

NUEVAS FORMAS DE CONTRATACIÓN

NEW FORMS OF EMPLOYMENT¹

Anthony GILES²

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In discussing new forms of employment with you, I will inevitably be influenced by what is occurring in my own country. So, although I have tried to pitch the argument at a more international level, and although the subject itself is inherently international, I am conscious that my reality may be different from other national contexts.

Linguistic differences often mask conceptual differences that are not so easily transferred from one language to another. As the committee of the International Labour Organization that sought to develop a convention on “contract labour” found out, some of the ideas and terms that I will be using have only rough approximations in other languages and sometimes no parallels at all in legal concepts and terminology. In the ILO’s case, for example, it seems that the English term “contract labour” has no adequate equivalent in either Spanish or French (see ILO 1998).

The question of legal terminology brings me to the third disadvantage under which I will be labouring this morning my status as one of the few non-legal scholars on the conference program. Although some of you will no doubt view this as a unfortunate error on the part of the conference organisers, I prefer to think of it as something of a hidden

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2 Département des relations industrielles, Université Laval, Québec, Canada.

advantage, because the question of new forms of employment is multi-dimensional and therefore multidisciplinary. For legal scholars, new forms of employment raise issues about the connection between employment law and work. Sociologists wonder about their impact on the dividing lines that crisscross societies and work organisations, as well as the wider issues of social exclusion and polarisation. For geographers, the traditionally close links between work and physical space seem to be weakening. For economists, new forms of employment are connected to the dynamics of the labour market and to issues like underemployment. For those who specialise in the way organisations work and the way human resources are managed, new forms of employment raise a host of new challenges to the way in which the effort and loyalty of employees can be elicited at the same time as employers seem prepared to offer less in the way of long-term commitment or stability. And, lastly, for those who study trade unions and collective bargaining, new forms of employment raise questions about the future of collective representation and the political and legal framework needed to ensure that collective representation can be preserved and, perhaps, even enlarged.

New forms of employment can therefore be examined from a number of different angles. In this paper, however, I will try to resist a unidisciplinary approach and instead attempt to synthesise a number of these different themes and issues. The drawback of this approach is that I will not be able to explore any one of the dimensions in detail. The advantage, I hope, is that this broad-brush approach will highlight the complexity and significance of the subject and alert us to the fact that, as we consider the strictly legal ramifications and challenges, we should not lose sight of the social, economic, political and organisational dimensions of employment.

In the first section of the paper, I try to clarify what is meant by “new forms of employment”. In order to do so, I begin by describing the “standard model of employment” against which the “new” forms are usually compared. After setting out the six major dimensions of the new forms of employment intermittence, part-time work, geographical dispersion, independence, multiple employers, and fixed-term duration I go on to identify a number of problems and oversimplifications in the usual way of portraying the distinction between the standard model and the new forms. In the second section of the paper, I look briefly at why

new forms of employment have apparently spread in recent years, focusing of two types of explanations, one emphasising short-term, cyclical factors, the other emphasising deeper structural changes. My purpose here will not be to resolve the question of whether one or the other of these explanations is more convincing, but rather to point out that the debate over what adjustments in public policy and labour laws are called for turns, in part, on which of these explanations is adopted. In the third part of the paper, I provide an overview of the advantages and disadvantages of the new forms of employment, paying particular attention to the points of view of employers and employees. The paper then concludes with a consideration of the implications for public policy in general and labour law more specifically.

I. NEW FORMS OF EMPLOYMENT: NEW WINE IN OLD BOTTLES?

A cursory glance through the scholarly and popular literature reveals that there are as many expressions for new forms of employment as there are new forms themselves. Among the most frequently encountered are “atypical”, “nonstandard”, “contingent”, “peripheral”, “precarious”, and “flexible” employment not to mention an equally inventive range of terms for describing the new work force, including the “disposable worker”, the “just-in-time workforce”, the “expendable worker”, and the “fungible worker”. There are, of course, some important distinctions that can be drawn between some of these forms (not all “nonstandard” forms of employment are “contingent” for example), and so they cannot all be simply lumped into one big basket. But there is also a sense that, taken together, they comprise part of a wider phenomenon, a growing heterogeneity of forms of employment and a shift away from what was traditionally regarded as the standard job.

1. *The Good Old Days: the “Standard Employment Model”*

Thus, before enumerating the specific types of new forms of employment, it will be useful to describe the “traditional” or “standard” employment model that is commonly used as the gauge by which new forms are identified and measured. This standard model is usually held to refer to jobs that are stable, continuous, full-time, with a single employer,

performed on that employer's premises, and entailing a hierarchical relationship in which (depending on the legal system in question) workers are subordinated to, dependent on, or under the control of their employer. Let me take a look at each one of these elements.

