.2	93.2	100	194,900
Fishery Workers	1998	0.1	5.8	94.1	100	184,300
	2000	n.a	n.a	n.a	100	176,400
Craftsmen &	1991	3.6	64.1	32.3	100	208,000
Operatives	1995	2.7	65.8	31.4	100	244,700
	1998	2.9	61.1	36.1	100	225,400
	2000	n.a	n.a	n.a	100	253,500
Elementary	1991	5.0	57.6	37.4	100	205,600
Occupations	1995	6.5	72.4	21.0	100	178,500
	1998	6.9	69.6	23.5	100	162,500
	2000	n.a	n.a	n.a	100	158,600

****Numbers too small for reliability**

Source: Adapted from Anderson 2000:12 and STATIN 2000

The hotel, restaurant and recreation sectors have added over 50,000 jobs during the 1990s and the category of social and community services produced 29,200 jobs.

Other sectors which have experienced growth in employment are, the financial and services. There was also increased economic activity in the business services sub-sector and small-scale firms. For the purpose of this report, the growth in these sectors is significant, because it is the locus of a number of innovations in the employment relationship.

0.3 *General Observations on the Jamaican Labour Force*

Although not presented in the data, one of the dominant features of the Jamaican labour force is that it showed a progressive aging, with the 25-29 years age group being a substantial portion of the population. They are remaining longer in school and they have the higher unemployment rates than other group.

Generally speaking, labour force participation is tending to decline, with the reduction being most evident among the youngest and most elderly. Falling female participation is also one of the observed features.

A rather impressive increase in the proportion of professional and administrative workers in the labour force, is another notable feature. Over the period of the 1990s, the number of persons employed in professional, administrative and technical positions has increased by more than 100 percent. Occupations in the service sector have expanded by more than 50 percent, while traditional basic skilled occupations have been reduced by around 20 percent.

There has been a significant growth of employment in the tourism, restaurant and recreation sub-sector, with a large proportion being at the small-scale end.

Although an area of traditional employment, the agricultural sector has continued to employ fewer personnel. However, there has also been a significant growth of non-agricultural employment in traditional rural areas. In a nutshell, there has been a major uplifting of occupational levels and a transformation of earlier patterns.

On the whole, urban employment has tended to shrink, with employment among residents of the Kingston Metropolitan Area (KMA) being the exception.

Given all of the foregoing, it perhaps can be stated that the main pattern of activity which has characterised the labour market, is the widespread attempts of corporations and other employers to "down-size" or "right-size." The result of this re-engineering process is a fall-out in employment levels. The impact this phenomenon has had in an economy in which collective bargaining has been a significant, if not dominant feature, is a serious one.

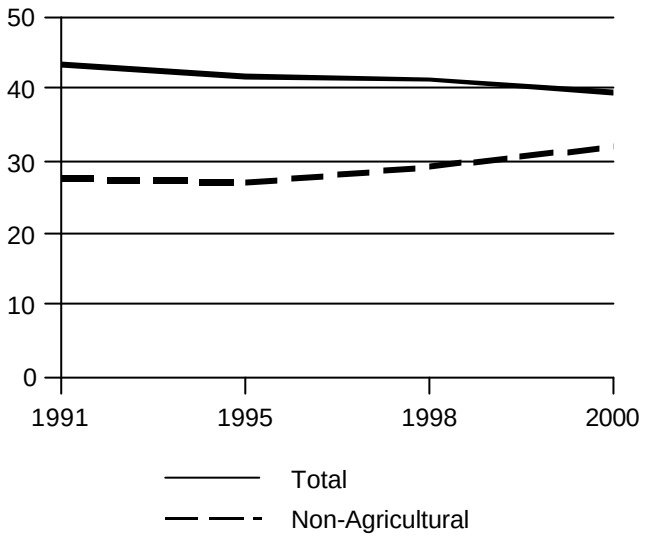
Nevertheless, more than 80,000 new professional jobs have been created, along with an additional 30,000 in the service and sales categories. Furthermore, craftsmen and operatives have increased their numbers by more than 17,000 persons. Against the background of the massive loss of employment for workers and the net increase in unemployment, the labour market does not show the crisis which is commonly believed to exist.

Yet, while the net effect on unemployment is not alarming, the rise in new forms of employment raises concerns about the erosion of benefits and protections which traditional employment guaranteed. The growing enigma of increased independent employment is significant enough to be given separate treatment.

0.4 *Independent Work, the Labour Force and the Employment Relationship*

One of the main features of employment in the past decade has been the increasing importance of the independent worker. Within the category defined by this report are three sets of workers, covered by the data from the Statistical Institute of Jamaica (STATIN). These are, "*unpaid worker*," "*employer*" and "*own-account worker*."

Figure 2. Independent Workers as a Percentage of Employed Labour Force 1991-2000



Source: STATIN The Labour Force, 1990 to 2000

This category demonstrates two trends. First of all it replicates the overall pattern of a movement away from traditional agricultural work. In 1991 the agricultural independent worker, who would include peasant farmers, comprised 43.7 percent of the category. By 1995 the number was reduced to just over 42 percent, and by the year 2000 the figure was less than 40 percent.

On the other hand, persons in this category in the non-agricultural sector moved from constituting 27.7 percent in 1991 to 29.3 percent in 1998 to 32.1 percent in 2000. Given the fact that the major areas of job loss have been among the professional salaried workers in private and public sector organizations and the service workers categories, it is safe to conclude from the data, that the bulk of self-employment has been created in these groups.

None the less, the suggestion is not that there has been a mere creation of new jobs *per se*, but a transformation of the labour force and a redefinition of terms and conditions of employment. In other words, the old re-trenched workers are being re-engaged under new contracts, thus joining the ranks of the *bona fide* independent workers.

The problem with the new work arrangements is that they frequently obscure the contractual relationships. Often, the worker is uncertain as to the type of contractual conditions under which he works, given the fact that very little has changed in the de facto relationship between the former

employer and himself. Commonly, the place, times, tools and process of work remain the same, while the only difference is a nominal one. With the new terminology, but no qualitative change in the conditions of work, there tends to be some confusion, as regards the respective rights and obligations of the employer and the worker, and the issue can become a source of disputes.

For an individual, who works as a truly independent worker, there is less potential tension between the user of his services and himself. He is an investor who is interested in generating a profit from his labour and capital. Most of his obligations lie with fulfilling statutory requirements, such as the payment of requisite taxes and guaranteeing that his product complies with the standards prescribed by the state.

On the other hand, a worker who is a *"disguised"* employee, labouring under a contract of service, is bereft of access to the range of protections and benefits provided under the various Jamaican statutes. This is a growing source of discontent within the labour force and the labour movement. He is generally placed in a precarious position because he, being unprotected, cannot enforce an inquiry into his contract to determine whether he is a worker and entitled to the full range of entitlements prescribed for workers.

To fully address this problem, which is only likely to worsen, a number of legislative and administrative measures need to be put into place. One obvious one is the re-definition of a worker under the various statutes to ensure that an individual worker who is engaged under a labour-only, dependent contract is not disenfranchised. If this basic issue is not addressed a significant number of workers will have lost access to the basic conditions of work provided in, and underpinned by the ILO Conventions which have been given effect by local legislation and practices. More details of this are discussed in the body of the report.

0.5 *Methodology*

In carrying out this study a combination of methods were utilized. First of all, statistical data, using the annual publication of the Statistical Institute of Jamaica (STATIN), *The Labour Force* for the period 1990 to 1991. Another source was the *Economic and Social Survey Jamaica* (ESS), by the Planning Institute of Jamaica (PIOJ), also published annually. There was also some reliance on a report done by my colleague Dr. Patricia Anderson, for the World Bank in 2000, entitled, *Work in the Nineties: A Study of the Jamaican Labour Market: Context Conditions and Trends*. These provided the basic data upon which the introduction was based. Other literary sources, as listed in the references, were accessed as well.

It will be noticed that some of the data for the year 2000 are missing from Table 2. This is partially due to so a portion of it being unavailable and another set being either ambiguous or suspect.

For the ensuing discussion on the scope of the contract of employment, a reading and analysis of the various statutes was undertaken. Given this researcher's background in labour matters, it was not necessary to inquire from the major parties in employment relations as to the existence of legislation. These statutes were sourced and re-read. Among the Acts of Parliament read are, the *Jamaica Constitution* of 1962, the *Employment (Termination and Redundancy Payments) Act* (ETRPA), and the *Labour Relations and Industrial Disputes Act* (LRIDA) of 1975.

To support the analysis of the statute laws a number of case books, outlining the "common law" provisions were sourced. These are listed in the references as well. Issues relating to the statutes and practices were also raised with practitioners in the field. Rather than a strict survey type of formal research, based on scientific sampling of respondents, unstructured questions and conversations were utilized. Open-ended questions were the preferred format when specific responses were sought.

Besides the above, other literature on labour law and industrial relations were utilized. These include previously published or presented works by this researcher in other fora. All sources are included in the list of references at the end of the report. The report is presented as follows.

I. Dependent Work and Independent Work

The present labour scenario in Jamaica is based almost entirely on the contract of employment or contract of service, which defines the relationship between employers and workers. Protection of employment, fundamental rights and freedoms, and attempts by workers' organizations to improve the terms and conditions of their members, all are predicated on the assumption that an individual who works is covered under such contracts.

Little if anything exists in industrial relations practice or law which contemplates any other scenario under which work is carried out.

A. *Dependent Work*

A.1 *Concept and Legal or Case Law Elements of the Employment Relationship*

There are several statutes in Jamaica which address the issue of the employment relationship. First of all there is the *Employment Termination and Redundancy Payment Act* of 1974 (ETRPA). This legislation is designed to provide to workers with compensation for the loss of their employment due to the employer ceasing operations or reducing the requirements for work.

Under Section 2, it defines an *employee* as, *"an individual who works, normally works, or in the case of an individual who has been terminated, one who worked under a contract of employment."* It is of importance that given the objectives of the legislation, that is to provide compensation for workers severed from their employment, the definition as a matter of course, includes dismissed workers.

