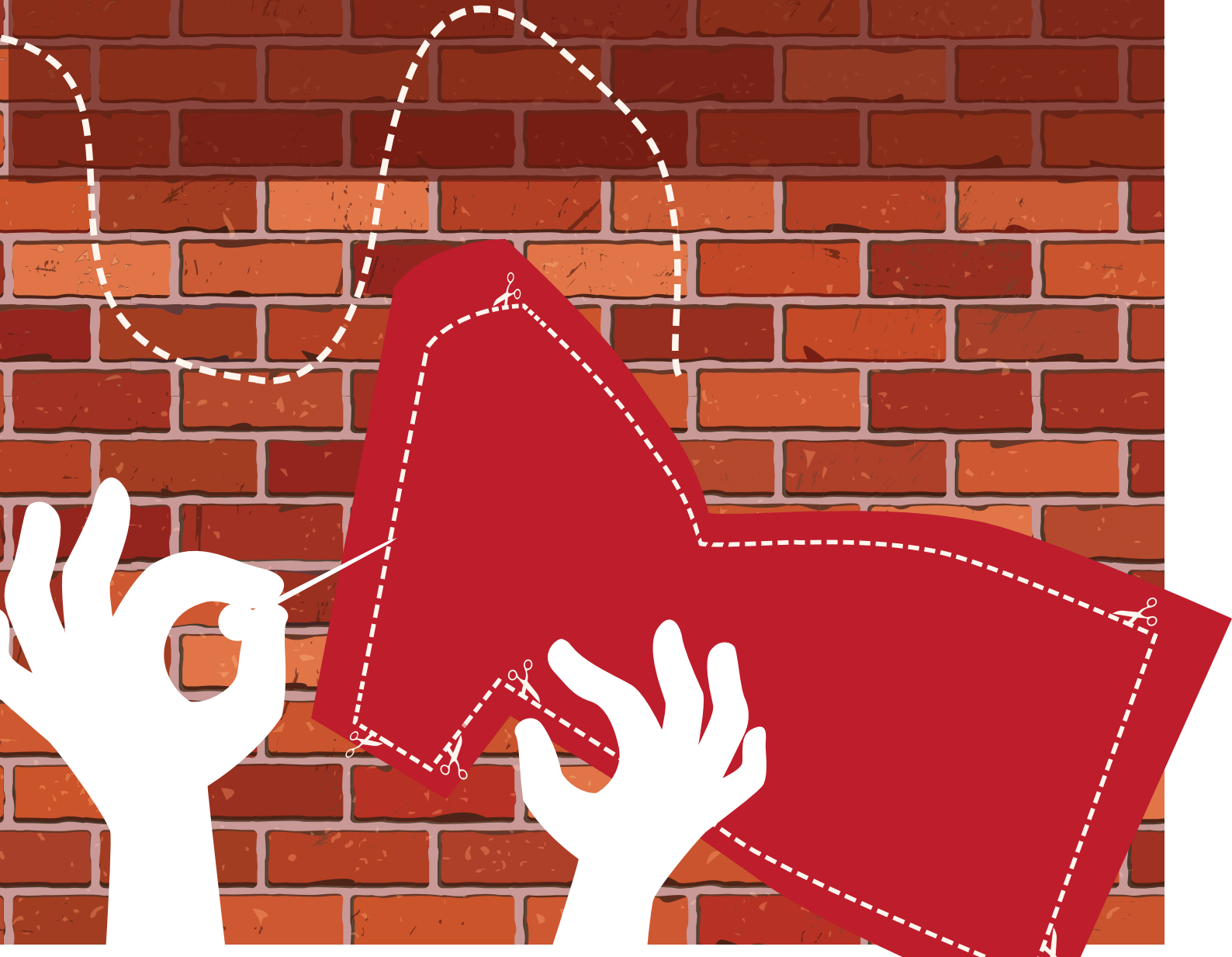
‘LIVING FOR THE DAY’:

CONTRACT WORKERS IN SRI LANKA’S FREE TRADE ZONES



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Dabindu Collective

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B. SKANTHAKUMAR

Social Scientists' Association

DABINDU COLLECTIVE

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TABLE OF CONTENTS

1. INTRODUCTION

Precarious work has expanded rapidly in Sri Lanka, even in the so-called formal or regulated private and public sectors, aside from the service and agricultural sectors.[1] Those classified as in precarious work, are workers who perform the same or similar duties and tasks of permanent employees, including in the core operations or business of that enterprise, but who are denied the same legal protection of their rights at work as the latter.

Whereas at least in the advanced capitalist economies, informal employment was seen as a fast-disappearing throwback from the past; now, in the global north as much as the global south, it is standard forms of employment that are in danger of extinction as 'labour flexibility' becomes the norm. While there are many contemporary features of precarious work, it is instructive to remember that it has always been with us. In fact, it is the period of expansion of formal or regular employment regulated by laws and institutions in the course of the 20th century that must now be seen as abnormal within the history of the working class.

As Chang observes, "It was when industrial workers organised the labour movement that the concept of a 'standard' form of capitalist work emerged".[2] As the industrial working class has decomposed, and its organisations have weakened, standard employment has become less representative of the employment relationship.

In Sri Lanka, unlike many other developing countries, there is a larger proportion of men (65.4%) than women (57.1%) recorded in the informal sector[3], as there have been employment opportunities for women in the public sector (clerical, education, health roles) as well as in export-oriented industries (production and packing). However, it is quite likely in keeping with global trends, that a higher proportion of women than men are in precarious employment, regardless of

[1] Padmasiri, Buddhima (2017), "Continuation of manpower work", *Daily FT* (Colombo), 3 January 2017, http://www.ft.lk/article/588778/Continuation-of-manpower-work.
[2] Chang, Dae-Oup (2009), "Informalising Labour in Asia's Global Factory ", *Journal of Contemporary Asia*, Vol. 39, No. 2: 161-179 at p. 167.
[3] Arunatilake, Nisha (2012a), "Sri Lanka's Female Workers and the Challenge of 'Precarious Work'", *The Island* (Colombo), 8 March 2012, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=46894.

whether they are in the formal or informal sector. One trade unionist has estimated that there are between 30-35,000 temporary workers in the apparel industry alone and more than ten times that number (or over 400,000) in other industries and sectors.[4] To place this in context, the total labour force in Katunayake Free Trade Zone is about 39,000 (22,300 women and 16,700 men) according to the Board of Investment.[5]

Not all of these are new jobs. Instead private sector employers encourage permanent workers to resign under voluntary retirement schemes with attractive pay-outs; and proceed to fill their jobs with temporary workers. Sometimes, the former employee is re-employed in the same job role as before, but now without the protection and benefits previously enjoyed. In addition to 'in-sourcing' workers for its operations, employers are 'out-sourcing' tasks such as catering, cleaning, computermaintenance, and security that were previously undertaken by its employees or could easily be undertaken by directly hiring additional staff, to contractors or service-providers.

The trend towards precarious forms of employment is considered by Kalleberg[6] among others, to be part and parcel of the global neoliberal agenda for deregulation of the labour market: by shifting risks and responsibilities from employers to workers, cheapen the cost of labour, and weaken the power of workers in the workplace, in order to maximise the profit of the owners of capital. Concurrently, there has been a rollback of public welfare programmes and privatisation of public goods provisioning; deep ideological shifts in the attitude of politicians, bureaucrats, the judiciary and the media, engendering a bias towards market-driven solutions to unemployment; and the decline of the class power of trade unions. A third dimension is the impact of technological change on the organisation of work, allowing for fragmentation and dispersal of production including sub-contracting production and in-sourcing of workers.