The first element in the model of the standard job is *indefinite* or *indeterminate duration*, a feature that is sometimes referred to as "stability" or even "permanence". What this means is that, in principle at least, employees can expect to continue to work for their employer as long as they like, provided of course that the employer stays in business and the employee does not commit a grievous industrial sin. The act of hiring is therefore akin to the establishment of an on-going relationship that is expected to persist even in the absence of a legal or contractual obligation that it should do so.

The second dimension is *continuity* over time. That is, in the standard model, employment is considered to be continuous rather than intermittent. To be sure, interruptions often occur. Indeed, even in the historical bastion of the standard employment relationship the North American automobile industry plant shutdowns for retooling were a common feature of the annual production cycle; more generally, the ups and downs of the product market, changes in weather and seasons, technological changes, and a multitude of other factors conspire to punctuate employment with spells of forced inactivity. Even so, in the standard model, the employment *relationship* continues during these idle periods, thanks to the presumption of continuity founded either in law or collective agreements, or simply in the assumptions that colour employer and worker behaviour.

Third, the standard model of employment almost always refers to *full-time* employment as the expected norm, so much so that, for a long time labour statisticians in many countries did not even bother to ask people whether they worked full-time or part-time. And, at least in Canada, this seems to have been a justified omission, since when the question did begin to be asked in the mid-1950s, fewer than 4 percent of the labour force held part-time jobs. (Some analysts of employment go further and suggest that the standard employment model also implies a fixed Monday to Friday, 9 to 5 work schedule. However, while it is true that this schedule is in some ways seen as a social norm or ideal, there have long been exceptions, like shift-work, in settings that were otherwise quite "standard").

Whereas the first three features of the standard model of employment all relate to various aspects of time, the fourth is linked to place. And that place used to seem pretty obvious to everyone: it was on the employer's premises, whether the factory, the office, the farm, the store or the construction site. Obviously there have always been some exceptions to this coincidence of employment and physical place: truck drivers, travelling sales personnel, meter readers, police officers, and many others all roam around in the fulfilment of their job duties. But in all of these cases the workers' physical separation from the employer's premises is necessitated by the intrinsically mobile character of their work. Moreover, most of them return to home base at regular intervals.

Fifth, in the standard employment model it is assumed that there is usually only one home base to which to return: that is to say, employment is seen as a relationship between a worker and a single employer. "Moonlighting" has always occurred, of course, but it used to be regarded as an entirely idiosyncratic practice to which a small number of unfortunate individuals were driven by dire personal circumstances. Thus, normal employment is seen as essentially a bilateral affair, a relationship established between two easily identifiable parties.

Sixth, and last, that relationship has long been understood in terms of the classic notions of subordination, dependence, or control. That is, although the legal fiction of the two contracting parties meeting on equal footing was maintained in some respects, the contract of employment came to be widely recognised as being fundamentally different from other contracts, for it entailed not an exchange of money for a product or for the result of services, but an exchange of money for time, time during which the employer enjoyed the right to direct the activities of the employee, to determine how work would be performed, and to establish and enforce rules and codes of discipline and behaviour.

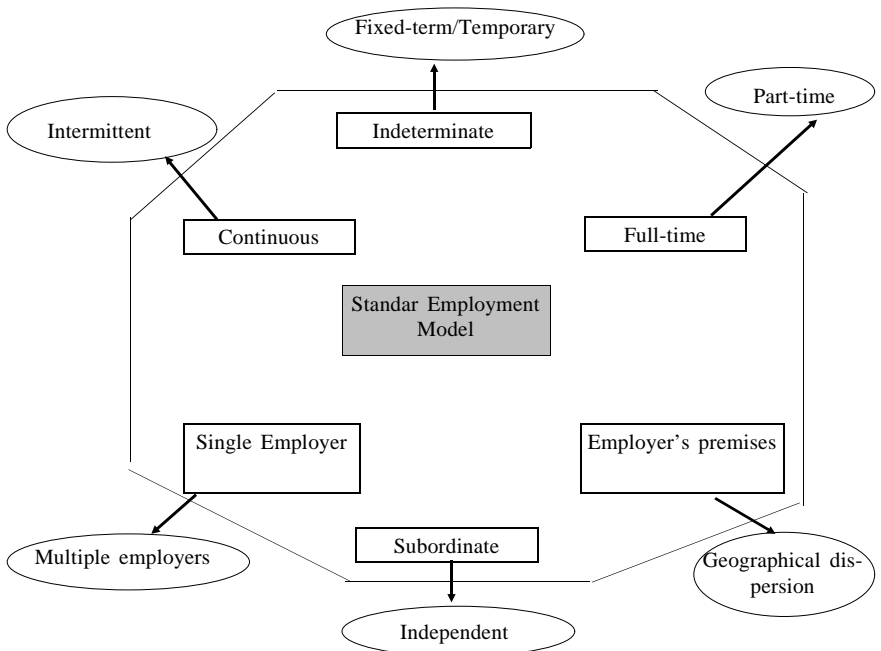
Before we examine the ways in which new forms of employment depart from this model, it is important to recognise that the standard model was never universal. Even where it reached its zenith in the advanced industrial nations in the post-Second World War era, especially in jobs held by male workers in large organisation it had a number of important variants, and it always coexisted with a wide variety of forms of "secondary" employment. However, even if the standard model was not quite as numerically dominant as some analysts of employment relations sometimes suggest, it played a hugely important role on the po-

litical and social terrain. For one thing, it defined what was considered to be a “good” job for most people. For another, it was the model that underlay a great deal of labour and social legislation at the national and international levels. And, finally, it underpinned the attitudes and beliefs of several generations of actors in the labour market, whether acting individually or collectively.