Two other statutes of note also define an individual engaged in an employment relationship, these are the *Holidays With Pay Order* of 1973(HWP Order) enacted under the principal *Holiday with Pay Act* (HWP Act)) of 1947, and the *Maternity Leave Act* of 1979 (MLA). Under these three statutes the definition is reasonably consistent. The HWP Order defines a worker as one who

> *"has entered into or works under a contract with an employer, ...whether the contract be .... express or oral or in writing and whether it be a contract of service or of apprenticeship or a contract to personally execute any work or labour."* (Section 2)

The definition above seems to implicitly include those persons who work under dependent contracts

to provide personal services. However, the fact that the term *"employer"* is used in the definition points to a contract of employment not a contract for services. This enjoins an individual from incorporating a dependent contract for services under the definition.

Given that the scope of the Order is to entitle a currently employed worker who is earning vacation and sick leave, the definition needs not include terminated workers, since vacation leave in an inalienable right.

On the other hand, there is the definition of the *worker* under the *Labour Relations and Industrial Disputes Act* of 1975 (LRIDA). A worker is defined as *"an individual who has entered into works or normally works under a contract of employment."* It does not operate in any other tense except the present. Under the Act, an individual who has been terminated, whether his dismissal is the subject of an industrial dispute or not, is not considered to be a worker under this statute. This was brought out forcefully, in the case of *R.. v. Ministry of Labour et ux, ex parte West Indies Yeast 1985.* (Cowell 1992:149-58) Here it was held that within the confines of the Act, a dismissed worker cannot be a worker for the purposes of pursuing an industrial dispute, the principal subject matter of the statute.

This is in clear contrast with the definition of *"employer"* under the Act. An employer is one *"for whom one or more workers work or have worked or normally work or seek to work"*, this definition essentially means that an individual is considered an employer under the Act even where he has ended the contract of employment, which binds him to the workers he used to employ. The tense is past, present and future. This is an inconsistency in the Act.

The implications of these are outlined at 4 below.

A.2 *Assumptions and Other Elements Facilitating the Confirmation of the Existence of an Employment Relationship*

In Jamaica, statute is silent as to how does one objectively define an individual as a "de facto" worker. At present there is a Bill before Parliament to amend the LRIDA. The proposed amendment, would now define a worker to include one

> *"…whose contract of employment is terminated by reason of redundancy and who is subsequently re-engaged under a new contract ....within three months of the date of such redundancy: or ....whose dismissal is the subject of an industrial dispute."* (LRID Bill 2000 Section 2)

If it is passed it could correct the omission exposed by the West Indies Yeast case, given that the Act now attempts to link the issue of dismissal to the worker's ability to pursue the matter of his dismissal as an industrial dispute.

However, the earlier sub-Section 2 (b) (a) is at best superfluous. It does nothing new.

The rationale for the amendment to the definition of worker is given in paragraph (a) of the Memorandum of Objects and Reasons, which seeks to include

> *"(i) an individual who works under a contract of service; as well as (ii) whose contract ...is terminated by redundancy and is subsequently re-employed by the employer under a contract and also whose dismissal is the subject of an industrial dispute."*

The Bill does not say whether the new contract under which the worker is to be engaged is to be a contract of service or one for services. If it is a contract of service, then the amendment would be unnecessary, since a re-engagement under a contract of employment would simply retain the status quo.

Obviously intended to end the abuse of unscrupulous employers who seek to cover unfair labour practices, the proposed amendment is well-intentioned. However, in its present form, it fails to capture the link between such practices and the recourse of the worker to the disputes resolution machinery. The fact is, even with the proposed amendment, *"...an individual who accepts the new terms and conditions of employment as a dependent contractor, loses his status as a worker in Jamaica."*(Taylor 2001:33)

Apart from this inadequacy, unless the amendment makes it clear that a worker has access to the full stretch of the dispute resolution procedure then the new amendment will be meaningless. This point is made clearer in sub-section 4(f) below.

However, until the amendment is passed there are no statutory means by which an individual contract of service can be verified. There is no assumption which is made beyond the letter of the contract. This poses a serious difficulty since an individual who asserts that he is, or is deemed by the Ministry of Labour to be a worker, has no recourse but to take the matter before the courts. This course of action is normally accompanied by prohibitive costs, beyond the means of the typical worker.

Where a matter is brought to litigation the courts may apply a number of tests based on the common law. Some of these include i), whether the individual's activities are an integrated part of the employer's production, ii) whether he has independence, iii) whether there is investment of his own capital and concomitant risk, iv) whether the employer has control over, what is done, when, where and the conditions under which it is done.

Nevertheless, given the fact that litigation is generally beyond the scope of the average worker, and the Ministry itself is not equipped to bring every such case to trial, it becomes a constant loophole through which unfair labour practices escape.

A.3 *Machinery Available to the Worker or the Labour Inspectorate.*

Under the Labour Officers (Powers) Act, the Ministry of Labour maintains a labour inspectorate, which is empowered to visit an employer's premises, and examine his employment records, which he is obligated to keep under the ETRPA. These officers are also charged with the responsibility of inspecting the physical infrastructure as well as. The inspectorate investigates to enforce the; *Factories Act*, which demarcates minimum standards of health and safety; the various *National Minimum Wage Orders*; the ETRPA; the *M L A; and* the *HWP Order.* Although the *Equal Pay(for*

Men And Women) Act of 1975 and the *Employment of Women Act* also fall within the purview of the inspectorate, these are less vigilantly monitored.

Table 3. Complaints to the PCEB by Statute 1991 -2000

Legislation	**1991**	**1993**	**1995**	**1997**	**1999**	**2000**
ETRPA	200	310	721	497	211	1929
HWP	156	249	394	546	1319	1657
MLA	4	9	25	49	39	60
MWA	432	661	912	1214	757	856
Total	**792**	**1204**	**2052**	**2225**	**4226**	**4502**

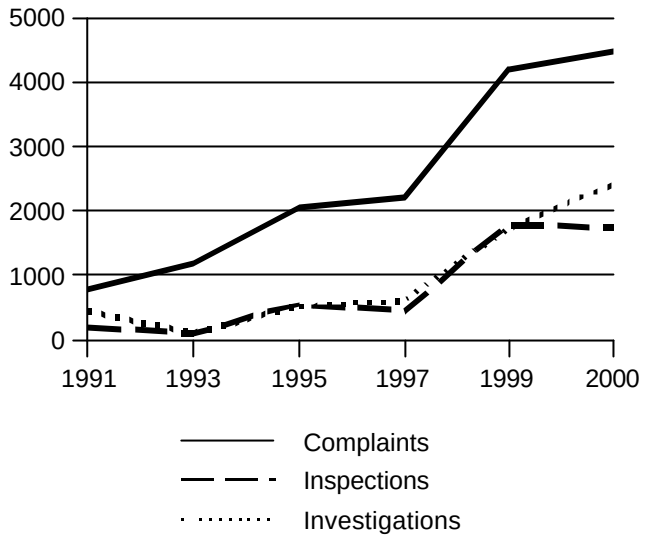
Source: Ministry of Labour

Table 4. Investigations by the PCEB by Statute 1991 -2000

Legislation	**1991**	**1993**	**1995**	**1997**	**1999**	**2000**
ETRPA	139	27	104	236	750	671
HWP	134	26	71	199	605	530
MLA	5	5	5	532	45	17
MWA	158	27	323	111	296	1212
Other	3	15	33	33	36	6
Total	**439**	**103**	**536**	**611**	**1732**	**2436**

Source: Ministry of Labour, Jamaica

Figure 3. Complaints to and Investigations & Inspections by the PCEB 1991 to 2000



Source: Ministry of Labour, Jamaica

Table 5. Inspections by the PCEB by Statute 1991 -2000

Legislation	**1991**	**1993**	**1995**	**1997**	**1999**	**2000**
ETRPA	33	16	48	49	495	380
HWP	41	17	42	49	359	354
MLA	10	7	32	41	265	115
MWA	105	55	387	233	402	747
Other	13	8	51	71	259	165
Total	**202**	**113**	**560**	**443**	**1780**	**1761**

Source: Ministry of Labour, Jamaica

Two divisions of the Ministry comprise the inspectorate. The first is the Pay and Conditions of Employment Branch (PCEB), which is charged with the responsibility of enforcing the minimum standards of working conditions by investigating complaints over alleged breaches of the relevant labour laws. The typical worker who recourses to the Ministry is a non-unionized worker who falls in the lowest quintile of the occupational and income ladder. Workers who are members of recognized majority unions constitute the next to lowest fifth.(Stone:1988)

With a labour force of just over a million, this means that the approximately 20 officers nationally of the PCEB are less than adequate to attend to a potential 640,000 complainants. Around 200, 000 of these are the lowest income earners. Over the ten year period 1991 to 2000, the Branch has received an average of over 2,500 complaints and conducted an average of more than 500 on site investigations.

This could perhaps suggest that there is a greater need for the Ministry's services given the increases in retrenchment as a re-tooling strategy. It could also indicate either growing discontent in the labour market or a rise in unfair labour practices. From experience, it is suspected that it is likely to be a combination of all three factors.

To the credit of the labour inspectorate, there has been an increase in activity of the PCEB over the period. The Ministry has had an increase in staff, to handle the increased demand for its services, and the number of investigations and inspections have risen. A qualitative difference exists between investigations and inspections. The former is normally done in response to a complaint while the latter is more pro-active, and takes place at the initiative of the Ministry's officers.

Both have risen from 439 and 202 respectively, in 1991, to 536 and 560 in 1995, reaching 2436 and 1761 in 2000. For each, this represents a more than 550 per cent increase for investigations and an almost 900 per cent increase for inspections. Given that the number of complaints have themselves risen by some 560 per cent, it does appear that the Ministry's staff is just keeping on pace with the increased demand.

Figure 3 gives a graphic picture of the trend.

Apart from the obvious logistical problems outlined above, it must be observed that the terms of reference of the inspectorate are limited by statute in that the officers can only act to enforce legislation. In any event, their activities are wholly dependent on the assumption that a contract of employment already exists. Given that there is no enactment which directly authorizes the labour officers to determine whether such a contract exists, there is virtually no recourse for the worker whose contract of employment is hidden under the illusive nomenclature of *"contractor."*

The second division which deals with labour inspection is the Industrial Safety Division (ISD). This Unit is responsible for ensuring that minimum requirements of occupational health and safety are adhered to. Its activities are discussed in 4(c).