Across the developing and developed world, the growth and spread of non-standard employment in the workforce is opposed by advocates for labour rights at work including trade unions and non-

[4] Palitha Athukorale, Co-coordinator of the Asian Floor Wage Alliance, quoted in Berenger, Leon (2015), "Manpower agencies banned from FTZs", *Sunday Times* (Colombo), 20 December 2015, http://www.sundaytimes.lk/151220/news/manpower-agencies-banned-from-ftz-176004.html.

[5] Board of Investment, Katunayake – General Information, http://www.investsrilanka.com/free_trade_zones/katunayake.

[6] Kalleberg , Arne L. (2009), "Precarious Work, Insecure Workers: Employment Relations in Transition", *American Sociological Review*, Vol. 74, No. 1: 1-22.

governmental organisations because of its association -- in comparison to the labour standards and rights of workers in permanent employment – with:

- insecurity of employment;
- lower and/or variable earnings;
- longer and arbitrary working hours;
- poorer occupational safety and health;
- reduced opportunities for training and skills development;
- lack of representation and fundamental rights at work; and
- limited or non-existent social security benefits.[7]

In addition, this kind of employment also has many negative consequences for the life and identity of the worker outside the workplace. For instance, the financial stresses of low and irregular pay on the wellbeing of the household and quality of personal relations; the status and inter-relationships of that worker in the community; and their social and political impulses in relation to the world around them.

There is an added complication to the problem of regulation of non-standard employment when the employment relationship consists of more than the employee or worker and the owner or manager of the place of work. Thus, in Sri Lanka, contractors (referred to locally by the generic name 'manpower' – and elsewhere as labour-despatch or private employment – agencies) are a third party engaged in the hiring, deployment, and payment of workers.

Whereas once manpower agencies provided workers for "low-skilled, temporary and supplementary jobs. This (sic) has now gradually moved into [the] main business activities of the company – machine operators, cashiers, and sometimes even managerial levels."[8] Some firms have gone further by creating their own manpower agency to exclusively supply workers to their

[7] International Labour Organization (2016). *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*, Geneva: International Labour Office, pp. 19-20.
[8] Jayawardena, Priyanka (2016), "Transforming Manpower Employment to Decent Work of Greater Quality", *The Island* (Colombo), 22 February 2016, http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=140748.

enterprise; or have arrangements with agencies established by former employees including human resource managers or relatives of senior management, for this purpose.

Many workers don't and won't know the name of the agency that hires them. Their first and only point of contact may be with an individual who is the agent or even sub-agent of a manpower agency; in some instances, the 'agency' is in fact that individual. The only information that workers may have about the labour contractor is a mobile telephone number: not its address; nor its registration; nor its agreement with the user enterprise; and nor its capacity and credibility in satisfying the statutory obligations of an employer (such as sickness benefits; social security benefits; termination benefits, etc.).

The hired worker does not receive an employment contract from the private employment agency; but rather a document which is more a receipt in which the daily wage is recorded. The agreementor contract between the manpower agency and the business undertaking or "user enterprise" (in International Labour Organisation terminology), or more precisely its terms and conditions, are not disclosed or available to the hired worker. Therefore s/he does not know how much the agency is paid for its services in recruiting and hiring out the worker by the user enterprise; and the margin of 'commission' or fee, as well as method of calculation of deductions for the transport and meals of the worker.

Meanwhile, the management of the user enterprise assumes little or no direct relationship and responsibility for the agency worker outside of the delegation of work and supervision of performance of duties. Workers can be transferred from one private employment agency to another and without informing them. There is a disguised employment relationship that intentionally sows confusion, in the minds of workers and state authorities alike, as to who is accountable for safeguarding the rights and statutory benefits of workers.

Private employment agencies in Sri Lanka do not only recruit and supply workers to the manufacturing sector but also to service and technical jobs in public sector workplaces such as the Ceylon Electricity Board (CEB), National Water Supply and Drainage Board, state banks and in

semi-state organisations such as Sri Lanka Telecom (SLT). In fact, SLT and the CEB have created their own employment agencies to 'in-source' workers for their core business areas.[9]

According to some trade unionists, 'manpower' agencies are an instrument for employers to erode the rights of workers and to promote precarious work.[10] Those workers recruited and deployed by these agencies may be employed for years in the same workplace while performing the same roles as permanent workers, but are denied security of employment; sick pay and leave; and other benefits.

In the public sector there are substantial differences in the take-home pay of 'manpower' workers in contrast to permanent workers. It is claimed that minimum wages for agency workers are a quarter (25%) of the salary of permanent workers in telecommunications and one-third (33%) in banking.[11] A massive commission (up to 40% of total daily wage of the worker) is taken by employment agencies for recruiting and supplying the worker; but with no enforceable responsibilities towards them.

The fear of losing their jobs, with few alternative employment options within the country is a powerful disciplining force against industrial action and labour protest. Nevertheless, since late 2014 onwards there have been sporadic and ongoing struggles by workers who are in continuous "temporary" employment for several years in the CEB and SLT, agitating for the permanent posts promised them by politicians on several occasions.[12]

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[9] Padmasiri, Buddhima (2015), "Increasing Precarious Employment and the Socio-Economic Costs", *economicdemocratisation.org*, 7 July 2015, http://economicdemocratisation.org/?q=content/increasing-precarious-employment-and-socio-economic-costs.

[10] Collure, Anushaya; Buddhima Padmasiri; and Niyanthini Kadirgamar (2015), "Manpower agencies and the increase in precarious employment", *Sunday Times* (Colombo), 14 June 2015, http://www.sundaytimes.lk/150614/business-times/manpower-agencies-and-the-increase-in-precarious-employment-152920.html.

[11] Padmasiri, Buddhima (2015), "Increasing Precarious Employment and the Socio-Economic Costs", *economicdemocratisation.org*, 7 July 2015, http://economicdemocratisation.org/?q=content/increasing-precarious-employment-and-socio-economic-costs.

[12] For example, Pussawela, Kasun (2017), "Manpower Employees Continue Their Struggle", *Sunday Leader* (Colombo), 15 January 2017, "http://www.thesundayleader.lk/2017/01/15/manpower-employees-continue-their-struggle/; Imtiaz, Zahrah (2016), "CEB manpower workers' issues to be resolved within next two months", *Daily News* (Colombo), 21 April 2016, http://dailynews.lk/2016/04/21/local/79435; Sri Lanka News (2014), "Government to make all employees recruited to CEB through Manpower Agencies, permanent", *news.lk*, 20 November 2014, http://www.news.lk/news/business/item/4504-govt-to-make-all-employees-recruited-to-ceb-through-manpower-agencies-permanent.

Recently the Chairman of the Board of Investment Upul Jayasuriya declared that manpower agency representatives are prohibited from entering the zones.[13] He also advised employers to hire workers directly rather than through private employment agencies. Jayasuriya went further by promising that temporary workers would be absorbed into the permanent cadre of the factories. According to him, his views are shared by the President and Prime Minister too. These three statements were welcomed by workers' rights advocates. However, only the first is within the control of the Board of Investment. The latter two require the cooperation of employers and rigorous enforcement by the Labour Department; and neither has been forthcoming.

The pronouncements by the BOI Chairman in December of 2015 have not changed the facts on the ground more than one year later. Manpower 'brokers' hover around the main bus-stand near Katunayake Free Trade Zone and frequent the areas near all zones where workers converge, to tout temporary job opportunities. Meanwhile, the employers too continue to use manpower agencies to meet labour needs; instead of direct recruitment which would add employees to their pay-roll with the associated additional costs to them.

It is in this context that trade unionists, non-governmental organisations, labour researchers, and sociologists among others have expressed concern on the absence of explicit state policy and a legal framework, for the regulation of non-standard employment in general and precarious work in particular, including the activities of private employment agencies.