2. *The Morphing of Employment*

Beginning around the mid-1970s and then gathering speed in the 1980s and 1990s, this standard model began to lose its dominance as what came to be called new forms of employment began to spread in the advanced industrialised countries. On each of the six dimensions outlined above, a variety of new work arrangements began to take root. Let us go back to the original list and consider the changes (see figure 1).

Figure 1. The Standard Employment Model and New Forms of Employment.



First, in contrast to the idea that employment was open-ended, even permanent, there is a widespread perception of an increase in temporary and occasional contracts of fixed terms, and in short-term employment more generally. In fact, this is a difficult phenomenon to measure. For example, in Canada, average job tenure has actually lengthened since the early 1980s (Heisz 1999). Similarly, at the international level, the OECD reports that, among its member countries, there has been no dramatic shift towards jobs of shorter duration (see OECD 1997). On the other hand, the same OECD report provides clear evidence that the feeling of insecurity has been rising in most countries over the last decade or more. Taken together, these trends suggest that, although it may not show up in general job tenure statistics, the *belief* in employment stability as an underlying value of the employment relationship has withered.

Second, continuity of employment seems to have declined in the face of a rise in work of an intermittent nature, in the form of seasonal, occasional, on-call or other “casual” forms of employment.

Third, there has been a marked shift toward part-time work as opposed to the presumption of full-time work in the standard employment model. Although part-time employment began to rise in some countries in the 1960s, there has been a broad trend across the industrialised world for the last twenty years (ILO 1997). In the OECD countries, for example, the share of part-time employment in total employment rose between the late 1980s and late 1990s in all but a handful of countries (OECD 1999).

Moving from time to place, employment has also begun to move out of the employer’s premises. One form of this geographical dispersion is the increasing numbers of employees who work from their homes. Here, three distinct types stand out. The first is the traditional self-employed worker whose office or workshop is in the home. A second, which is juridically indistinguishable but very different in practical terms, is the apparent revival of “putting out”, i.e., the strategy of farming out production to dependent home-based workers, a practice that is common, not to say notorious, in sectors like clothing. Third, higher up on the technological ladder is telework (or telecommuting), i.e., the practice of employees (or independent contractors) working part or all of the time from their home and linked to the employer or business by means of electronic communications.

A separate aspect of the loosening of the geographical umbilical cord is the dispersion of employment into smaller production units. In manufacturing, for example, there is a clear trend toward smaller factories that are linked together to form production chains (see Murray 1988). For white-collar workers and the service sector, concepts like the virtual office or “hoteling” are becoming more popular (see Barker and Christensen 1998).

The fifth change that appears to be occurring is the phenomenon of multiple employers. On the one hand, in at least some countries there has been a rise in the number of multiple job holders (or “moonlighters”), i.e., people who work for more than one firm, or who work part of the time in paid employment and part of the time for themselves. On the other hand, a growing number of workers are finding themselves working within what some have called “trilateral” rather than “bilateral” work relationships. One well-known aspect of this phenomenon is the growth of “agency work”, in which temporary help agencies supply workers to employers who are seeking to fill temporary (or not-so-temporary) vacancies. A related phenomenon is the apparent growth of subcontracting in which one firm either sends out work to an outside firm or brings that firm or some of its employees onto its own premises. All of these arrangements, despite their different organisational and geographic forms, involve a move away from the simple, bilateral relation in the standard model.

Last, there is the phenomenon of the rise of “independent” work or self-employment. For the OECD as a whole, by the late 1990s around 15% of the workforce was made up of self-employed workers. As for individual countries, the figures vary considerably and tend to fluctuate over time; but it seems reasonably clear that there is a broad trend toward a rise in this form of employment. In Canada, for example, self-employment rose from around 11 percent in the mid-1970s to 17 percent in 1999.

Strictly speaking, of course, “self-employment” is only a “form of employment” in the widest sense of the latter term. However, it is typically treated as one of the new forms of employment because, on the basis of anecdotal evidence at least, some or even much of the increase in self-employment is more properly regarded as disguised employment, that is, situations in which the juridical form is one of independent con-

tracting, but where the social reality more closely approximates a relation of dependence or subordination.