A.4 *Main Shortcomings in the Protection of Workers*

The present legal and operational framework in Jamaica has significant shortcomings as regards the protection of workers, whose contracts of employment are disguised under the title of contractor. However, Jamaican workers, who have verified contracts of employment, by and large, do have protection under the various statutes. Workers who are unionized have even greater protection and overall higher standards of terms and conditions of work.

(a) Conditions of Employment and Remuneration

As indicated above, there are several statutes which provide basic standards of employment for workers in Jamaica. The *Holiday With Pay Order* 1973 (HWP) provides both compulsory vacation and sick leave for workers in the private sector. Under this legislation workers, who have worked more than 110 consecutive days are entitled to sick and vacation leave of a minimum of two weeks per year, respectively. Public Officers are exempt from the provisions of this statute. However, they are covered by the *Staff Orders for the Public Service* of 1976, which actually provide for higher rates of leave. They are also eligible for up to 14 days Departmental leave beyond their sick and vacation entitlements.

Compared to workers in most countries (including metropolitan ones), the local labour standards as regards leave of absence are satisfactory. Compared to the United States, for example, the legislative provisions in Jamaica are more favourable. For public sector workers, this difference is even greater.

Individuals who work under a "labour-only, dependent" contract are not defined as workers under this legislation. Inasmuch as they are contracted to supply only their personal labour, and do not invest their capital there is nothing in statute which dictates that they are workers. Thus, there is no entitlement to any sort of leave or time off with pay which accrues to them.

Under the ETRPA, an employee who has been terminated due to an occupational illness or injury, or because the employer is ceasing operations, reducing the requirements for labour, or intends to do either, or sells the business or dies, is entitled to a redundancy payment. This payment may be a minimum of two weeks pay for each year up to ten years of service, and three weeks for each year beyond ten. In addition, he is entitled to notice of between two and 12 weeks, or pay in lieu thereof, depending on his years of service.

There is one shortcoming of significance in the ETRPA. It allows an employer to lay off a worker for up to 120 days before the employee is eligible for redundancy. It does not take into consideration short intervals which effectively break the period. Thus, an unscrupulous employer can, and does from time to time, recall the workers within the limit and send them off again shortly afterwards. While complying with the letter of the law it flaunts the spirit of it and prevents the worker from accessing the benefit he has earned. It should be noted that in other Caribbean territories such as Barbados, this could not occur. Under the *Barbados Severance Pay Act*, enacted a year before the Jamaican statute, there is an accumulation of days within a given period. Thus, short interruptions do not significantly postpone the limit from being reached.

Another flaw in the ETRPA lies in the actual payment of redundancy to terminated workers. At present, an employer does not have to make even the first instalment on a worker's entitlement before a year after he has been made redundant. As for the worker, if he does not make a claim on the employer within six months of his termination, he loses his entitlement. Whatever might have been the rationale for this "moratorium" it has a clear bias towards employers. Not only does it give the delinquent or immoral employer waiting time, but it allows him time to pull up plant and disappear without meeting his obligations to his workers.

It is interesting to note that in the aforementioned Barbados Act, there is provision for a deduction to be made from the earnings of the employer, as a contribution to a severance payment fund. This fund, administered by the government, pays redundancy to the worker if an employer has failed to fulfil his commitments under the Act. Nothing like this exists in Jamaica, therefore workers are frequently left with their entitlements un-met.

Despite this glaring gap, there is no move afoot to amend the legislation. Therefore, for the immediate future, employers will have this avenue to compromise workers' rights while workers will be exposed to the unsavoury practice.

It is therefore not surprising that one finds a considerable increase in the number of complaints to the Ministry's PCEB between 1991 and 2000. As Table 3 illustrates, over the ten-year period these grew from 200 or 25 percent of all reports to the Branch to 1929 or close to 43 percent of total requests for the Ministry to intervene.

Public employees are excluded from the provisions of this Act and are thus not entitled to redundancy payments. Terminal benefits for them are limited to their pension benefits, to which, they become entitled, on reaching the age of 60. This is, doubtless, a serious injustice for these workers.

Again, persons who work under labour-only dependent contracts are not defined as employees under this legislation.

There is a Maternity Leave Act of 1979 which guarantees a minimum of eight weeks with pay and another four without, for a female worker who has had a pregnancy of six months and beyond. The only stipulation is that the worker must be at least 18 years old and have worked for a minimum of a year for the employer. The Act is satisfactory since it is merely a minimum. In any event, under the Act a worker can be given her vacation leave along with this leave. She is also eligible for another 14 weeks without pay if she or the child is ill.

Jamaica has a National Minimum Wage Order for all workers as well as several specific to certain occupational groups such as industrial security guards. At the time the first draft of this report was presented, it was $1,200 per week, for a 40 hour work week, with time and one half pay for any period beyond eight hours on any particular day or the 40 hours in a week. In addition, work done on any public holiday or rest day attracts double time pay.

Although significant below the poverty line, the Minimum wage is at least a guarantee that workers cannot be arbitrarily exploited. In the current labour surplus situation and the lack of economic growth, there is not much higher that the rate can go. Notwithstanding this, there was an increase in January 2002, bringing the figure to $1,800.

Apart from these statutes there is an Employment (Equal Pay for Men and Women) Act of 1975, which prescribes the equality of pay for equal work. Intended to eliminate gender distinctions in pay and to give effect to Convention 100, the Act still falls short. For over a decade the ILO, in its Report of the Committee of Experts and direct requests, has pointed out that the Act does not address discrimination where female dominated occupations are remunerated lower, even where the work is of *"equal value."* As indicated by Taylor (1993:13) *"The preliminary evidence suggests that even where jobs are equally important to an organisation, the female dominated ones are paid at a lower rate."* There is no suggestion that this gap will be remedied in the near future

Clearly, statute sets basic limits for the terms and conditions of work for persons engaged under contracts of service. Workers have a range of protection and have access to the labour inspectorate to enforces the rights which are guaranteed under the statutes. Workers who are unionized are far more protected and enjoy better terms and conditions of employment. It is the "de facto" worker, engaged under a dependent contract, but labelled as a contractor, who is enjoined from receiving these.

(b) Social Security

In Jamaica, social security is the purview of the Ministry of Labour and Social Security. Twinned to the Ministry of Labour, the Social Security Division identifies its principal role as *"addressing the needs of the poor and other vulnerable groups."* (MOL 2000:58) The Ministry's social protection falls into two sub-categories; *Social Assistance*, which is designed to transfer resources to groups, which are deemed eligible due to their deprivation, and *Social Insurance*, which is social security, financed by the contributions of workers. Social Security is based on the insurance principle, that is persons protect themselves from risks by pooling resources in order to deal with a future or likely challenge.

Social Assistance is available to all members of society who are classified as needy according to the parameters outlined by the Ministry. It includes, the Food Stamp, Public Assistance, Drugs for the Elderly, and School Feeding, programmes as well as Education and social intervention assistance for inner city students, and services for the elderly and the disabled.

The primary instrument of social security in Jamaica is the National Insurance Scheme (NIS). Formed under the National Insurance Act, it is the official "old age pension" of those persons who have carried out economic activity during their working life. At present the NIS Fund stands at over 18 billion Jamaican dollars. All persons in Jamaica who earn an income are required to contribute to the NIS. In addition an individual who works under a contract of employment, is entitled to have his/her employer deduct and match his/her contribution and remit both to the Ministry. The responsibility for the deduction lies with the employer. Self-employed workers have an obligation to act on their own behalf to comply with the statutory requirements.

NIS benefits fall within two main categories; *General Benefits* and *Employment Injury Benefits.* Benefits in the former include; Old Age pensions and grants, Widows' pensions and grants, Widowers' pensions and grants, Orphan/special child pensions and grants, Maternity Allowance, Funeral Grants and Special Anniversary pensions. In the latter the benefits comprise; Medical treatment, Temporary incapacity disablement pension, and Employment Injury death benefits.

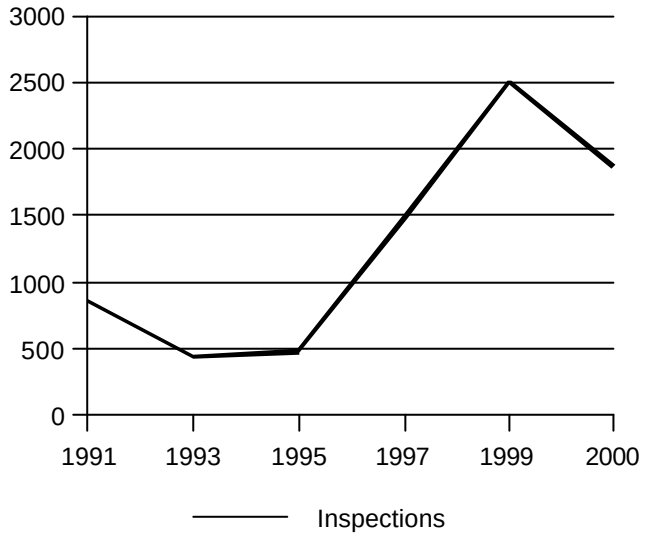
At the end of the year 2000 a total of 109,957 persons were receiving NIS pensions.

To be a beneficiary under the NIS, an individual must be a contributor to it. Thus, where a worker does not have his contributions made, whatever the reason, he is excluded from protection under the scheme. This is one of the areas where it is critical for individuals who work under hidden contracts of employment to be regulated.

At present there is an appreciable problem with employers who either refuse to deduct or remit deductions to the NIS. The policing machinery of the Ministry is inadequate to deal with this occurrence. Notwithstanding this, the Scheme seems to be developing a greater capacity to deal with a larger number of persons and to provide greater benefits. It is noted that the fund has grown from $5.5 billion in 1996 to its current value of over $18 billion.

It is to recognized that the government is presently investing heavily in a Unified Benefit scheme. Designed with funding and expertise from multilateral agencies, it is intended to replace the existing social security regime. Launched in early 2002, it is too early to be evaluated

Figure 4. Inspections Carried Out by the Industrial Safety Division 1991-2000



Source: Ministry of Labour & Social Security

(c) Occupational Safety and Health Conditions

As enshrined in the Labour Relations Code, established under the principal LRIDA, the employer has primary responsibility for the security and safety of workers.