This small study of the ready-made garments industry in Sri Lanka aims to contribute to the development of a comprehensive approach based on law, policy and institutional reform to the problem of temporary or agency labour. In the course of arriving at its findings and recommendations, the questions that it also asks are: What accounts for the growth of agency work in the Free Trade Zones? What are the attitudes of workers, unions, employers, state agencies and other relevant stakeholders to this issue? What measures can be taken to better protect workers' rights in the current situation?

[13] Berenger, Leon (2015), "Manpower agencies banned from FTZs", *Sunday Times* (Colombo), 20 December 2015, http://www.sundaytimes.lk/151220/news/manpower-agencies-banned-from-ftz-176004.html.

1.1 Literature Review

Arunatilake (2012b) locates the expansion of non-standard employment in Sri Lanka in the structural transformation of the economy after 1977; with the shift from import-substituting to export-oriented industrialisation and "increased competition" from abroad driving employers to "resize" the labour force and to "lowering fixed costs".[14] In other words, there was a conscious strategy of expanding employment that is temporary or casual; and where the legal responsibilities that employers have to employees are shrunk to the bare minimum. However, Arunatilake also observes that there are other economic sectors – and predating the 'open economy' policies of the last four decades – where "uncertainty, instability and insecurity" of work has been prevalent, including agriculture oriented to the home market (that is, domestic food consumption) and export-crop plantations. There are two main issues facing precarious workers in Sri Lanka in her view. First, the conditions of their work: safety at work, working hours, production expectations,paid leave days and superannuation payments. Secondly, the nature of their contract of employment such that short-term contracts are used by employers to avoid the higher costs of hiring permanent workers.

The Institute of Policy Studies or IPS (2014) having examined labour force data as of 2012, observes that more than 54 percent of those in work in Sri Lanka were in temporary or casual employment.[15] Some 16 percent of all employees did not have a permanent employer. The private sector accounted for the overwhelming number of temporary jobs (92 percent as of 2012). The prevalence of non-standard employment in the private sector is attributed to (i) fluctuating seasonal demand for labour; (ii) costs to employers of regular labour recruitment or standard employment; and (iii) the nature of services provided by businesses.

The IPS study observes that owing to limitations of statistics, the number of agency-hired workers through manpower agencies is not known, although it is widespread especially in the Free Trade

[14] Arunatilake, Nisha (2012b), "Precarious Work in Sri Lanka", *American Behavioural Scientist*, Vol. 57, No. 4: 488-506, p. 489.
[15] Institute of Policy Studies (2014), 'Asia's Precarious Work: The Need for a New Policy Framework' in *Sri Lanka State of the Economy 2014*, Colombo: Institute of Policy Studies, p. 180-1.

Zones.[16] These workers are recruited for the core business of the factories. Most lack written contracts of employment, even of a temporary nature. The recruitment process is informalised even further by the presence of 'brokers', that is individuals who directly tout for workers outside the Katunayake Free Trade Zone to supply to firms within the Zone. It is reported that some firmshave taken the step of forming their own manpower agencies from which workers can be hired ona temporary basis; and without the statutory rights and protections afforded to regular recruits such as gratuity.

Among the recommendations made by the IPS are promoting decent work as a policy objective such that better jobs are created; greater accountability of employers to eradicate precarious conditions of work; public provisioning of employment benefits to temporary workers; conversion of fixed term contracts into permanent ones; limiting the number of temporary workers in each enterprise; extending legal protection to agency-hired workers; regulating manpower agencies including compulsory registration by the Labour Department; limiting casual work to certain sectors; mandatory issuance of letters of employment to all temporary workers; mandatory insurance for despatched workers in event of occupational injuries; and awareness campaigns onthe labour rights of agency-hired workers.[17]

1.2 Scope of Research

The International Labour Organisation (ILO) has identified four types of 'Non-Standard Employment'[18] including 'part-time and on-call work' and 'disguised employment/dependent self-employment', in a recent report. However, in the context of non-standard employment in Sri Lanka's free trade zones, the scope of the present research study is on practices of 'temporary employment' and the 'multi-party employment relationship' with a focus on the ready-made garment sector.

The specific objectives of the study are:

[16] *Ibid.*, p. 183.
[17] *Ibid.*, p. 185-186.
[18] International Labour Organisation (2016), *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*, Geneva: International Labour Office, pp. 6-8.

- To identify the legal standards and labour rights that all workers, especially in the Free Trade Zones/Export Processing Zones, are entitled as provided in national laws and policies and consistent with Sri Lanka's international obligations.
- To scope and analyse the terms and conditions of employment of agency workers in the Free Trade Zones (especially in the apparel/ready-made-garments industry) in relation to the national and international standards discussed above.
- To discover the perceptions and perspectives of stakeholders – on the issues of agency labour (particularly in the Free Trade Zones) and towards its regulation consistent with national laws and policies and international obligations – including agency workers; factory management (human resource managers); employment ('manpower') agencies; trade unions and non-governmental organisations; Board of Investment (BoI); Labour Department; Free Trade Zone Manufacturers Association; Employers Federation of Ceylon; and International Labour Organisation (ILO).
- To devise recommendations for the regulation of agency labour in Sri Lanka that are protective of workers' rights, and women workers' rights in the Free Trade Zone sector in particular.
- To inform advocacy by trade unions and non-governmental organisations on issues of agency labour and to strengthen campaigns against precarious employment and for decent work.

1.3 Methodology and Limitations

The first phase of the study was *desk research* to review the secondary literature on precarious work in Sri Lanka. The existing statutory framework on workers' rights and relevant case-law on the regulation of agency labour was analysed to establish the legal provisions on workers' rights and especially the rights of agency workers.

The second phase of the study shifted to collection of primary data and triangulation of information through field research from October to December 2016. Focus Group Discussions (FGDs) were conducted with around 50 agency workers to establish their experiences at work in the course of non-standard employment. The workers were interviewed in 3 groups of 10 each.

There were 2 FGDs with workers from Katunayake Free Trade Zone and 3 FGDs with workers from Biyagama Free Trade Zone.

The proposed criteria for selection of FGD participants was to ensure that (i) half or more are women; (ii) different age groups between 18 and 45 years are represented; (iii) varying duration of work experience ranging from 1 to 8 years are represented; (iv) one group be of Tamil ethnicity and North-Eastern origin; (v) varying kinds of employment ranging from piece-rate to daily to fortnightly to monthly pay; and (vi) their household status is varied to include single, married, separated/divorced, children, cohabitants, etc.

In-between the FGDs, there were *semi-structured interviews* in parallel with key informants. Those individuals selected as stakeholder representatives from industry, government, employers' and workers' were as follows: (i) 2 factory (human resource) managers from Katunayake and Biyagama; (ii) 4 'manpower' agencies from Katunayake and Biyagama; (iii) 2 officials of the Board of Investment (1 each from Katunayake and Biyagama Zones) (iv) 3 Labour Department officers in Negombo and Colombo; (v) 1 official of the Free Trade Zone Manufacturers Association in Colombo; (vi) 1 official of the Employers' Federation of Ceylon in Colombo; (vii) 1 representative of the International Labour Organisation office in Colombo; (viii) 4 representatives of trade unions in Colombo, Gampaha and Katunayake; and (ix) 2 representatives of non-governmental organisations in Katunayake.

The third phase of the study was to analyse and write-up the initial findings as the first draft of the final report. This draft was the basis of a presentation to a group of trade unionists in Colombo in mid-January 2017. In the course of the vigorous discussion during the sharing of findings and draft conclusions, it was clear that there was not yet consensus even among like-minded workers' rights advocates on the most strategic way to move forward in tackling the issue of agency hired workers. Whereas one point of view is to campaign for increased regulation of manpower agencies and to reduce the scope of agency hired workers to genuinely short-term needs and for non-core business operations; this approach was opposed by others who believe that the regulation of these agencies confers legitimacy upon them, when they and the practice of manpower work should be abolished *in toto*.