These six new forms of employment are, needless to say, very heterogeneous. Indeed, even within particular types there is a great deal of variety, not just in terms of the legal appearances, but also in terms of the real social meaning and substance. Self-employment, for example, may entail genuine independence, or it may mask what is effectively an employment relationship, or it may even lie somewhere between (see Beaucage and Légaré 2000). But despite their heterogeneity, these new forms of employment all appear to be part of a more general shift. All entail some manner of “distancing”, an attenuation, or a loosening of the ties between the employer, or the party for whom the work is being carried out, and the employee, or the person who is selling his or her labour power, whether under the form of a contract of employment or not. This loosening may be in terms of the temporal dimension, as in the case of part-time, temporary or intermittent work; it may be physical, as in the case of home-based work, putting out, telecommuting or the more general dispersion of production; or it may be socio-legal in character, as in the case of triangular relationships or independent work. Irrespective of the nature of the distancing or loosening, however, the underlying movement is away from employment as a *relationship* and towards the treatment of work as something more closely resembling other commodities.

Not only are these developments all moving in the same direction, there is often considerable overlap between them as they congeal into specific practices. Self-employment is closely associated with home working, for example. Or take the term “contract labour” that gave the ILO so much trouble. To the worker delegates, it seemed obvious that sub-contracting, employment disguised as independent contracting and triangular work relationships of various sorts formed parts of a wider trend. The employer delegates, along with some of the government representatives, chose to stress the differences between these types of contract labour, arguing that it was inappropriate to design an international instrument that would cover all of these situations. But, while the employers were undoubtedly correct in the narrow sense, they were on quite shaky ground from a wider perspective.

Lastly, it is important to point out that virtually none of the “new” forms of employment discussed above are genuinely new. With the exception of telework, which alone among all of the new forms is the only one that is technologically novel, all of the “new” forms of employment have historical antecedents that go back well before the years during which the “standard employment relationship” came to dominate the landscape of work. In fact, as I hinted earlier, even during the era of the dominance of the standard employment model there were plenty of nonstandard jobs. What seems to have happened, then, is a twofold movement: one the one hand, a resurgence of older forms of work and employment; and, on the other, a redrawing of the lines between standard and secondary employment.

3. *Two Worlds?*

There is often a tendency to draw a sharp line between the new forms of employment and the standard model, and to suggest that the number of workers within the standard model is shrinking and that the number of workers whose work is in the new forms is expanding. And on one level, this is accurate, if sometimes exaggerated. There does seem to be a deepening polarisation of the workforce that is being helped along by the resurgence of these old-new forms of employment. But on another level, this way of thinking about trends in employment misses something important, or rather, three things.

First, the new forms of employment frequently coexist with standard forms of employment within the same industries, within particular firms and even within individual workplaces, which suggests that distance between the two worlds is not enormous.

Second, there is a surprising amount of mobility between the two worlds. For example, studies in Canada indicate that many people move between paid employment and self-employment. Similarly, hiring temporary workers, either directly or through third parties, is a method sometimes used by some employers as a recruitment and screening device allowing the firm to decide whether to offer the person a regular position without any up-front commitment; in these cases, new forms of employment are converted into standard jobs. Finally, the large number of young people in many countries in non-standard jobs has sometimes been associated with the phenomenon of transition status between school and

work. Thus, not only is the distance between the two worlds not great, there is a considerable amount of shuttle traffic between them.

The third reason why the sharpness of the dividing line between the two worlds should not be exaggerated is because there are changes underway in the way work is organised and employment is regulated in the core sectors of the economy. Above and beyond the general loss of a sense of security, these changes increased autonomy for employees in the planning and execution of their work, a growing emphasis on individualized career development and remuneration, a closer link between output and performance are to some extent blurring the distinction between the “standard” and “new” forms of employment (see Vallée 1999; Supiot 2000). As Wial puts it, the changes in the structure of the firm and in the organisation of work means that “the boundary between the people and activities that are inside the firm and those that are outside has become much less sharp than in the model of the independent, vertically integrated firm” (1994, 305).

This is not to argue that the distinction between “standard” and “new” forms of employment is meaningless, or that there aren’t plenty of people who remain for long periods indeed their whole working lives within one or the other. But it does caution against an overly simplistic analysis of two completely separate and unconnected worlds of employment inhabited by different employers and employees.

II. EXPLAINING THE RISE OF NEW FORMS OF EMPLOYMENT

Why, then, have employment relationships become, as Lowe, Schellenberg and Davidman (1999, 4) put it, “more diverse, individualized, implicit, deregulated, decentralized, and generally more tenuous and transitory?” There are two broad interpretations of the spread of new forms of employment. The first portrays them as temporary phenomena explainable in terms of short-term, cyclical factors, whereas the second suggests that there are deeper, more permanent changes at work in industrial societies. Tempting though it might be to dismiss this debate as a typically sterile academic exercise, it has important implications for our analysis of the implications of new forms of employment for labour law and public policy.

1. *Short-term Pain?*

The first explanation is that the spreading of new forms of employment represents a short-term response to the miserable economic conditions that have befallen most economies since the mid-1970s and the accompanying changes in the balance of power between workers and employers on the labour market.