In particular, Section 12 of the Code states explicitly that,

> *"Management has a duty to-*
>
> *(i) furnish equip and otherwise provide factories, workshops, offices and other places where work is to be performed with such facilities as meet the reasonable requirements of safety, health and welfare regulations and to adopt safety measures for the workers protection, and the prevention of the spread of epidemic or infectious disease."*

The Factories Act is the principal legislation which outlines these basic standards of health and safety. The aforementioned factory inspectorate is charged with the responsibility of administering the Act. Unlike the PCEB, it is not limited to investigating non-unionized workplaces. Neither does it have to wait until a complaint or report is made before acting. Notwithstanding this, there are also fewer than 20 factory inspectors to police an innumerable total of workplaces. In particular, there are 1,842 undertakings in Jamaica, which are registered as *"factories"* under the Act. This figure has grown from 1,334 in 1991 to reach its current number, after a decline in 1995 to 1,118. It is to be noted that the definition of Factory under this legislation is sufficiently wide to include all premises which are involved in the production of goods, the provision of services, or the employment of persons.

Again, the human resources implication of this is obvious. Nevertheless, over the period the inspectorate has responded to the increased demand. In 1991, 861 factories were inspected. After a decline to 446 in 1993 the figure reached 1487 in 1997 to peak at 2,507 in 1999 to decline to 1865 in 2000. Though less than ideal, the Factory inspectorate is still relatively apace of the monitoring process.

Not withstanding the work of the ISD of the Ministry, the individual who does not qualify as a worker under the relevant statutes such as the ETRPA or HWP is not guaranteed protection from an employers' indiscretion regarding health and safety. If he is not a worker under the ETRPA or HWP, he is not entitled to paid sick leave even if he is injured on the job. He is also not eligible for a redundancy payment if he falls ill due to an occupational illness.

This, coupled with the lack of protection a worker, who does not pay NIS, is exposed to, puts him in a precarious position.

(d) Freedom of Association

Enshrined in the Jamaican Constitution are a set of basic rights and freedoms which are seen as inalienable. These rights include *"..freedom of conscience, of expression and of peaceful assembly and association...."* as detailed in Section 13(b) of the Jamaican Constitution. More explicit is the *right peacefully to assemble freely with others and in particular, to form or to belong to trade unions or other associations* (Section 23) However, the Constitution does not provide for penalties where these rights are abridged.

In Jamaica *"arms of management"* are embodied in the LRIDA's definition. The case of *Reynolds Jamaica Mines v. the BITU* (Cowell:15-20) puts the issue beyond doubt. Given this, it is easily comprehended why there are myriad management staff associations and unions which essentially behave like the typical workers unions in Jamaica.

The Jamaican Trade Union Act 1919 makes, an organization whose principal purpose is the regulation of relations between employers and employers, as much a trade union as a workers' union. Hence, an individual, whether he works under a contract of employment or a contract for services, has the right to belong to any association he chooses. The right to collective bargaining is however another matter.

Section 4(1) of the LRIDA provides that;

"Every worker shall, as between himself and his employer, has the right - (a) to be a member of such trade union as he may choose; (b) to take part, at any appropriate time, in the activities of any trade union of which he is a member."

The Act goes further than the Constitution because it does not only reinforce the right of association but it provides penalties for any breach of it. Section 4(2) is very explicit because it ominously warns that:

"Any person who -

(a) prevents or deters a worker from exercising any of the rights conferred on him by subsection (1); or

(b) dismisses, penalises or otherwise discriminates against a worker by reason of his exercising any such right, shall be guilty of an offence and shall be liable on summary conviction..."

Subsection (3) is even more pointed in the warning that it gives, as it specifies the types of conduct that may result in a breach of the provisions of the Act:

"Where an employer offers a benefit of any kind to any workers as an inducement to refrain from exercising a right conferred on them by subsection (1) and the employer -

(a) confers that benefit on one or more of those workers who agree to refrain from exercising that right; and

(b) withholds it from one or more of them who do not agree to do so. the employer shall for the purposes of this section be regarded, ... as having thereby discriminated ..."

It should be noted that this freedom of association is precisely and only that. This does not include a "*right to strike*," or to take any other form of industrial action. Such a right does not exist at common law, and no statute guarantees it.

At common law, a worker operates under a contract of employment. Under this contract he worker is expected to carry out his obligations and if he does not, he is breaching his contract. In the event that his contract is breached by his refusal to do work, the employer is free to consider the contract at an end or not to pay the worker, since the agreed tasks were not completed.

Notwithstanding this, a worker who takes industrial action does not, by that simple act, bring his employment to an end, even though he gives his employer the right to do so. In the 1966

Trinidadian case of *Collymore v. The Attorney General,* (Chaudhary 1986:52) it was held that the right to strike was not inherent in any fundamental right given under the Constitution, and in particular, freedom of association. *"Workers, who take strike action, breach their contracts of employment by exhibiting "repudiatory," conduct. They therefore expose themselves to the sanction of dismissal."*(Davis & Taylor 2001:19)

In Jamaican case law, three cases outline this issue; *Serv-Wel of Jamaica Ltd. v TUC* [1982]; *Danah Brassiere Co. v. NWU* [1982]; and *Four Seasons Hotel v. NWU* [1984] (Cowell: 81-112) According to Justice Carey in the latter,

> *"…workers who go on strike, although they do not expect to lose their jobs, may nevertheless have their jobs terminated because their withdrawal of service is repudiatory conduct. They may therefore be dismissed or the employer may otherwise terminate the contract by accepting their repudiatory conduct".* (Cowell: 112)

Simply put, any employee who refuses to work due to an industrial dispute exposes him/herself to the possibility of dismissal.

It should be therefore understood that there is no *"right,"* but a *"freedom to strike."* This freedom means that the worker may withdraw his labour from his employer without breaching any Act of Parliament. Notwithstanding this, he is still vulnerable to the civil sanction of dismissal by his employer.

Workers in the essential services have neither a right nor a freedom to strike. Any form of industrial action is *"unlawful"* for which they can be fined or imprisoned. Similarly, anyone who wilfully disobeys an order of the Industrial Disputes Tribunal (IDT), not to take strike action, or to end it is in breach of the LRIDA.

The consistent interpretation of the courts regarding the right to strike is, in the opinion of this writer, "good law", since there is nothing which gives the worker the right to breach a contract. An unabridged right to willy-nilly withdraw one's labour is a recipe for chaos. In a small economy with an entrenched labour movement such an imagined right could lead to serious disruptions. Nevertheless, in practice, this "right" is virtually institutionalized. As a rule, workers are not terminated for striking. If the exercise of the right to terminate were to become the norm, the political fallout would be tremendous.

It should be noted also that although an employer has the right, at common law, to terminate due to strike action, this does not necessarily make it make "justifiable" before the IDT, which, like the Trinidad and Tobago Industrial Court, has the unshared power (which no higher Court has,) to reinstate. In the 1995 Grand Lido Case, (Davis & Taylor) it was held that the simple act of withdrawing labour in contemplation or furtherance of a dispute, does not provide sufficient grounds for dismissal.

Figure 5
Work Stoppages in Jamaica, Selected Years 1990-2000

Source: Ministry of Labour

The effect of this case is that workers, in practice, have closely approximated the right. The considered opinion is that there in no further right that workers need to have in exercising their choice of pursuing a dispute.

In any event, Figure 6 demonstrates that there has been a more or less, steady decrease in the number of work stoppages in Jamaica. Between 1990 and 2000, with the exception of 1994, there has been a linear decline in industrial unrest as indicated by industrial action. From a high in 1994, when they numbered 95, stoppages have steadily reduced to a low of 28 by the end of the period.

While there are those who would suggest that the diminution in the number is a measure of the reduced level of conflict in labour/management relations, it more my belief that it is at least due in part to a weakening of the labour movement via a skilful use of the gaps in the current framework of labour statutes, allowing for the dismissal of workers and re-employing them as contractors, thereby de-unionizing them.

In the face of the increase in the use of this technique by employers, it is suspected that the strike weapon is becoming less viable as an option. Workers and their organization seem to have been muted by the constant threat of termination, used by employers, as a means of controlling their labour force. This strategy of using termination as a managerial too, though effective, becomes tantamount to a restriction of the right of freedom of association.

The other aspect of freedom of association with respect to the right to have union representation at the workplace, is dealt with in (e) below.

(e) Collective Bargaining

In *Banton and Others v the National Workers Union* (Cowell:1-6)) it was held that an individual worker had the right to belong to any trade union he wished. However, he could not force the employer to recognize any union for the purposes of collective bargaining

Under the Regulations of the LRIDA, a union that wishes to gain bargaining rights for any categories of workers may do so, via an elaborate process administered by the Ministry of Labour. The process, which begins with the union serving a claim for bargaining rights, involves the Ministry making inquiries and procuring information from employer and union. Typically, the Ministry will conduct a ballot, and if the union has a majority - that is over 50 percent - of the categories claimed for, the union becomes the bargaining agent for all workers, including those who are not its members.

Once in, a union cannot presently be removed except by a challenge from another union. There is nothing which allows workers to reject the union as their bargaining agent even where it has no more members within the categories it represents. Neither is there any process or procedure whereby a union can be de-certified by the Ministry. This means that the implicit counter-freedom to not associate, is missing in the Jamaican statutes. At present, the Bill before Parliament is proposing changes to make this possible. Although understandably unpopular with the trade unions, such an amendment has to be made so that the principles underlying collective bargaining are not made a mockery of.

There is an issue of *"minority representation"* which the ILO has raised since the beginning of the 1990s. In the opinion of Committee of Experts, the Government should put in place mechanisms which would facilitate a union without the requisite simple majority to bargain, at least on behalf of its own members. Given the multiplicity of unions in Jamaica, it is difficult to share the view of the Committee. The considered opinion is that it would be extremely impractical to move in the direction of minority representation.

It is to be noted that the right to bargain collectively is a right given only to groups of individuals who work under contracts of employment. Contractors who work under contracts for services, whether real or contrived, are denied this right.