In deference to the sentiments expressed, it was decided that the formulation of specific recommendations is premature in the absence of wider consultation and consensus-building among trade unions and women workers' organisations. Therefore the report has taken the form of a background paper which can inform further discussion among a cross-section of trade unions and workers' organisations. With this objective in mind, the first draft of the report was revised. Thereafter the second draft was circulated for internal review by Dabindu Collective and has since been finalised for public release.

A number of limitations to the present research study should be noted. Clearly the sample size of 50 is too few to make generalisations about the experiences and perceptions of agency-hired workers within the Free Trade Zones.

While the sample met most of the criteria spelled out above to capture the diversity of the working class in the zones; we were unable to secure the participation of workers older than their mid-30s; no piece-rate workers could be identified for inclusion; and nor were we able to establish the household status of all participants. These challenges stemmed from access to a larger and more diverse number of workers; anxieties or fatigue on the part of workers to participate in research of this nature; and unwillingness to disclose their household status especially when in unconventional relationships or arrangements.

Further, it was a tremendous challenge to secure key informant interviews particularly with human resource managers and manpower agencies. Those whom we were able to interview insisted on anonymity in exchange for responding to our questions. It is unclear why there is such reluctance to share their point of view in public. It is not unlawful to operate a private employment agency; nor for employers to hire agency workers. The impression that is left is that these parties do not wish to draw attention to their activities and therefore themselves. As a consequence of so many informants not wishing to be identified; none of the key informants are named in the report. Further, we note with regret that despite repeated requests, the International Labour Organisation office in Colombo did not grant an interview to explain its perspective and approach in Sri Lanka.

1.4 Structure of the Report

The report is divided into six sections. Section 1 presents an overview of the research topic in the context of Sri Lanka and specifically the Free Trade Zones. This part also reviews the scanty literature on precarious work and explains the methodology that was used for the research. In section 2, there is a brief discussion of the framework of labour rights in Sri Lanka. Care is taken to distinguish between the law on the books, that is the rhetoric of labour rights, and the law in practice, with particular reference to the Free Trade Zones.

Section 3 presents the experiences of some manpower workers from the sample participating in focus group discussions in the Biyagama and Katunayake Free Trade Zones. These are grouped around a series of propositions to establish the agency of manpower workers in their working lives. Section 4 shifts to the viewpoints of a range of disparate stakeholders from manpower agencies to factory managers to the Labour Department to trade unions and non-governmental organisations on the issue of manpower work, employment agencies, and what is to be done in regard to the issues identified.

In section 5 there is a summary of relevant policies and recommended laws for the regulation of manpower work, both domestic and international. Section 6 concludes by locating the problem of precarious employment within a larger set of concerns. The aim of doing so is to be mindful of the limits or even dangers of piece-meal approaches to this problem and the need for holistic strategies.

2.0 LABOUR RIGHTS IN SRI LANKA

There is a comprehensive regime of labour laws in Sri Lanka that is protective of workers' rights and benefits. All of these laws are applicable, without exception, to the export-oriented industries including within the free trade zones. As will be explained below, the application of labour laws in Sri Lanka is uneven: in fact, a unique labour law regime operates within the zones and industrial parks licensed by the Board of Investment. Needless to add, this situation is extra-constitutional and extra-legal. However, it has prevailed for so long and been enforced with such force, that it is normalised within the understanding and expectations of employers, workers and unions, and the Labour Department alike.

2.1 Rights in Law

This section begins by presenting in tabular form core labour rights and relevant labour laws and Wages Board decisions in Sri Lanka, to establish a baseline from which to evaluate the rights and conditions of free trade zone workers in general and agency workers in particular.

RIGHT/OBLIGATION	CONTENT	LAW
Contract of Employment	Written or verbal agreement between employer and worker specifying wages and terms and conditions of service.	Shop and Office Employees Act No. 19 of 1954
Regulation of Working Hours	45 hours a week (9 hours per day for one-shift operation; 8 hours per day for two and three shift operation). Night-Work for women is voluntary; requires their consent and approval of Labour Commissioner. Maximum of 10 night work shifts per month on women; no restriction on male workers.	Factories Ordinance No. 45 of 1942 (as amended by Act No. 32 of 1984)
Wages	Monthly wage to be paid within	Wages Boards Ordinance No.

	10 days of end of the month.	27 of 1941 Shop and Office Employees Act No. 19 of 1954
Overtime and Overtime Payment on Working Day	Women workers or young person (aged between 16 and 18 years) limited to 60 hours of overtime work per month. No limit on male workers. 1.5 hours pay for each hour between 7pm and 7am.	Factories Ordinance No. 45 of 1942 (as amended by Act No 19 of 2002)
Payment and Lieu Leave for Weekly Holiday	1.5 day's wage for working on weekly holiday and one day's lieu leave within next 6 days.	Shop and Office Employees Act No 19 of 1954
Payment and Lieu Leave on Public Holiday	There are 8 public holidays each year. Double wages or extra holiday with pay in lieu (before 31 December) for work on a public holiday. One and a half days wages for working on a *Poya* day and no lieu leave. Prior approval of Commissioner of Labour is required.	Wages Board for Garment Manufacturing Trade
Leave / Holidays	Sunday is weekly holiday and Saturday is a half-day (5 ½ hours). *Poya* day is a paid monthly holiday. Extra paid holiday for public holiday falling on a weekly holiday. 14 days of annual holidays per year (6 at a stretch).	Factories Ordinance No. 45 of 1942 Wages Boards Ordinance No. 27 of 1941

Maternity Benefits	12 (84 days) weeks of paid leave (6/7th of a week's pay) for first two confinements and 6 weeks (42 days) from third confinement onwards. Nursing interval of no less than 30 minutes, twice a day, where creche or nursery is provided by the employer; and of no less than 1 hour, twice a day, where not provided by the employer.	Maternity Benefits Ordinance No. 32 of 1939
Security of Employment	Labour Commissioner's permission is necessary to terminate employment of worker/s (on non-disciplinary grounds) in enterprises with 15 or more workers.	Termination of Employmentof Workmen Act No. 45 of 1971
Trade Union	Every worker may join and/or form a trade union.	Trade Union Ordinance No. 14 of 1935
Collective Bargaining	Compulsory bargaining with union which has in its membership not less than 40 percent of employees on whose behalf it seeks to bargain.	Industrial Disputes Act 1950 (as amended by Act No. 56 of 1999)
Strike Action	"The cessation of work by a body of persons employed in any trade or industry acting in combination, or a concerted refusal, or a refusal under a common understanding of any number of persons who are, or have been so employed, to continue to work or to accept employment." (Trade Unions Ordinance)	No express constitutional or statutory provision but an implied right recognised in judicial decisions. One of the lawful objects of a trade union (under the Trade Unions Ordinance, section 2)is "the promotion ororganization of financing of strikes in any trade or industry ..." Certain public servants are legally prohibited from strike action: judicial officers, prison officers, police officers, and agricultural corps.

Compensation for workplace injuries	Employer must compensate worker for injuries at the workplace or resulting death to a quantum determined by the Commissioner for Workmen's Compensation.	Workmen's Compensation Ordinance No. 19 of 1934
Retirement Benefit	Gratuity is payable to any worker who has completed more than 5 years of service, in an enterprise with 15 or more workers, at the rate of a half month's salary for each year of service based on last monthly wage.	Payment of Gratuity Act, No. 12 of 1983
Social Security	8% deduction from worker's monthly earnings and 12% contribution from employer to be remitted to the Employees Provident Fund (Central Bank of Sri Lanka) on or before the last day of the succeeding month. 3% of the salary of a worker to be contributed by the employer to the Employees Trust Fund Board on or before the last day of the succeeding month.	Employees Provident Fund No. 15 of 1958 Employees Trust Fund No. 46 of 1980

This section continues by evaluating the conditions and rights of free trade zone workers against the summary of labour rights of general application above, to establish where variations or contradictions exist between them and their consequences.