More particularly, it is possible to argue that, under conditions of intensified international competition, employers have simply been attempting to retain or regain competitiveness, and that one of the many strategies deployed to this end is the reduction of their labour costs through the use of a range of new forms of employment (see, for example, Krahn and Lowe 1998, ch. 2). That they have been able to do so is, in turn, largely connected to the relatively high levels of unemployment that have characterised most countries throughout this period, which has tilted the distribution of power in their favour.

Consistent with this argument is the proposition that some of the new forms of employment have become more common because they represent escape routes from unemployment. For example, it is commonly suggested that the rise of self-employment is (partly) explicable as a second-best alternative to paid employment. For instance, self-employment in Canada expanded dramatically in the 1990s, but as the economy slowly improves, it appears that the rate of self-employment is beginning to drop again. Similarly, in many countries, as unemployment rose or remained high in the 1980s and 1990s, the share of what is called “involuntary part-time employment” also climbed, again suggesting that non-standard employment represents a second-best choice. Lastly, the concentration of young people in the new forms of employment seems to indicate that the direct bridge between school and a permanent job is being replaced by a series of stepping stones.

This would also explain the fact that many governments have aided and abetted the rise of new forms of employment. Not only have they often resorted to the use of temporary employment and contracting out themselves, there has been a marked tendency for public policy to favour the spread of new forms of employment, or at least to remove barriers to their use. Examples include the removal of restrictions on the types of employment contract that can be offered; efforts to make part-time

employment easier or more attractive; and the wide range of government programmes aimed at fostering entrepreneurship and self-employment (ILO 1997; Arzeni 1998). Besides constituting a response to business's demands for more flexibility and less regulation, most analysts agree that a key impulse behind these trends in public policy has been the political goal of reducing visible unemployment and the associated public costs of unemployment.

2. *Structural Change?*

In contrast to the first explanation, the second focuses on structural changes and suggests that many of the new forms of employment, far from being a short-term response to the conjuncture, will retain their popularity for some considerable time to come. More particularly, four such changes are said to have contributed to the development of new forms of employment (see Beaucage and Légaré 2000).

One obvious factor is new technology, especially innovations in information and communications technologies. For instance, the phenomenon of telework is only possible if the teleworker is linked to the employer by means of computer modem. Similarly, the growth of subcontracting, outsourcing and the development of networks of small inter-linked plants all seem to have been helped along by developments in communications technologies that provide co-ordination through, for example, just-in-time inventory systems and virtual production planning.

A second structural factor suggests that the spread of new forms of employment is more apparent than real, in the sense that it is a product of the underlying tendency for those sectors where new forms of employment have long been popular to expand at the expense of other sectors where the standard employment model was king. For example, it is clear that the growth of the services sector relative to agriculture and manufacturing is tied closely to the expansion of part-time employment.

A third commonly cited structural factor is the changing composition, aspirations and expectations of the labour force. Here a number of demographic and social changes are said to be combining to make new forms of employment more popular for workers. For example, it is frequently argued that as the trend toward increased female labour force participation continues, women are seeking jobs with characteristics that are more easily reconciled with family responsibilities. In addition, it is sometimes

argued that employees, especially younger employees, want more independence and flexibility, and that their rejection of the standard employment model, laden as it is with elements of long-term commitment and organisational loyalty, is leading employers to offer more in the way of flexible, temporary and more mobile forms of work. Finally, we regularly hear about highly skilled workers who are using the scarcity of their skills as bargaining levers to win lucrative but short-term contracts from employers desperate to pay anything to acquire particular types of knowledge.

The fourth and probably the most powerful structural change stems from the changing organisational strategies of employers. Although it may be going too far to say that the age of the large, vertically integrated corporation has come to an end, significant restructuring has occurred (see Castells 1996). One dimension of this restructuring has been a trend toward smaller, more focused organisations, which, instead of trying to do everything themselves, enter into a variety of alliances and networks with strategic partners, sub-contractors and other outside agents. In addition, the increased emphasis on speed of innovation and the capacity to respond to less predictable market demand has put a premium on organisational flexibility. All of these changes, whether they are labelled as downsizing, reengineering or whatever is the most popular term at the moment, have encouraged organisations to adopt new forms of employment as a means of developing the flexibility to adapt to changing circumstances and to focus more narrowly on what they term their “core competencies”. The result has been a drift toward an externalisation and commercialisation of employment that can be seen in the expansion of new forms of employment.

All four of these structural changes have probably played a role in fostering the spread of new forms of employment. However, I suspect that the driving force is the fourth factor, the restructuring of organisations and their strategic reorientation. Technological developments have certainly facilitated these changes; the growing weight of the services sector and of knowledge-based industries has amplified their effects; and the changing aspirations of the workforce has made new forms more palatable to some people. But I would suggest that the key dynamic is a fundamental change in the way in which employers are seeking to organise, or reorganise, their systems of production and work.