(f) Access to Justice

The system of industrial relations is designed to handle matters which are defined under the LRIDA as "*industrial disputes.*" Under Section 2 of the Act, an industrial dispute is "a dispute between employer or employers or their representatives and workers or their representatives." The source of the dispute is delineated by the Act as well. The narrow reasons for the dispute must arise out of the contract of employment and must relate to a limited number of factors.

These may only be over:

> *"a) terms and conditions of employment, or physical conditions of work,*
> *b) the suspension or dismissal of any worker or workers*
> *c) the engagement or non-engagement of any worker*
> *d) the allocation or non-allocation of work*
> *e) any other matter affecting the rights privileges or duties of any worker or employers or any organization representing them."* (LRIDA Section 2)

(f)(i) Dismissal

One of the areas of greatest conflict between employers and workers is the termination of employment. The common law position is simple. Like any other contract, the contract of employment is terminable by, performance, appropriate notice, or breach. If an individual is to be terminated by the employer it must be for a just cause, that is misconduct or it can be done by giving the appropriate notice.

Where appropriate notice is given or where there is established misconduct, a dismissal is perfectly *"lawful"*. This means in effect, that all an employer needs to do is to give notice to an employee notice or pay in lieu thereof, to make the dismissal defensible before a court. It should be noted that where a court finds that a dismissal was carried out without proven misconduct the remedy to the worker is notice pay. The court cannot, even if it finds the cause for dismissal frivolous or spurious, reinstate the employee.

None the less, as is discussed below, a worker who is dismissed in Jamaica, can be reinstated by the Industrial Disputes Tribunal, if it finds that the dismissal was *"unjustifiable."* These powers, under Section 12 (5) (c) of the LRIDA, have no parallel in the courts. Yet, for an individual worker to have access to the mechanism of the IDT is a daunting prospect

(f)(ii) Grievance and Dispute Settlement Procedure

The schema of the LRIDA does not recognize disputes that arise between any other sets of actors except workers and employers and or their respective representatives. It is designed to address collective matters.

The issue of who can be parties to an industrial dispute is a crucial one. Only workers who are currently employed to an employer can be parties to disputes. An important exclusion from the ambit of the Act is the ex-employee who has been dismissed. What this means is that there is no mechanism for the airing of a dispute unless the currently employed workers are aggrieved about it

The Labour Relations Code, outlines a typical grievance procedure. Although the provisions of the Code are not binding in Law they are relevant before any Tribunal sitting. Thus, although, on a day-to-day basis, the Code is generally applied consensually. Still, if its guidelines are not followed, and this procedural breach becomes part of, or the subject of a Tribunal deliberation, any award made will take the breach into consideration. Thus, in practical terms, the Code has imperative effect within the scope of collective bargaining.

It should be noted that the entire dispute settlement procedure under the principal Act and the Code, assumes a scenario where there is a recognized majority union. Even the individual grievance procedure gives a central place to a worker /delegate and the union.

The Code prescribes a typical individual grievance procedure. This procedure ideally prescribes:

i. the grievance being discussed first by the worker and his immediate supervisor;
ii. that if it is unresolved after this stage, the grievance should be referred to the Department head, and that the *worker delegate* may accompany the worker at this stage – the Second stage, if the worker so wishes; a the highest stage at the plant level, the union officer intervenes.
iii. that on failure to reach agreement at the third stage, the parties agree to the reference of the dispute to conciliation by the Ministry of Labour.

In the case of a private sector employee the next stage is arbitration at the Tribunal described below. For public officers it is a matter for the appropriate Services Commissions to determine.

The above process under the Code combines well with the three-staged process outlined under the Act. Section 6 states that every collective agreement must have a procedure for the settlement of disputes. In the absence of an explicit procedure, the following process is implied. First the parties attempt to settle the dispute between or among themselves at the local level. This process is called *Negotiation.* Also called free collective bargaining, the parties independently discuss their issue and arrive at a mutually acceptable position, which is beneficial to all. If still unsettled, the dispute can be referred by any party to the Ministry of Labour for *Conciliation.*

There is no compulsion on either party to attend any meeting at the Ministry. Conciliation is an entirely voluntary process. The conciliator has no power but his moral suasion and his experience and guidance. In the end the parties, if they accept the guidance, arrive at a mutually accepted (if not acceptable) position. However, if a dispute is unsettled the Minister may refer the matter to the Industrial Disputes Tribunal (IDT) for settlement.

The Tribunal, established under Section 7 of the LRIDA, is a body with the power to hear disputes and make awards. It is a tripartite entity consisting of members nominated by employers and unions as well as those independently appointed by the government. Its powers are significant. They include;

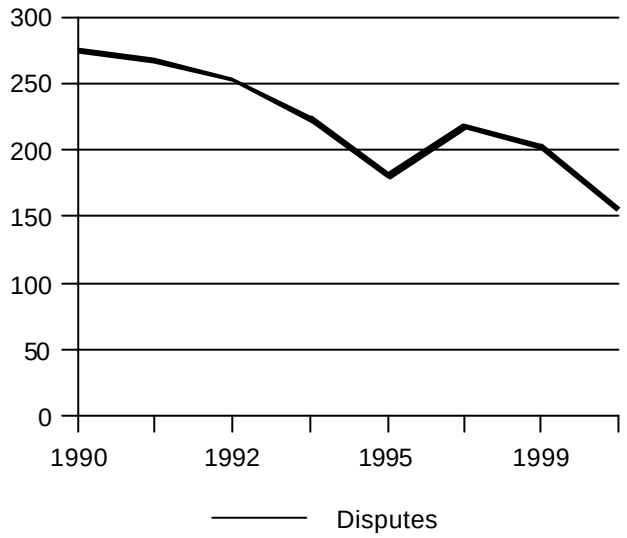
i. the power to administer oaths and hear evidence, even in the absence of any party;
ii. the power to order industrial action to cease or not to take place;
iii. the power to reinstate a worker who has been unjustifiably dismissed, or to order compensation. This power of reinstatement is significant because statute has accorded to this *"lower court,"* an authority which no other court, including the Supreme Court, has. None the less the tribunal has prerogative to hear any matter relating to the appointment, dismissal or any disciplinary action taken against any public officer. This is a matter for the exclusive privilege of the Services Commissions;
iv. the power to make awards on any dispute before it. Such awards are final and conclusive and binding on all the parties concerned.

However, the Tribunal is limited in its scope. Not only can it not adjudicate in a matter relating to rights disputes for public officers, but it also cannot make an award which is contrary to the national interest. This means, for example, that if at a certain point the government has in place a wages policy, the IDT cannot award an increase beyond the wage guidelines.

Under normal circumstances however, it can deal with interest disputes for both public and private sector employees. A Tribunal award is final, conclusive and binding on all the parties involved and cannot be impeached except on a point of law. Such a challenge can only be raised in the Supreme Court. If a dispute is unresolved, the parties may jointly request the Minister to refer the dispute to the Tribunal, in accordance with Section 11(1) of the Act.

In the essential services, as defined under the Act, where conciliation fails, the Minister has the power to refer the dispute to the IDT, for settlement. This he may do, without the consent or request of the parties.

Figure 6 Reported Industrial Disputes in Jamaica, 1990-2000



Source: Ministry of Labour

Under the Section 11A of the Act, introduced in 1978, and itself amended in 1986, it is provided that the Minister may send a dispute to the IDT for settlement, if he is satisfied that the matter should be settled "expeditiously." The 1986 amendment included sub-Section 1(a) (i), which provides that the Minister may refer any matter to the Tribunal for settlement even before efforts at conciliation take place.

This discretion of the Minister is not an unrestricted one, it generally must be exercised only where *"industrial peace, the national economy, or the public interest is threatened."* (Cowell:155)

In the case of a dismissed worker, there must be reason for the Minister to believe that the matter, if unsettled, will lead to industrial action of some sort. In the West Indies Yeast case, it was held that

the entire schema of the LRIDA *"does not contemplate such a dispute as related between an employer on the one hand and the non-unionized worker on the other hand in a way that does not threaten industrial peace,"* (Cowell:155)

What this effectively means is that the worker who is not a member of a recognized union, which has bargaining rights for workers in his category, has no automatic access to the one arena which can full remedy an unjust dismissal. If however, workers who are unionized are sufficiently aggrieved by the dismissal - even if the ex-worker is not unionized - they may take or threaten industrial action in furtherance of the matter. Given the definition of dispute outlined above, there would be sufficient rationale for the Minister to forward such a dispute to the Tribunal, if it is not resolved at conciliation.

Though covered in other statutes across the region, persons in Jamaica who work under a labour only, dependent contract, are completely ignored by the Act, making it impossible for them to benefit from the protection from arbitrary termination among others. For any person to be a party to a dispute, he needs to be a worker, currently employed, that is, one who presently works, under a contract of employment. An individual who is not a party to a dispute but is the subject of it, must be either a worker or employer, or a representative of either. As indicated earlier, persons who work under dependent contracts, but not defined as employees, are not considered to be workers under the Jamaican statutes.

It is to be noted that there is at present, no structure in place for the determination that a contract is either one of employment or one for services. Only if the question is raised before the courts can this be addressed.

Given that a person who works under a dependent contract for services, commonly referred to as a contractor, is not a worker and cannot be a party to a dispute, other *de jure* workers may consider themselves aggrieved over matters affecting him. Nevertheless, workers who wish to take issue with, or action against their employer in pursuance of their discontent over termination of his contract, put themselves at risk of termination for abandonment of their jobs. In this case there would not be a dispute, thus the protection offered at common law, under the *"golden formula"* would not exist.

On a point of clarification, it should be noted that at common law, where workers take strike action in *"contemplation or furtherance of a dispute,"* they operate under the golden formula. The consistent opinion is that the employer cannot conclude that they have abandoned their jobs, or themselves have brought the contract to an end, even though they give him the right to terminate.

The effect of the now exposed gaps in the legislative framework and the increase in the termination...has been a fairly consistent reduction in the number of industrial disputes brought to the attention of the Ministry, up to the beginning of the millennium. In absolute terms, the unionized work force has decreased. This has had a double impact. First of all, fewer workers are now available to be parties to disputes. Second, and perhaps more importantly, the prevalence of contract work and the lack of access to the IDT for the new type of workers, means that an even smaller number of persons will be able to bring their disputes to the Ministry for conciliation.