2.2 Standards in Free Trade Zones

The Board of Investment (BOI), though established as the regulatory agency to attract foreign direct investment into the country and the administrative authority for areas designated as export processing zones and industrial parks, has assumed a third role which is in conflict with the

previous two. The BOI has supplanted the Labour Department in the supervision of industrial relations within BOI-licensed enterprises within the zones and parks.

It has a discrete Industrial Relations Department which main functions[19] are: (i) advisory services to investors and enterprises as to the statutory obligations of employers under Sri Lankan labour law; (ii) monitoring compliance of enterprises with labour laws, including through periodic inspections; (iii) responding to grievances of workers and as intermediary in conciliation of disputes between employer and workers; (iv) promoting labour dialogue and consultative practices, for example through establishment of employees' councils at enterprise-level.

It will be observed from the foregoing that the second and third functions are properly those of the Labour Department, that unlike the Board of Investment is not aligned with or beholden to one party (that is, the investor/employer). The fourth function is one of the roles of the trade union.

The standard agreement[20] between the investor and the Board of Investment includes clauses on the obligations of the employer towards the worker. "The Enterprise shall ... observe the provision in relevant labour laws, including those relating to wages, hours of work, overtime, leave, provident fund, welfare facilities, safety precautions and workmen's compensation and implement the payment of any wage increase, as may be specified by the Board."

There also clauses on the obligation of the investor to "... facilitate the formation and functioning of [an] Employees' Council in the Enterprise in accordance with the Guidelines on the Formation and Operation of Employees' Councils issued by the Board" and to "prevent and settle disputes between the Enterprise and the employees in accordance with the Dispute Settlement Procedure laid down in the said Labour Standards and Employment Relations Manual". What is elided hereis the right of workers to also form and/or join a trade union as recognised in the 1978

[19] Wijetunga, Leslie (1997), 'Industrial Relations in Export Processing Zones: The Case of Sri Lanka' in Adewumi, Funmi (ed.), *Labour Relations in the Export Processing Zone: Challenges for Organized Labour*, Lagos: Friedrich- Ebert-Stiftung, pp. 37-38.

[20] The Industrial Relations Department of the Board of Investment head office in Colombo kindly shared the relevant extracts which are on file.

Constitution of Sri Lanka[21] and in ILO *Convention No. 87* (Concerning Freedom of Association and Protection of the Right to Organise)[22] ratified by Sri Lanka in 1995.

The 2004 'Labour Standards and Employment Relations Manual' of the Board of Investment is scrupulous in its description of the relevant labour standards in Sri Lanka, which are applicable both within the zones and licensed enterprises outside. In practice, the BOI is unable to supervise the many hundreds of establishments outside the zones in various parts of the country for lack of human and other resources. Of greater concern is that it appears neither does the Labour Department. As the guidelines rehearse the labour rights that are presented above, there is no need for their duplication here.

However, it is useful to highlight a few standards of particular relevance to the problems of manpower or agency-hired labour in the free trade zones; and which are routinely violated in the case of workers both in standard as well as non-standard employment. In other words, in the context of the free trade zones in Sri Lanka, workers in non-standard employment are treated more or less equally as workers in standard employment in so far as violations of their rights aresimilar.

> *Contract of Employment*: "Every worker including trainees" is entitled to a written contract of employment "embodying terms and conditions of service including the designation or category of the employee, normal hours of work, rate of pay, period of training if any, probationary period, leave, holidays and superannuation benefits"[23]; and acknowledgment of receipt of which by said work should be obtained by the employer.
>
> *Payment of Wages*: It is stipulated that all employees should receive a monthly wage. To avoid any doubt, the same section goes onto to specify that no wages are to be paid "on daily rate or piece rate or on contract basis".[24]

[21] Article 14 (1) (d) "Every citizen is entitled to—[...] the freedom to form and join a trade union".
[22] Article 2 "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."
[23] Sec. 1.6. in Board of Investment (2004), *Labour Standards & Employment Relations Manual*, Colombo: Board of Investment, p. 1.
[24] *Ibid.*, Sec. 3.2.1., p. 3.

Overtime: No female worker is to be employed on overtime work "in excess of 60 hours a month".[25]

Weekly Holiday: Any worker employed on a Sunday shall be remunerated at not less than 1 ½ times the daily rate of wages and "in addition, a day off shall be given within the 6 days succeeding such Sunday".[26]

Occupational Injury Compensation: 'Workmen's compensation, at present rates shall be paid to a worker in respect of an injury caused due to an accident arising out of and in thecourse of employment or disease which is of an occupational origin".[27]

Trade Union Rights: "The right of employees to form and join trade unions of their own choosing and to bargain collectively"[28] shall be respected by every employer.

Employees' Councils: The objects and functions include inter alia " ... (c) The representation of employees in collective bargaining and industrial disputes".[29] However, "where both a recognised trade union having bargaining status and an Employees' Council exist in an enterprise the Employees Council shall not represent the employees in collective bargaining and settlement of industrial disputes concerning terms and conditions of employment"[30].

In 2005 the Board of Investment adopted 'Implementation Rules' on the *Policy Guidelines on Employment of Casual/Temporary Workers and Contract Labour for BOI Enterprises* (in the form of a Circular issued on 16 March 2005) for clarification of the same.[31] The rationale for the *Policy Guidelines* to place controls on the purpose and conditions of employment of agency-hired

[25] *Ibid.*, Sec. 3.3.4. (1), p. 4.
[26] *Ibid.*, Sec. 4.1.1., p. 4.
[27] *Ibid.*, Sec. 8.1.1., p. 9.
[28] *Ibid.*, Sec. 9 (iii), p. 10.
[29] *Ibid.*, Sec. 10.3.1. (c), p. 12.
[30] *Ibid.*, Sec. 10.3.2., p. 12.
[31] The Industrial Relations Department of the Board of Investment head office in Colombo kindly shared a copy of this unpublished document.

labour is the "sustainable employment of workers employed in enterprises registered with the BOI and effective compliance of labour standards in these enterprises."

The grounds for recruiting workers through labour contractors or suppliers must be to "perform work of a seasonal or intermittent character" or "meet unforeseen or special orders which are not of a regular nature". Therefore, what is emphasised here is that it is not permissible to hire contract workers for continuous or permanent work.

The obligations of the enterprise that engages the services of a labour contractor or supplier (significantly described by the BOI as the "principal employer") are:

(i) To notify the Director General of the BOI of the contact information of the employment agency and the agreed wages and terms and conditions of employment (copy of notification to be sent to the relevant Zonal or Regional Director of the BOI);

(ii) To ensure that such employment through Labour Contractor/Supplier is not a regular feature;

(iii) To obtain the approval of the Director General of the BOI, where the need to continue such employment without break is for over 6 months and;

(iv) To require the Labour Contractor <u>through written agreement</u> (emphasis in the original) to—

"(a) Undertake absolute responsibility for the payment of all statutory and other dues of his workers arising by way of employer / employee relationship.

(b) Maintain, keep and preserve wage, EPF/ETF, overtime and other records required to be maintained under the law in respect of his workers.

(c) Pay wages, overtime remuneration, EPF/ETF contributions, holiday pay etc. to his workers as required by the relevant laws applicable.

(d) Furnish to the principal employer a copy of records maintained by him in respect of all workers supplied by him.

(e) Permit the principal employer or his duly authorised representative to inspect the wages, EPF/ETF and other records required to be maintained by him under the relevant laws applicable.