This also implies that the structural changes are likely more significant than short-term, cyclical factors, and that the spread of new forms of employment or, if you prefer, the resurgence of older forms is not a temporary development, but a longer-term change. This suggests, of course, that a rethinking of public policy and of labour law may be needed, since if the new forms of employment were just a passing fad, we could safely ignore them.

III. CONSEQUENCES

Is the rise of new forms of employment cause for celebration or concern? In preparing this paper, I drew up a table divided into employer and employee columns, each of which I then sub-divided into “pros” and “cons”, thinking that this would allow me to list fairly the advantages and disadvantages of the new forms of employment for both sides. In fact, the space I gave myself for advantages to employers filled up very quickly, as did the space I left myself for disadvantages for workers. Luckily, there was lots of space left over in the other two columns, the disadvantages for employers and the advantages for workers. On the other hand, as I listed the advantages and disadvantages, I found myself continually qualifying the points. For example, I listed increased flexibility as an advantage for employees, but then realised that this applied only to some cases; similarly, I initially listed lower productivity as a disadvantage for employers, and then had to backtrack when I discovered that, although this is true for some forms of employment, it is not the case for regular part-time employees. So, this exercise taught me not only that it is chiefly employers who are the beneficiaries of the new forms of employment, but also that it is extremely hazardous to generalise about the advantages and disadvantages, since what is an advantage in one new form of employment is often a disadvantage in another, and what might be an advantage for one worker or one firm might well be a disadvantage for another workers or another firm.

So, with this qualification in mind, let us first consider the consequences of new forms of employment from the point of view of employers. Here, there seems to be little mystery as to why many employers find new forms of employment to be of considerable benefit.

First, in many cases, employers are able to enjoy lower labour costs through lower salaries, fewer benefits, lower taxes and social charges, and lower overhead expenses (such as training and administrative costs). This is after all the logic lying behind the enthusiasm of many employers for new forms of employment, and the evidence is consistent and clear.

Second, employers also enjoy the advantage of greater flexibility through the use of nonstandard work. In particular, firms can use the various new forms of employment to adjust more quickly and at a lower cost to product market fluctuations, changing technologies, changing labour market conditions, and so on.

Third, in some cases, several of the new forms of employment are thought to boost productivity. One reason this is so is that in the new forms of employment, remuneration is often tied more directly to performance. It also seems that the productivity of part-time workers is generally higher than that of full-time workers because, according to the ILO, part-timers “work more intensively, with less absenteeism and job tedium, and especially when they formerly worked full-time, may be expected to carry out a set of activities that normally would be carried out by a full-time worker” (1997, 9).

Fourth, in the case of self-employment and sub-contracting, some of the costs of capital equipment and maintenance are shifted either to workers or to other firms. For example, an employed translator has to be provided with computer equipment, access to a variety of printed and electronic resources and on-going professional development or training programs, whereas self-employed translators are expected to furnish these tools themselves.

Fifth, not only are costs shifted, so too is a measure of economic risk. This is why terms like “peripheral” or “disposable” workers crop up so frequently discussions of new forms of employment: the strategy of reducing the firm’s activities to its “core competencies” those from which it extracts the most value-added or in which it has the greatest proprietary content usually entails an externalisation of risk as a means of cushioning the core.

Sixth, many of the new forms of employment promise to reduce the bargaining power of workers and their unions, either through fragmentation, loss of collective identity, geographic and social isolation or other means.

Against these obvious advantages, do employers face any disadvantages from the overall loosening of the employment relationship? The experience of a number of firms in recent years suggests that there is sometimes a price to pay.

First, workers who are genuinely independent and mobile and/or those who are hired on explicitly short-term contracts, will obviously be less loyal to the organisation and less committed to its goals. Indeed, much of modern human resources management practice tries to address exactly this problem, *i.e.*, how to better align the goals of employees with the goals of the firm.

Second, according to some analysts, there is a risk that some new forms of employment may lower productivity. Although it appears that part-time employees, especially when they work on a regular basis, are just as or even more productive than their full-time counterparts, the same is surely not the case for temporary or occasional workers who do not have the time to pick up the wide range of skills and intimate knowledge that is so necessary to be fully productive.

Third, higher turn over other costs (like contract administration) may eat into the savings on wages and benefits. For example, a heavy reliance on outsourcing may well be attractive as a means of lowering direct costs, but in some circumstances it may also increase indirect costs associated with additional external co-ordination, legal expenses, and other “transaction costs”.

Turning from employers to workers, let’s look first at what advantages there may be for those who choose or who are forced to work within these new arrangements. Perhaps the most commonly cited advantage accruing to employees is the possibility of increased flexibility in the use of time, and especially “the chance of a better balance between working life and family responsibilities, training, leisure or civic responsibilities” (ILO, p.1). It needs to be stressed, however, that this advantage is sometimes exaggerated, for it presumes that workers control their hours of work and their workloads, which is often not the case. Moreover, as numerous commentators have pointed out, many women workers are forced to seek “flexible” work situations only because of the unequal distribution of household and family responsibilities in society.