It is also not inconceivable that the trade union movement may have become less militant given its loss of strength and membership. Unless there is change in the current regimen of

employment law, this pattern, in my view, will persist.

Undoubtedly, there is the need for the Act to be amended to include de facto workers as provided in the Trinidadian and St. Lucian Acts. The definition in the LRIDA is restrictive, inadequate and denies justice to the majority of workers.

Another area which needs addressing is the question of "sexual harassment.". Jamaican legislation is silent on this matter. The only hint of an avenue is the ETRPA which defines a dismissal to include a termination by the employee where he *"is compelled, by reason of the employer's conduct, to terminate that contract without notice."* (Section 5 (5) (c)).

Notwithstanding this definition, there is no link between this nomenclature and the grievance procedure under the LRIDA. Thus, it is difficult for a worker to gain justice for this infraction. Given the gendered nature of the phenomenon, this is a subject which must be placed on the agenda of the government.

A.5 *Possible Solutions*

(i) Legal

A significant part of the problem which exists is due to the inadequacies of the LRIDA in regard to the definition of worker. As noted, the definition worker is at present, discriminatory for workers who have been dismissed, given the ruling in the *West Indies Yeast* case. It provides no avenue for the full examination of disputes emanating from the non-unionized worker.

The proposed amendment to the Act seeks to incorporate a re-engaged dismissed worker who was dismissed for redundancy. Also, it includes an individual whose dismissal is the subject of an industrial dispute. This contemplated modification seems on the surface to change the status quo, but it does not.

This amendment is circular and tautological because it makes a presumption that the rest of the Act does not. It presumes that is that a dismissed worker can himself be a party to any dispute, while there nothing in either the present Act, or in the Bill, which states this.

The fact is, the Act needs to change the definition of *"industrial dispute"* to include that which exists between a dismissed worker and his employer over his own termination. This would then nullify the effect of the *West Indies Yeast* case, and then allow for a mechanism for the worker to access justice where he is terminated unjustifiably.

Such an amendment would bring the statute more in concert with the provisions of the Trinidad and Tobago *Industrial Relations Act* (TTIRA), which was enacted two years before its Jamaican counterpart. The TTIRA in comparison, similarly defines a "worker" to include one "*..whose dismissal, discharge, retrenchment or refusal of employment has led to a dispute*." (TTIRA:9)

However it also encompasses a person who, *"has been dismissed, discharged, retrenched, refused employment, or not employed, whether or not in connection with, or in consequence of, a*

dispute." (TTIRA: 9) This then prevents the worker from being hamstrung by the need to be represented by a union or to have other workers become aggrieved on his behalf. Thus if a worker is terminated and he himself subsequently becomes unhappy with his termination, he can utilize the three-staged process, ending with a determination of the matter in the Industrial Court.

Unlike the dismissed worker in Trinidad and Tobago, the Jamaican worker, even with the anticipated amendment, will still not have access to the IDT, if he feels that his dismissal is unjustifiable.

Thus, the need is for a provision in the Act which makes it more congruent with the Trinidadian statute on this issue.

A second need, which is even greater than that discussed above, is that of creating a status quo which embraces the individual who is not an independent provider of services. Not only would it allow the individual recourse to justice, but it would also prevent employers from concealing contracts of employment under the misnomer "contractor." With this in place workers would have access to the rights under the various statutes discussed earlier.

A solution to this is simple, and it can also be found in the TTIRA and other statutes across the region, including the recent St. Lucian, Registration, Status and Recognition of Trade Unions and Employers Organizations Act 1999 (RSRTUEOA). As indicated in another forum,

> *"The TTIRA clearly designates a contract worker who works under a "labour only" contract, as a worker. This is consistent with the common law position which has tended to define as workers, those individuals whose activity constitutes a part of the organized production of the employer. St. Lucia's RSRTUEOA also explicitly incorporates these types of contract workers as workers within the context of the Act. Under this Act, individuals who carry out work as "dependent contractors" to be employees as well. Thus, they are entitled to union representation and have recourse to the grievance settlement procedure."* (Taylor 2001:34)

The Jamaican legislature merely needs to follow suit and widen the definition to include those persons who work under dependent contracts or supply only their own labour. Such a definition would allow disenfranchised workers to receive the basic entitlements under the various labour statutes, their guaranteed rights of association under the Constitution, and protection under the LRIDA. The current Bill before the Parliament does not fully address the present shortcomings of the Act. It is to be noted that the definition of *worker* or *employee* under all of the statutes discussed in this report would need to be amended, not just that under the LRIDA.

(ii) Administrative

Doubtless the labour inspectorate is still under-manned. The number of labour officers across the Island needs to be increased. This is so for both the PCEB and the ISD. The increases in manpower, however, are likely to present a strain on the Ministry's budget and are likely to be resisted, given the current emphasis on *"rightsizing"* and *"rationalizing."* Yet ironically, the national trend towards downsizing and the increase in "contract work" will be putting more pressure on the Ministry' resources.

Given the apparently imminent reduction of the unionized labour force, more workers will be needing the services of the Labour Inspectorate. As discussed, a noted trend over the last decade has been a reduction of the number of reported industrial disputes by unions. This is consistent with the shifting emphasis from contracts of employment to contract or disguised employment.

In the absence of increased resources to deal with what is already a rising number of individual cases, the government may find itself dealing with widespread social dissent as workers find themselves excluded from the means of expressing their grievances and seeking justice.

B. *Independent Work*

Concept

Independent work is any bit of economic activity which is carried out outside of the scope of a contract of employment. In essence, given the criteria outlined in the aforementioned labour statutes such individuals are not considered workers or employees. The most common terminology for individuals who perform independent work, is *"self-employed."* Other expressions designating such persons include, *"own-account workers"* and *"employers."*

B.2 *Modalities*

Outside of the subsistence agricultural sector, self-employment is a large contributor to the economic existence of a significant number of Jamaican citizens. A wide range of activities fall within this category. It includes, itinerant vendors, professional home-based computer specialists, dressmakers, and caterers among others. A very popular emergent category in this group includes the informal commercial importers (ICIs) who figure large in the informal sector. Also classified in this group are independent contractors, who may provide a myriad of services. A popular modality in this group is those persons who provide services on construction projects such as electricians and draftsmen.

B.3 *Legal Systems Governing the Main Forms of Independent Work.*

There is no constitutional provision which specifically delineates independent work, however individuals who carry out economic activities are subject to the payment of income tax, general consumption tax, national housing trust, and national insurance, in accordance with the Income

Tax Act, National Housing Trust Act and The National Insurance Act. Individuals engaged in the production of goods or provision of services are required to be registered under the NIS. As a result, every economically active person is required to have both a national insurance NIS number, and a taxpayer's registration number (TRN).

As a rule, independent workers, as the name suggests, are free to carry out any type of economic activity as long as it does not contravene statute or the common law. Some types of economic activity of independent workers are regulated under The Shops and Offices Law, which limits the opening hours of bars, shops and other undertakings.

Protection of Independent Workers

Given the legal framework discussed in (A) above, the entire system of labour regulation is predicated on the assumption that economic activity is carried out by individuals engaged under contracts of employment. Consequently, there are no comparable statutory rights for persons classified as independent contractors who may be carrying out work.

(a) Conditions of Employment and Remuneration

An individual who is classified as an independent worker is not a worker or employee under any statute in Jamaica. Thus, the issue of conditions of employment does not in fact arise, since the whole concept of basic conditions of employment assumes that the individual is engaged under a contract of employment. An independent worker is deemed as a trader who is exchanging his goods or services for a fee.

(b) Social security

The responsibility for the remittance of statutory deductions under *The National Insurance Act,* lies with the employer where work is performed under a contract of employment. Where work is performed under a contract for services or an individual is an own account/self-employed worker, he is responsible for making his own deductions and forwarding them to the Ministry of Labour, and Social Security.

A significant problem which arises in the contemporary situation is that workers deemed to be independent contractors such as private security guards are left on their own to submit their NIS payment to the Ministry. The fact is, there is a serious problem with compliance, because workers, however defined, are unaccustomed to making these remittances and are frequently unwilling to intentionally reduce their own take-home pay. Thus, not only are these *de facto* workers breaching the legislation, and are thus liable to prosecution, but more importantly they are deprived of the benefits though minimal, that are associated with the National Insurance Scheme.

(c) Occupational Safety and Health Conditions

As above, there is nothing in statute that directly forces an individual to put in place minimal conditions for himself. However, the *Factories Act* requires employers to provide a safe environment. The legislation defines a range of undertakings as *"factories,"* which includes, all premises where production is taking place or where workers are employer.

Not withstanding this, the common law position makes the contractor of one part, responsible for the contractor of the second part, in the event that the former does not take necessary care and precaution for the safety of the latter.

(d) Freedom of Association

The Constitution guarantees the right of association to all citizens. However, as discussed earlier, there is no translation of this right into a right to collective bargaining, unless an individual is a worker as defined under the LRIDA, and is a member of a union that has gained bargaining rights. Thus, in practice, no person who does not fit the definition outlined under the Act has access to the tangible benefits of freedom of association.

However, in rare cases such as the Bauxite Industry, pure expedience has led to an understanding between the management of the company and the unions to have collective bargaining carried out for these contractors even though there is no legal basis for it.

(e) Collective Bargaining

As discussed in (d) above, independent workers do not normally have access to the institutionalized mechanisms of collective bargaining. Since Collective bargaining rests on the assumption of recognition of a majority union, representing workers, they do not qualify. However, there is nothing to prevent an employer from treating these workers as if they were bona fide employees, if it is in his interest to do so.

(f) Access to Justice

Again, the concept of Justice revolves around the contract of employment and deals with industrial disputes which arise out of such contracts, the most popular of which involve the suspension or termination of employment. At common law, dismissal is a termination of a contract of employment at the initiative of, by, or as a result of the conduct of the employer. The system of dispute resolution contemplates workers as defined under the LRIDA.

Thus, where there is a contract between an employer and a contractor for services, and there is a dispute this should be a matter for the courts, but not the Tribunal.

B.5 *Possible Solutions*

(i) Legal

Independent work is likely to remain the relatively unregulated phenomenon that it is as compared to dependent work. However, there needs to be a clear distinction in the legislation between dependent and independent workers. At present, there is little to extricate the de facto worker from this category. An independent worker is an entrepreneur who takes risks in order to gain economic benefits. Thus, within the general scope of his activities he is willing to deal with the consequences of his enterprise.