(f) Issue to every worker pay-slips giving details of wages and overtime remuneration paid, deductions made from wages, contributions made to EPF/ETF etc."

The obligations of the BOI-licensed enterprise (or 'principal employer') in the case of parties to whom the business process is outsourced or sub-contracted is to require these parties through written agreement (emphasis in the original) to discharge the identical responsibilities set out above.

It is explained by the BOI that these requirements are intended to "absolve the principal employer from statutory liabilities arising from the employment of workers engaged by the party to whom the business processes / activities are outsourced / subcontracted, and enable the principal employer to satisfy the requirements of buyers' compliance audit."

2.3 Rights in Practice

The sections above have presented the laws and regulations governing the labour rights of workers in Sri Lanka; and the role of the Board of Investment in administering those standards within the zones and industrial parks that it operates. However, the letter of the law is not the same as the spirit in which it is implemented and sometimes not implemented. A large secondary literature[32], confirmed by periodic public disputes and struggles of free trade zone workers, testifies to the violation of many if not most labour laws in practice regardless of whether those workers are permanent or temporary.

[32] For example, see Hancock, Peter; Carastathis, Geoff; Georgiou, Jonathan; and Max Oliveira (2015), "Female workers in textile and garment sectors in Sri Lankan Export Processing Zones (EPZs): gender dimensions and working conditions", *Sri Lanka Journal of Social Sciences*, Vol. 38, No.1: 63-77; Padmasiri, Buddhima and Swasthika Arulingam (2015), "Trapped at the Katunayake Free Trade Zone", *Sunday Times* (Colombo), 30 November 2014, http://www.sundaytimes.lk/141130/business-times/trapped-at-the-katunayake-free-trade-zone-129478.html; Marcus, Anton; Da Bindu Collective; Women's Center; Joint Committee of Workers' Councils in the FTZs; and Institute of Occupational Health and Safety (1998), 'Free Trade Zones and "Transnationalisation" of the Sri Lankan Economy' in Asia Monitor Resource Center (ed.), *We In The Zone: Women Workers in Asia's Export Processing Zones*, Asia Monitor Resource Centre: Hong Kong; and Devanarayana, C. (1997), *A Review of Free Trade Zones in Sri Lanka*, Dabindu Collective: Ja-ela.

Thus in the ready-made garments or apparels industry in particular, the working day is regularly in excess of the maximum permissible hours and especially during seasonal production highs to meet the targets agreed with buyers. It is an industry norm for overtime to exceed 100 hours per month. Asbasic wages are low (in comparison to the public sector and even manual unskilled work), overtime is a necessity for all workers to take home a wage adequate to their subsistence needs. There is coercion of workers to work overtime after the end of their daily shift, despite it being a voluntary decision by law. This includes night-work for women, which ought to be consensual andis prohibited for women who have worked earlier shifts on the same day, but which safeguards are flouted in practice. The day-off in lieu of work on a weekly holiday (Sunday) is not enjoyed by workers. There are consistent complaints by workers that request for leave is denied, except in the event of a death in the immediate family.

A complex system of bonuses, fines and penalties is used to discipline workers who are late to work, take sick leave, are unwilling to do overtime or work on holidays, and who do not meet their production targets (whether reasonable or not). These are entirely arbitrary and at the discretion of individual factory management, without oversight or authorisation by the Labour Department or even the Board of Investment. Compensation for occupational injuries is not forthcoming in many instances. There is no collective bargaining at industry or even enterprise-level: the annual increment of the basic wage is determined bilaterally by the regulatory agency for the zones (Board of Investment) and the employers (Free Trade Zone Manufacturers Association). Representative organisations of workers are excluded entirely from this process. Often the government, reacting to political pressure from trade unions and workers organisations, intervenes to compel employers to agree to the measly increase (around Rs500 per month).

Trade unions are actively discouraged, with union members victimised and blacklisted from future employment within the zones. All the unfair labour practices detailed in the BOI's own Labour Standards manual as prohibited are in fact carried out by employers, especially within the zones. These range from threatening workers with loss of employment for joining a trade union; to

intimidating workers that the factory would be closed if a trade union is formed; to inducements to workers not to join or take executive positions in a union, etc.[33]

The BOI while not explicitly opposed to the establishment and operation of trade unions within the zones and parks as provided by law, does in practice take an anti-union stance. Its' clear preference is for the formation of 'employees councils', which are joint bodies of management and workers' representatives for the purpose of industrial harmony, efficiency and labour productivity; and not genuine workers' organisations which organise, represent, and bargain with employers on wages and working conditions.

At the same time, there are other labour rights that are better respected. For instance, excepting in instances of factories that have suddenly ceased operations, for example where management has absconded from the country to evade their financial liabilities to workers, generally there is timely payment of wages; the correct rate of overtime payment is made; the appropriate provident fund and trust fund contributions are deposited by employers; and there is payment of gratuities upon resignation to eligible workers (though not always promptly). However, according to the BOI's own records, it has discovered massive arrears in payment of wages and provident fund contributions,[34] upon inspection of payroll records. There is no indication that any appropriate action has been taken against the offenders by way of penalties for these serious violations of the law.

Workers in standard employment receive a letter of appointment from their place of work after completing their probationary period. This is not a proper contract of employment as it only specifies the wage but not other terms and conditions such as working hours or even job description.[35] In the case of workers in non-standard employment, the appointment letter is issued by the private employment agency itself and on its letterhead. Likewise the attendance sheets, leave applications and salary slips of manpower workers bears the name of the manpower agency. However, these workers during their hours of employment, are supervised and under the control

[33] *Ibid.*, Sec. 9 (iv) (a-g), p. 10. This section is a faithful reproduction of the provisions and language of the new part on unfair labour practices to the Industrial Disputes Act as added by the *Industrial Disputes (Amendment) Act No. 56 of 1999*, Sec. 2.

[34] Cited in Sivananthiran, A. (2008?), *Promoting decent work in export processing zones in Sri Lanka*, p. 11, http://www.oit.org/public/french/dialogue/download/epzsrilanka.pdf.

[35] Bharati, Deepa (2007), *'Tears of the Emerald Isle': Women Garment Workers in EPZs of Sri Lanka*, Committee of Asian Women: Bangkok, p. 16.

of the user enterprise which also monitors their attendance, overtime and leave, and not by their nominal employer.[36]

It is unclear whether there is an unwritten understanding between the Board of Investment and the employers, where the former accepts the flagrant violation of some labour standards (detailed above), in return for which the latter respect other workers rights pertaining to their wages, overtime payments and end-of-employment benefits.

Women workers in the zones face specific gender-based issues[37], some of which falls outside of legal regulation. Sexual harassment is a well-known grievance: in addition to unwanted attention and advances by male management within the workplace, women are also verbally and sometimes physically threatened by males in the community as they make their way to and from the factory by foot or on public transport. Another concern is the abysmal quality of affordable accommodation for women workers, who are largely internal migrants from other districts to the Western province.

The only available option are 'boarding houses' in villages around the zones which are over-crowded, badly ventilated, and with poor water and sanitation facilities. Despite the zones having been in operation for over three decades, and much documentation of these issues in the mass media, by non-governmental organisations, and in academic studies, there is sheer indifference by employers, local authorities, the Board of Investment, and state authorities to remedy this situation by means of policy and institutional reforms, leave alone introducing legal protection.

Finally, in respect of the implementation of the BOI's 2005 *Policy Guidelines on Employment of Casual / Temporary Workers and Contract Labour for BOI Enterprises*, the information that was received by the key informants points to it being largely ignored by all concerned.