Second, we should not downplay the genuine sense of increased independence that is associated with some of the new forms of employ-

ment, or of the general reduction in hierarchical controls in organisations where the standard model is still important. On the other hand, increased independence is not a necessary corollary of all of the new forms of employment. In fact, even for the self-employed, independence from direct supervision and from the rigidities of a rules-based workplace does not necessarily mean freedom from constraints, and may simply mean that the constraints are self-imposed.

Third some workers appreciate the fact that the rewards they receive are more closely tied to their individual performance and thus reflect more fairly their personal effort, ingenuity and investment in education and training. In addition, those who possess skills or knowledge that are in especially high demand may command more leverage in their dealings with their employers and customers.

Last, many of the new forms of employment are said to provide an easier or smoother transition into or out of the paid labour force. At the entry level, for example, part-time or contractually limited employment may serve as the means to acquire the skills, experience or contacts necessary to land a more stable job. And, at the other end of the employment life cycle, self-employment, part-time work or other atypical arrangements may serve as a useful means of easing the frequently difficult transition from employment to retirement.

But against these undoubted, if unevenly distributed, advantages, we have to acknowledge the widely recognised disadvantages. As you will see, these are in a sense the mirror image of the advantages enjoyed by employers.

First, many of the new forms of employment are characterised by lower earnings and fewer fringe benefits. As Nollen and Axel put it, “by reducing the core workforce and refraining from hiring permanent staff to meet increases in demand, companies are able to exchange typically higher employee wage and benefit compensation for lower wages and fewer or no benefits paid to contingent workers” (1998, 128).

Second, most of the new forms of employment reduce financial and career security. Indeed, as we saw earlier, this follows from their use by firms as a means to reduce long-term commitments to employees in order to enhance flexibility and to pare costs.

Third, many of the new forms of employment leave workers outside the protection of labour standards legislation, health and safety legisla-

tion, and other entitlements that flow from employment status or that have minimum eligibility requirements, like unemployment insurance.

Fourth, social isolation is more pronounced in such work arrangements as telework or independent work. This “individuation” of employment is not doubt attractive to some workers, but for many it substantially undercuts the social integration function that employment has played in industrial societies, thereby undermining social cohesion.

Fifth, collective representation is more difficult to achieve and sustain, partly because of laws that extend this right only to employees, partly because of the fragmenting effects of nonstandard work on collective identity and interests, and partly because of the difficulty of identifying the real employer in triangular employment relationships.

Lastly, those in nonstandard work arrangement also tend to receive less in the way of employer-provided training: “The contingent worker is considered a commodity, and this commodity is seen as a fixed, non-renewable resource in which there is little, if any, investment by the firm. Organizations are replenished with new workers as needed, and hence there is no need to replenish the worker” (Barker and Christensen 1998, 9).

As always, then, we have to recognise that there are two sides to every coin. There are potential advantages and disadvantages to both employers and employees in the overall trend toward an attenuation of the employment relationship. Similarly, we need to be sensitive to the fact that much depends on the particular form in question, and especially to whether it is chosen as a matter of genuine personal preference or is accepted simply for lack of a better opportunity or because of other constraints. Nonetheless, it seems fair to say that one side of the coin seems to shine quite a bit more brightly than the other. When all is said and done, the spread of new forms of employment have generally proven more advantageous to employers than they have to employees.

IV. IMPLICATIONS FOR PUBLIC POLICY AND LABOUR LAW

Against the background of these multiple and far-reaching changes in employment relations, what are the implications for public policy in general and labour law in particular?

Perhaps the key difficulty is that many of our labour and employment laws, not to mention many of the practices and traditions that form the private law of the workplace, are premised on the standard model of employment. As Cobble (1994, 286) notes of the U.S.:

The labor relations framework that rose to dominance in the 1930s and 1940s has two glaring assumptions embedded within in that make it increasingly inappropriate for today's work world...: its worksite orientation and its adherence to Taylorist practices. Union benefits, both in economic returns and "voice", [are] tied to the individual employer. Recognition processes and bargaining structures [assume] a long-term, continuous, on-site, and full-time commitment to a single employer, in part because the New Deal system took the male-dominated, blue-collar industrial plant as the norm.

This suggests that, in order to ensure that the underlying objectives of labour and employment law are achieved in the context of the evolving employment relationship, serious reform is needed. It might of course be argued that these traditional objectives themselves. The protection of the most vulnerable members of society and the encouragement of collective action as a counterweight to the power of employers over individual employees have themselves become outmoded. But those who believe that, despite all of the changes we have witnessed, power and rewards attached to work continue to be distributed unevenly, will agree that public policies need to be strengthened and reformed, not dismantled in an illusory search for market freedom.

But what kind of reform or modernisation is appropriate? Alain Supiot (2000) has made a useful distinction between three possible strategies of reform; and although his argument is limited to the specific issue of the declining relevance of the distinction between self-employed, independent contractors and paid workers, we can apply his framework to the wider set of changes examined here.