Notwithstanding this, there are few if any cases when a contractor, who supplies his own effort, is independent. Even where his activities are sold to the producer or contractor of the first part, they are normally central to his (the employer's) economic operations. Thus, there is the responsibility relating to vicarious liability. At common law, this means that if a contractor, whether dependent or otherwise, causes damage or injury to a third party, while in the normal performance of the contracted task of duties, the employer is responsible.

(ii) Administrative

The Jamaican Government has ratified the Labour Clauses (Public Contracts) Convention No. 94, and has legislation to regulate public contracts. The Office of the Contractor General was created under the Contractor General Act of 1983, and the provisions of the Contractors Levy Act combines with its function, to put in place a set of checks and balances for the carrying out of work by independent contractors who do public work..

A similar body needs to be created, perhaps within the general scope of the Labour Ministry, to regulate private contracts, especially those that arise between persons, unsure of their employment status.

C. *Work of an ambiguous or disguised nature*

C.1 *Main difficulties*

This area is one of the possible problem areas in discovering the true dimensions of work. A main difficulty has always been what is considered by the individuals themselves to be work. Independent economic activity especially that of women has been characterized by invisibility or low visibility. As observed by Taylor (1993:12) *"Sometimes a husband will willfully hide a spouse's economic activity to glean social security benefit."* Furthermore, women due to their proximity to the household have fewer obvious activities. Thus, *"She may sell sweets at home or make clothes there or even operate a small kitchen"* (Taylor 1993:12) Beyond that, income which is concealed will not come to the scrutiny of the Revenue and Social Security authorities. Thus, there is at least a short-term benefit in not revealing one's earnings.

In some circumstances there is a lack of clarity as to whether the particular conditions under which work is carried out actually points to a contract of employment or a contract for services. Some examples include where an individual is engaged to sell goods for another, or where craft

items or furniture are produced for a distributor. Often the title of the job is not instructive. As in the case of industrial security guards discussed later in this report, workers frequently perform their tasks under conditions which point to a contract of service, rather than a contract for services. The passing of legislation designed to clear up this ambiguity is overdue.

C.2 *Trends Concerning Work of an Ambiguous or Disguised Nature*

(a) Quantitative Evolution

The phenomenon of work of an ambiguous nature is inextricably linked to the rise in the independent or self-employed category. Returning to Table 2, it has been noted that in this group, there has been a general tendency towards own account work in the service sector, with a less strong but notable movement into this type of work among professionals.

Figure 2 demonstrates a gradual, but consistent, shift away from work in the agricultural sector, towards self-employment other sectors dominated by former workers. This suggests that this sort of activity is likely to become a salient feature of employment in the near future.

(b) Qualitative Evolution

The present changes in these categories and sectors invariably incorporates some of the elements related to disguised employment. With the predominance of work in the sectors where traditionally the contract of employment was the defining feature, more workers are now becoming labelled under the new misnomer. What this is leading to is shorter contracts and fewer benefits.

C.3 *Modalities of Ambiguous or Disguised Employment*

(a) New Forms

The most common form is the 'contract worker.' Employees are given documents in which they are purportedly engaged under contracts for services. This includes temporary secretarial and office workers, security guards, hotel workers among others. Much of the terms of employment reflect relationships which are more characteristic of the contract of employment. The only thing they provide to the employer is their labour.

(b) Relationships Under Which the Employment Relationship May Be Disguised

These may include membership on boards, whether public or private. Given the fact that membership in these civil and civic entities is not normally full time, and is linked to honorariums, rather than direct salaries it is difficult to establish that there is an employment relationship.

However, it may very well be that there is some type of contract of employment since such individuals are generally given fairly explicit terms of reference, which, can be equated to terms and conditions of employment.

C.4 *Conditions of Workers Independent in Law but Dependent Economically*

Workers who fall in this group include small furniture makers and craftsmen, who produce goods for a distributor. These are discussed in Part II. Some workers in this category are also called sub-contractors. In many cases, their very existence is based on the relationship with the employer.

Whether the dependency situation is by itself a persuasive factor, is another matter. In almost all economic and contractual relationship there is dominance, inequity and dependence. In many cases, bona fide employers are dependent on a large purchaser or client for the majority of their income. Loss of such contracts usually brings about the demise of the employers operations. A small producer for a moderate to large employer is different only in kind.

Strictly speaking, in the considered opinion of this researcher, the small producer does not, simply by his economic vulnerability, qualify as a worker for the purposes of determining disguised contracts of employment.

In some cases, the workers' activities are integrated within the productive structure of the employer's undertakings. In these cases, where the worker is a dependent contractor, although not defined as such under the relevant statutes discussed in this report, he should be treated as such.

It is felt that if the necessary statutory changes are made, then many of the problems related to concealed or ambiguous employment will be remedied. However, designating self-employed workers with the same status as subordinate workers might prove a more difficult task. One challenge would be how to quantify the level of integration or dependence.

C.5 *Protection of workers*

The same problems which workers in independent or dependent contracts have are replicated here. Their situation is exactly the same as outlined in (4) (a) to (f).

II. "Triangular" Relationships

I.1 *Panorama and Trends*

The available data are not configured to directly capture the phenomena. Labour force data merely subsume independent work under one general heading. Thus, the trends observed under that heading incorporate the frequency of these occurring.

II.2 *Modalities*

The most common forms of triangular relationships are those involving "contractors" and Sub-contractors. A popular manifestation of these relationships is seen in the construction industry, where a builder for example, will contract with an individual, who wishes to have a house or

other structure, built. This contract is not a labour only contract and involves the investment of capital of the contractor, who subsequently engages other labour.

Other examples of these triangular relationships include personnel services agencies. Two popular entities which supply this type of service are Dot Personnel Services and Hamilton Knight Associates. In the health services, there is a company contracted to the hospital to perform ancillary duties. The primary contract to provide services exists between the hospital and the company. In the cases above, the contract of employment which binds the individual, who is actually carrying out the work, for which the contractor is paid, is between the contractor and the worker. Simply put, the primary user of the service is not the employer and as a result, is not responsible for the payment of wages nor the terms and conditions of employment, which are demarcated by the various labour statutes discussed in this report.

Workers engaged in these relationships are seen as no different from workers who are engaged in a direct contract with the primary user of their services. Thus, they are the same as regards access to benefits under the relevant statutes. The same applies to their other benefits and rights.

II.3 *Most Frequent Situations of Fraud*

In some industries, such as the aforementioned security industry, an employer may establish a "dummy" company to provide services to the parent company. This does not necessarily alter the status of the workers under the relevant labour statutes unless they are re-engaged under the types of contracts which are the subject of this report.

In any event, the employment law in Jamaica does not address contractual relationships outside that which exists between the individual employer and the person who he has contracted to carry out work. There is nothing which establishes a relationship between the individual who is performing the tasks and the user of his services, unless such beneficiary of the labour is the primary contractor.

II.4 *Concept in Law of the Intermediary and the Contractor*

In law, a party to a contract is primarily responsible for its execution and performance. Therefore, the only intermediary contemplated is the employer of the workers for the purpose of the labour statutes discussed herein. The contractor, who is the user of the service, is not directly responsible for any matter relating to the terms and conditions of employment of the workers.

If the intermediary is one who procures the labour, but does not actually contract with the person performing the tasks, he has no status within the scope of an employment contract. At best, he may be an agent, representing a client.

II.5 *Workers' Protection and Main Problems of Inadequate Protection*

(a) Conditions of Employment and Remuneration

In law there is no distinction between a worker who works as a sub-contractor and one who is directly engaged to the employer. Thus, all requisite benefits and protection outlined in 1.A (4) (a), are relevant and applicable.

(b) Social Security

As the law does not distinguish between a worker engaged to an employer, who is the primary user of his services and one whose labour is sold to a third party, the provisions as discussed in indicated in 1.A (4) (b) are identical

(c) Occupational Safety and Health Conditions

As indicated in 1.A (4) (c), there is a range of legislative and procedural guidelines related to the health and safety of workers. The stipulation for workers in multilateral or triangular relationships are indistinguishable from those in direct relationships.

(d) Freedom of Association

The Constitution, the LRIDA and the common law, demarcate the entire range of the application of the parameters surrounding this right. Workers in these indirect relationships enjoy exactly the same set of rights as described in 1.A (4) (d)

(e) Collective Bargaining

As long as workers and their organizations follow the guidelines indicated in 1.A (4) (e), it is irrelevant whether they operate under contracts where their labour is or is not utilized by the primary employer.

(f) Access to Justice

If a worker is unionized he has greater access to the mechanisms of justice than his counterpart who is not. As outlined in 1.A (4) (f), there is some inequity. The situation for workers in triangular relationship is the same as for those who work in a direct one with the employer.

II.6 *Possible Solutions*

Given the similarity of the status of the worker in a triangular relationship to a worker in direct ones with their employers, the same comments expressed earlier would be relevant.

As elaborated in 1.A (5), much needs to be done in improving the level of protection to workers,

both those engaged under contracts of service and those under dependent contracts under which they only supply their labour

III. Case Studies

III.1 *Truck Drivers in Transport Enterprises*

Such individual are generally considered workers if they are merely contracted to operate the units which are owned by the proprietor of the enterprise. This occurs in the case of the national bus company, the Jamaica Urban Transit Company (JUTC) and several others. Similarly, workers who deliver goods for a trucking company, are *de facto* workers because they are engaged to utilize the property of the employer to carry out the main activities of his undertaking. They are not regarded as operating under any other contract than a contract of employment.

In the case of a worker who operates a taxicab, owned by an individual entrepreneur or company, there is some difficulty in deciphering the relationship. On the one hand, it could be agreed that the driver is a worker since he is not investing his own capital and is merely supplying his labour for a fee. Nonetheless, these drivers are generally engaged to work on the understanding that a pre-determined sum must be remitted to the "employer" at a regular interval, either a day or a week. Here there is some nebulousness. It may be argued that the individual driver in such circumstances is an entrepreneur himself, who "rents" the unit from the owner for a fee. The more common conclusion is that these drivers are independent workers. In this scenario then, they do not qualify as workers under the statutes administered by the Ministry of Labour. However, as producers of economic activity, they are subject to the provisions of the laws which are relevant to Internal Revenue and Social Security. In practice however, they tend not to report their earnings, thus do not in the long term find themselves able to benefit from social security or loans from the National Housing Trust.