[36] Weerakoon, Wijepala (2014), "End of permanent employment?", *Sunday Times* (Colombo), 26 October 2014, http://www.sundaytimes.lk/141026/business-times/end-of-permanent-employment-124000.html,

[37] For example see, Hewamanne, Sandya (2006), "'Participation? My blood and flesh is being sucked dry': Market-Based Development and Sri Lanka's Free Trade Zone Women Workers", *Journal of Third World Studies*, Vol. XXIII, No. 1: 51-74.

For instance, there is no practice of all enterprises informing the BOI's Director General of agreements with labour contractors or suppliers; nor of submitting such agreements for scrutiny of its provisions.

There is no evidence that all BOI enterprises honour the obligation to seek approval of the BOI Director General where the period of employment of contract labour is longer than six months.

There was no certainty from the manpower agencies and contract workers interviewed in the course of this study, that every worker receives a pay-slip with a breakdown of wages, overtime payments, deductions(if any and for what purpose) and the contributions made for EPF and ETF.

Neither does it appear to be the norm for manpower agencies to submit its documentation on workers that are supplied to the enterprise; nor for the enterprise to request to inspect the records of labour contractors or suppliers in regard to workers employed in that enterprise.

3.0 'WE LIKE TO BE MANPOWER WORKERS'

In the course of focus-group discussions with free trade zone workers (women and men) in non-standard employment, there were variations in responses between those employed in the Katunayake and Biyagama zones, as well as between participants of Sinhala and Tamil ethnicity working in Katunayake. The responses are clubbed together below and organised around the key findings. There were no significant divergences based upon gender identity: the experiences of women and men appeared to be similar. This finding alerts us to the importance of contextualising any discussion on agency work in the free trade zones in their spatial location as well as in the identity of the workers themselves (ethnic origin, linguistic group, and place of origin).

Preference for Agency Work: All the participants expressed their preference for agency work over permanent jobs. This is true even for workers who have previously been in permanent employment and/or are within the age cohort that makes it likely they would secure standard employment, if interested. The main advantages to them in being temporary and not permanent are flexibility of working days; the opportunity to receive their wage in hand at the end of the working day, instead of having to wait for the end of the month; and the higher wage for manpower work in comparison to permanent work.

According to the temporary workers interviewed, their daily wage ranged between Rs. 850-Rs. 1200 depending upon the user enterprise. Most received between Rs. 850 and Rs. 1100. This is significantly higher than what permanent workers receive. The basic or minimum salary in the apparel sector is currently Rs. 13,500; with overtime the worker can expect to top it up by around 50 percent or almost Rs. 20,000. Assuming that a garment worker in permanent employment has worked for 27 days in a particular month, her daily pay before overtime is Rs. 500 (before deductions for own provident fund contribution) and after overtime averages Rs. 740. In comparison, manpower workers can expect to earn at least Rs. 200 more.

None of the participants appeared to be anxious over their exclusion from or likely non-receipt of the statutory benefits (especially EPF and ETF) available to permanent workers. Each of them valued their greater independence from the factory in determining whether to work on a particular

day, and their greater freedom to take breaks during the year when they would return to their natal villages. The only downside of non-standard employment, as expressed by them, is their exclusion from access to loans (from the company as well as commercial organisations) and the bonus payment to workers.

No or limited diversity of past employment: Almost without exception, factory work had been their only or main experience of waged labour. A number of women had been in the Middle East as domestic workers between stints of factory work. One respondent held a permanent job as a nurse in a factory but took up agency work on the production floor for extra income at other times.

No contract of employment: None of the respondents had a contract of employment with either the manpower agency nor the user enterprise. Most are presented a document by the manpower agency at the beginning of the working day on which the only information recorded is their name,national identity card number, and the payment to be received that day. This document is signedby them at the beginning and again at the end of the working day. There is no written informationon the number of hours of work; nor the hourly rate of pay; nor the name of the workplace; northe job to be performed: all or some of these terms of employment are communicated verbally by theagency or the broker.

Prior knowledge of daily place of work: Manpower workers of Sinhala ethnicity in Katunayake and Biyagama say that their agency informs them of the name of factories where there are vacancies, when they present themselves for work each morning. However, Tamil workers in Katunayake reported that the hiring agency did not disclose this information, and that their first knowledge of the name and location of the factory would be upon arrival there (transportation having been arranged by the private employment agency).

No prior informed consent to user enterprise and job role: In general, the manpower agency selected the user enterprise for the workers. Some workers of Sinhala ethnicity said that they would ask the name of the factory beforehand, and only then decide whether they wished to work there. This decision is apparently respected by the manpower agency. There is no discriminatory treatment of them for their unwillingness to work, according to them. Other Sinhala and Tamil

workers claimed that they had no choice in deciding where they would work: only whether to report for work or not. The Tamil workers (all women) appeared to be most vulnerable to pressure from manpower agencies; as according to them the decision was taken on their behalf without consultation. They could not imagine refusing to work where the agency decides. The differences among Sinhala workers are also contingent upon individual agencies. Some are more flexible as to the preferences of workers while others are not. The nature of the work to be performed at the user enterprise is verbally informed at the time of acceptance of offer of employment. However, all the respondents said that they can only be sure of their work role upon reporting to the user enterprise and receiving instructions from a supervisor. Also, their job role may be changed in the course of the working day as determined by the factory floor management.

Uncertainty over Social Security Contributions: Most workers had been informed that statutory deductions from their wages are made for the Employees Provident Fund, and are contributed on their behalf by the manpower agency to the Employees Trust Fund as is the legal requirement. A few workers reported receiving confirmation slips of the contributions made and balances in the Provident and Trust Fund once every six months. However, most workers were uncertain as to whether they had EPF and ETF accounts, and suspected their agency of pocketing monies that should have been deposited on their behalf. Most workers appeared to be resigned or even indifferent to never receiving any superannuation benefits at all.

Ad-Hoc Deductions from Wages: Some workers reported deductions from their wages for manpower agency uniforms; for the day pass to enter the zone; for transport; and for meals whileat work. Other agency workers believed they received their uniforms and transport for free fromthe agency.

Ratio of agency to permanent workers: Whereas in Katunayake the participants believed that around a half or even more of the labour-force comprised manpower workers, in Biyagama the ratio was perceived to be two-thirds or more of permanent workers to agency workers. Agency workers in Katunayake considered themselves to be in demand and therefore able to pick and choose their place of employment, as did agency workers in Biyagama.

No paid leave: None of the workers, including those in monthly employment, received paid leave.

Working hours: All agency workers reported working 12 hour shifts during the day. The night shift can also vary between 8 to 12 hours.

Seasonal Lay-Offs: Some workers, particularly the Tamils, reported being temporarily laid-off by the user-enterprise during the months of April and December in particular. These workers would look elsewhere for other work either of a similar nature, or alternative employment outside of the zone, but return to their earlier places of employment when the demand for their labour resumed.

Tensions with and differentiation from permanent workers: None of the participants reported incidents of unequal treatment by the user enterprise in comparison to permanent workers. However, some perceived that they are treated inferiorly when permanent workers are admitted into the factory before them, and when permanent workers are allowed access to the meal area before them. The manpower workers also felt that permanent workers believe themselves to be superior because the latter consider themselves to be better qualified through six months of on-the- job training unlike agency workers. At the same time, a common complaint is that the permanent workers are lazy or do not work as hard as agency workers, and pass the difficult or unpopular jobsto agency workers when they enter the factory.

Trade union membership: Most of the workers had never been a member of a trade union. A few in Biyagama were unionised but they were reluctant to declare so openly, for fear of being victimised by the user enterprise. The Tamil women workers believed that they were not eligible to join a trade union as they are not permanent employees. There was general pessimism over uniting workers in the same enterprise. There was also intense awareness of the risk of losing employment if they do join or form a trade union.