The first route would be to move the line dividing the standard employment model from the new forms of employment in a way that would bring more of the latter under the protective reach of traditional laws. A concrete example of this strategy is offered by the notion of the "dependent contractor" which is found in Canadian labour law (see Arthurs, Carter and Glasbeek 1984, 17678). Dependent contractors are those whose status is formally that of independent contractors, but who in

reality are dependent on, and subordinate to, a single employer. In cases like these, a number of Canadian jurisdictions have broadened the reach of labour laws to allow such workers access to unionisation and collective bargaining.

However, as Suppiot points out, the difficulty of this strategy is that it simply shifts the problem, that is, it leaves in place the idea of a dividing line between two essentially different work situations, which does not go very far toward resolving the difficulties of definition. Moreover, as Cobble (1994) notes, simply including nonstandard workers within the existing framework is not appropriate given the inherent difficulties of organising and the different conditions of work that need to be negotiated by such workers.

Thus, a second solution would be to embrace ambiguity, or in other words, to accept that there is a zone lying between the traditional employment relationship and the genuine non-employment relationship, a zone inhabited by those whose work arrangements represent a mixture of elements of the employment relationship and non-standard arrangements. This suggests that we ought to be tailoring a range of laws and policies that address the specific needs of these intermediate groups. A Canadian example can again be used to illustrate how this principle might be translated into practice. The Quebec and federal governments in Canada have adopted legislation that applies to various types of artists who are self-employed (see MacPherson 1999). This legislation provides access to collective representation and to the right to bargain (on a multi-employer basis) with those who hire their services, but it leaves untouched the right of individual artists to negotiate arrangements that are more advantageous. In this way, the legislation seeks to incorporate and balance the two dimensions of their work arrangements.

The problem with this type of solution, according to Suppiot, is that it might encourage the proliferation of non-standard employment by legitimising it. So, a third path would be to engage in a more fundamental restructuring of work and employment regulation. More particularly, if we begin with the premise that all of those who work, irrespective of the juridical form, are entitled as a matter of basic right to certain protections and minima, then it follows that a more universal approach is required, one that starts not with employment as its touchstone, but with the wider concept of *work*.

Advocates of such a strategy would argue, for example, that instead of tying social benefits like unemployment insurance or public pensions to employment, there should be a broader regime of social entitlement, something like a guaranteed annual income. One OECD analyst has even suggested that “a basic-income programme could help to encourage both useful unpaid activity (like taking care of the young and the elderly or improving ecological conditions) *and* more flexibility in pay rates and employment contracts for paid work since workers could afford to live even with below poverty wage rates” (Miller 1997, 27).

But this strategy could be used in areas that are not so directly based on income. For example, a broad reform might see occupational health and safety regulation evolve more in the direction of public health, or rights of association and bargaining become treated more as human rights than as rights tied to employment. Indeed, a number of authors have proposed that there is a need to rethink public policies with respect to collective representation and bargaining in way that allows the fostering of bargaining models that break with the assumption that the key relationship is situated between specific firms and a permanent workforce. On this view, broader-based bargaining structures, “network” models, and even a return to occupationally based unionisation and bargaining should be encouraged through public policies as a means of adapting labour law to the realities of new forms of employment.

V. CONCLUSIONS

Let me conclude by briefly invoking the title of this seminar, “Labour Relations in the 21st Century”. At the beginning of the last century, who could have predicted the vast and accelerating transformations that lay ahead? Who would have foreseen the huge progress in economic and industrial development, the world-wide increase in living standards, the incessant technological changes, the persistent struggles for democracy in the face of an often brutal authoritarianism. And who would have guessed that, despite all this progress, the world would today be even *more* unequal than it was one hundred years ago? Or that the modern workplace, despite its many changes and improvements, would continue to be a domain governed, in the main, by principles of hierarchical authority rather than consensus and participation?

Will any of this change in the new century? Only the very brave or the very foolish would hazard anything more than a wild guess. But more to the point, what can law and public policy contribute? Let us go back to the ILO's deliberations on the thorny issue of contract labour and listen to Jean-Claude Parrot, the worker co-chair of the committee lament the failure of the process:

... millions of workers have fallen through the cracks in a floor built by society out of the need to preserve justice and fairness and out of learned experience. The reasons these workers are unprotected are legal. The workers themselves are real and the situations they are in are real. The subject is difficult because it must examine the abstract world of law and the real world of work. The subject is difficult because the number of workers falling through the cracks, always at least a trickle, has now become a flood (ILO 1998, Committee Report, 5).

I chose to close with this quote not only for its colourful rhetoric, but also because it throws down a challenge to those of us who care about the relevance of state law, who continue to believe that, although it is not a panacea, it has the potential to improve lives at and outside work, but that to do so it needs to be as flexible, as innovative and as dynamic as the economic age into which we are rushing.

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