Another scenario, which is also quite popular, is one where the driver supplies his own vehicle and is given a specific sum for his work. This work is usually indexed to the number or quantity of deliveries made. By definition, these workers are designated "haulage contractors" and are not workers under the LRIDA, ETRPA, nor the other labour laws. Notwithstanding that, they mostly operate in a crucial industrial sector, the petroleum industry, one which, (contrary to the provisions of Convention 98,) is considered under the LRIDA to be an essential service. As a result, the terms and conditions of employment under which they operate are given much attention.

Within this industry, there are drivers who are engaged to the haulage contractors. These are de facto and de jure workers. They are accorded bargaining rights by the employers. Thus, they are covered by the minimum provisions under the labour statutes. Given that collective bargaining is one vehicle whereby workers improve their terms and conditions of employment and enhance their job security, there is no disadvantage that these sub-contractors suffer as compared to those who are engaged under other contracts of service.

III.2 *Salespersons in a Large Store*

A typical salesperson is a worker in every sense of the word in Jamaica. In the case where the worker is engaged under a fixed salary, which is not directly indexed to volume of sales or amount of revenue generated, such an individual is treated as being entitled to the statutory provisions of the various statutes. These include the obligation of the employer to collect and remit NIS and NHT on their behalf and to make his own contribution. As workers they are guaranteed the rights of freedom of association and the necessary access to the collective bargaining process. Assuming that they are members of a union, which has gained bargaining rights, they have full access to justice where there is a rights dispute, including where they are felt to be unjustifiably dismissed.

If the worker is employed on a commission or 'piece rate' basis, or any combination of fixed and variable rate, where his/her earnings are linked to his/her production or productivity, he/she is still considered to be engaged under a contract of employment. However, his/her benefits under the HWP Act, and ETRPA are computed along lines which take into consideration the average earnings of the most recent period of employment. As with workers on a fixed, hourly paid wage, there is full access to union membership, freedom of association and all the protections and remedies for unjust treatment by employers.

Despite this, there is a fairly new tendency among employers to engage these service type workers under contracts where they are labelled "contractors," suggesting that they are not workers. As indicated, there are few resources to tackle this unwieldy problem. Thus, inasmuch as they are workers in the true sense of the word, they are subject to discrimination, and are excluded from the benefits and protections which all workers are entitled to.

III.3 *Other Workers of Particular Importance in Jamaica*

(i) Industrial Security Guards

One of the largest and fastest growing groups of semi-skilled workers are the industrial security guards. This category of workers, has been given importance in the post-1975 period, to the extent that they are one of the occupational categories which have their own Minimum Wage Order. Workers in this sector, have rates of pay higher than any other group with similar occupational status. Bearing in mind the problems with crime nationally, there is a premium on security. There is a vast number of security companies, which employ a growing number of security guards.

The National Minimum Wage Order rests on the assumption that security guards are workers under all the relevant statutes. Thus, they are considered to be dependent workers, engaged under contracts of employment or contracts of service. As workers they are deemed to be covered under the various statutes including those which deal with collective bargaining.
Historically, security guards have been a key industrial sector and the industry developed a Joint Industrial Council (JIC) in the 1970s. JICs, as the name suggests are bodies formed by the key producers or providers in the industry, to establish standardized terms and conditions of

employment, and most importantly, to establish an additional stage in the grievance procedure and collective bargaining process, which is utilized before resorting to conciliation at the Ministry of Labour. JICs are both creatures and facilitators of consensus and involve officials of all the major unions which represent workers in the industry. Underlying JICs is the spirit of good faith and a sense of justice, fairness and equity for all parties.

Since the 1990s, the practice of re-trenching workers under the ETRPA in order to strive in a competitive labour market has become more commonplace. Despite the fact that the statute speaks of the termination of employment of persons, the common interpretation of the ETRPA, is that *positions*, vis-à-vis *categories* not employees are made redundant. Since bargaining rights are accorded to unions on behalf of workers in given categories, and not personally, a redundancy exercise which removes certain categories of workers, effectively removes the union as bargaining agent. In effect, it is interpreted that the categories no longer exist.

After the workers are terminated and duly compensated under the Act or existing collective agreement, some of them, frequently excluding union delegates and vociferous workers, are subsequently re-engaged under new terms and conditions. The new moniker is "contractor." Usually, the workers are told in writing, that they will be responsible for the deduction and payment of their statutory obligations; NIS, NHT, Income and Education Taxes. In spite of this new nomenclature, they are provided with standard uniforms, tools, weapons, dogs, where necessary, and are assigned to work as integral parts of their employer's business at places and times specified and determined by him. In practice there is little to justify calling them contractors. In any event, if they are contractors, then they are dependent contractors. If they were included under the definition of worker under the LRIDA and other labour legislation then there would not be any significant negative effect

However, on the basis of the title, the employer does not assume the responsibility for them as he would a normally labelled worker, and they do not have access to NHT and NIS benefits, unless they themselves make the deductions. These security guards do not enjoy the benefits of collective bargaining nor the protection from arbitrary dismissal. The evidence seems to suggest that the practice is a means of depriving workers of their constitutional rights of freedom of association and it infringes the provisions under Section 4 of the LRIDA. In the opinion of several trade unionists, it is a form of *"union busting."*

A worker who is terminated on the basis of redundancy has no recourse. Even if it is concluded that the dismissal may not have been for the manifest reason stated he has a difficult time getting reinstated since an enshrined principle in labour management relations is that management has a right to manage.

(i) Workers in the Hospitality and Tourism Sectors

Like security guards, this group is experiencing changes in their terms and conditions of employment. A fairly large number of workers here have been made redundant and subsequently re-engaged under contracts of service. There is little that changes in the de facto situation. However, based on the disguised or falsely named relationship, these workers do not have access to the protection they previously had.

There is also a certain appeal of this kind of employment to the workers because, due to the reduced labour costs associated with this new arrangement, employers are often able to pay more wages up front. Furthermore, since the statutory deductions are not taken out, the net income of the workers tends to be closer to their gross.

Nevertheless, in the long run, the social security and job protection implications, are significant. The depth of this phenomenon is worth further investigating.

Conclusions

The current framework of labour management relations is based on the contract of employment or contract of service. The basic protection which comes with the status of worker is demarcated by a number of statutes. This gives the average worker access to terms and conditions of employment which are relatively high, compared to many other countries. A worker, defined as one who operates under a contract of service, has certain entitlements as regards his employer, who has responsibility for his social security, welfare and safety.

Workers who are unionized have even greater access to better working conditions and terms due to the impact of collective bargaining. Importantly they have access to a forum which can mete out justice, where unfair labour practices are carried out. Security of tenure and protection of the typical unionized worker from arbitrary dismissal is a significant feature. The right of freedom of association coupled with the right to bargain collectively gives the unionized worker a protection not offered by the courts.

On the other hand, workers who are engaged under other types of contracts, than contracts of employment are not afforded the basic protection which their counterparts have. Where workers are engaged or re-engaged under contracts for services and labelled contractors they are in the most precarious of positions. On the one hand, they are required to perform as de facto workers, yet on the other hand they are deprived of the benefits. This is the case with workers who are both independent and dependent, as well as those in triangular relationships where the true contract is disguised of at best ambiguous.

There is reason for concern because the most significant transformation within the labour market is the increase in own account or independent employment, within areas traditionally dominated by employment within contracts of service. The ultimate effect seems to be one which is consistent with the observation made in another forum that the salient trend in globalization is the declining labour standards among countries attempting to improve their economic status.

Nevertheless the political repercussions are not likely to be pleasant. Given the large-scale lack of social consensus and the still embryonic attempts at forging an elusive "social contract," the matter of workers' growing lack of protection is one to be dealt with expeditiously.

The short term solution is to modify the legal framework to incorporate workers engaged under dependent labour only contracts as workers, in particular under the LRIDA. The irony of having the least amount of, and diminishing protection for the group which is charged with the responsibility of protecting the productive sector, in the face of rising crime speaks volumes.

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	"The Regulation of Industrial Conflict: A Cross-Country Comparison of the Dispute Resolution Systems of Trinidad and Tobago, St. Lucia and Jamaica," in Caribbean Journal of Public Sector Management, Vol. 2 No.2, May 2001
	"Women and Work; They Are Still at Risk." in Caribbean Labour Journal Vol. 3. No. 2 1993

ADDENDUM/POSTSCRIPT

The *Labour Relations and Industrial Disputes (Amendment) Act* was passed in March 2002, modifying the definition of worker. Under the amended Section 2, the new meaning is as follows:

> *AAn individual who has entered into or works or normally works (or where employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee.@*

Clearly, an improvement on the pre-existing definition, this denotation now nullifies the effect of the *West Indies Yeast* case. This means that workers, who have been dismissed, can now be considered workers under the Act, thus ma king them parties to disputes, including any that arises from their termination.

Within the new definition persons who work under dependent contracts, where they only supply their own labour, are also incorporated. With this, these workers are now free to form and be members of trade unions.

Despite these changes there are still significant gaps. First of all, even with the new status quo a worker, who is not unionized, still does not have recourse to the Industrial Disputes Tribunal. Thus, this body which is the only one capable of fully remedying an unjustifiable dismissal, is still inaccessible to him/her.

Second, the term >*employee*= appears, in the definition but nowhere else in the Act. In other statutes, such as the TTIRA, which include dependent contractors under the definition of worker, there is a separate definition for >dependent contractor= and worker or employee. Since the term is not defined in the LRIDA, it may very well become in itself, a likely source of disputes. It is not enough to suggest that the description can be found in other statutes since the definitions under various statutes are not transferable. If this were so then the definition of employee under the *Employment (Termination and Redundancy Payment) Act*, (ETRPA) would have been applied in the abovementioned case

Furthermore, in order for the new definition to truly enfranchise these contract workers, the definition under the other statutes such as the, ETRPA, *Holiday With Pay Order*, and the *Maternity Leave Act*, will all have to be modified.