No Alternatives: Most participants did not seem to have any plans for alternative employment, or when they did, these were as precarious as their current employment for instance manual labourfor men which pays better than factory work. In general, their goal is to work for so long as theycan within the zones. A couple of them had ideas for self-employment in their hometowns or

villages. However, the majority appeared to have no employment aspirations whether within the same industry or other sectors. The future to them is an extension of the present. To live, work and earn as they are, for as long as necessary (for some) and possible (for others).

Some Observations: The responses above are extracted from the focus group discussions to illustrate some experiences and perceptions of manpower agency work by agency-hired labour in the Biyagama and Katunayake Free Trade Zones. There is no suggestion that these views and opinions are representative of all or most contract workers. Further, not all workers responded toallquestions, and therefore the responses of those who were more vocal cannot be assumed to also bethat of those who were silent. Nevertheless, on the basis of what is recorded above, some comments are in order.

What can we understand from the stated preference for manpower agency work? At least two points should be kept in mind. Firstly, for all women workers in the export-oriented sector and regardless of their status of employment, this kind of work is one of few alternatives available to them based on their educational and skill level. The poverty of their households and the paucity of alternative and more desirable waged work closer to their homes has pushed them to migrate from their villages to the industrialised Western province for employment.[38]

Secondly, choices are not conditioned in abstraction. The 'desirability' of manpower work can only be appreciated in the context of the dehumanising labour process of the factory. The long hours of work of up to half-a-day for most; the intensity of work as production targets have to be met regardless of the consequences for health and safety; and the regime of labour control and discipline enforced by the management, are repellent in a society where agricultural work has a different rhythm as does most work in the large public sector.

[38] Shaw, Judith (2007), "'There is No Work in My Village': The Employment Decisions of Female Garment Workers in Sri Lanka's Export Processing Zones", *Journal of Developing Societies*, Vol. 23. Nos. 1-2: 37-58. While garment factories have mushroomed across the island, including in unindustrialised areas, access to this kind of employment is not equal to all. In some cases, the factories are too distant to commute daily. In other cases, the jobs available are distributed based on political patronage. In all cases, the wages are lower than offered within the Free Trade Zones in the Western province.

Manpower agency work presents the worker with the opportunity for greater autonomy from the factory than is available to those in permanent employment. It allows the worker the 'freedom' to choose whether to work the following day or not; to work the day or the night shift; to refuse the offer of employment depending on the identity (and therefore nature) of the employer. Of course, these liberties are not unqualified or unconditional: unemployment is only possible for as long as savings or alternative sources of income to waged work allow. Nevertheless, the unwillingness of many workers to contemplate permanent employment is an indictment on the harshness of export factory work; the low wages on offer; and the desire for greater control over their lives and time.

Small wonder then that there are an estimated 50,000 vacancies in Board of Investment licensed companies (15,000 in Katunayake Free Trade Zone alone).[39] The only puzzle is why employers and the government are mystified by such a situation in a country with low levels of female participation in the labour force and high levels of under-employment. Unless wages improve drastically and working conditions likewise[40], female and male workers will continue to seek better remunerated employment abroad, regardless of working conditions there and the pains of dislocation from their families, friends and familiar environment.

[39] "Over 50,000 jobs vacant in BoI companies", *Daily News* (Colombo), http://www.dailynews.lk/?q=2016/04/07/business/78486.
[40] Barria, S., with A. Roy (2014), 'Sri Lanka' in *National People's Tribunals on Living Wage for Garment Workers in Asia: Synthesis Report*, Asia Floor Wage Alliance: New Delhi, pp. 40-55.

4.0 'A FREE LIFE OR A PRECARIOUS ONE?'

In section three above, the experiences and perceptions of a small sample of manpower workers, women and men, were presented. For section four, the views of a range of involved parties were solicited. The questions that were asked of them were not identical but to elicit specific factual and other information of their own perspectives, roles and recommendations. Therefore the responses are clustered around the key informants or stakeholder representatives.

There are some common themes such as shifting recruitment preferences of employers; the inclination of at least some Free Trade Zone workers for contract over permanent work; the intermediary role of private employment or manpower agencies and the responsibilities owed to workers; and whether contract work can, and indeed should, be prohibited or regulated. There is also a stark divergence of views on these matters, such that those supportive of manpower work paint it as an opportunity for workers to choose a 'free life'; whereas those opposed to manpower work draw a very different picture of workers pushed by capital and the state into a 'precarious' existence.

4.1 Factory Management and Manufacturers Association

Two human resource officers of long established companies and an official of the Free Trade Zone Manufacturers Association which represents investors and employers within the Board of Investment regulated industrial areas were interviewed. These companies are not necessarily representative of the bulk of factories in the Zones; in so far as their employment of manpower workers is apparently few in number in relation to their total labour-force. Also, their managers appeared to be aware of, and sensitive to, the statutory entitlements of at least permanent workers (with the standard exception to trade union and collective bargaining rights); which is not always the case in apparel factories outside the zones.

Both factory personnel stated that manpower workers are a tiny percentage of their total workforce. The workers are only supplied by agencies with which the companies have agreements. Neither of the managers acknowledged any criteria for selection of workers for instance, gender,

age cohort, language, etc. Both managers confirmed that agency workers are subject to their supervision, that is are under their control, during working hours.

They explained the preference of some workers for manpower work over permanent work on account of its flexibility. Those with permanent jobs are able to increase their income through additional work elsewhere. In light of this observation by a human resource manager, it is opportune to once again highlight the diversity of manpower workers. While some are only and have ever only been engaged in that kind of work, others are on a permanent contract but clearly need a second job to make ends meet. There are also workers (especially women) who once past 40 years in age are no longer wanted by factories for permanent work, and must resort to temporary work for their economic sustenance.

One manager claimed that manpower work allows the worker to "bargain his salary". However, there was no verification of this from the workers who participated in the focus group discussions, nor from other sources. The daily wage rate for manpower workers in both Biyagama and KatunayakeFree Trade Zones varied between Rs. 850 and Rs. 1200 per day (though very few received the topend). This is higher than the take-home pay of permanent workers when computed on a daily basis. Further, according to the workers, the wage depended on the agreement between the agency and the user enterprise rather than on any negotiation between workers and the factory.

One manager also accounted for the popularity of manpower work by reference to freedom from the 'target' system where mainly women workers are set production goals each day which must be reached by them. To achieve the quota for each production line or team, women workers are compelled to stand while sewing which speeds up their activity rate. The cost to them from standing continuously while working is in the occupational injuries they endure, such as back pain, spinal harm, swollen feet and ankles, and urinary tract infections from delaying or avoiding toilet breaks so as not to slow down production.

According to the factory managers, agency hired workers are only employed for non-core operations within their respective factories. One manager claimed that as a rule it did not fill

vacancies for permanent staff with temporary staff. The manpower staff are only hired for supplementary activities of the factory's operations and on a seasonal basis. Another manager claimed that only a handful of workers are hired on a daily basis, and usually for non-production line tasks. As the workers are classified as temporary by the user enterprise, they only receive a wage and no other benefits.

Therefore the advantage of agency hired workers for factories, according to the human resource officers is that they can be hired and fired depending on seasonal up and down swings in the production cycle. This reduces the number of workers in permanent employment, who have to be paid regardless of available work. By law, women workers may only be employed for a maximum of 60 hours of overtime each month; manpower workers meet the demand for extra units of labour, without the need to expand the number of permanent workers. As temporary workers are not on the payroll, they are equivalent to ghosts who are not seen or recognised as rights-holders by the employer nor the state in relation to the duties that the labour code imposes upon employers for the welfare and wellbeing of workers such as sick leave, holiday leave, maternity benefits, social security benefits, gratuity and the like.

For this reason, the managers rejected the need to maintain shadow files on manpower workers to record their payments, deductions to the Employees Provident Fund and employer's contribution to the Employees Trust Fund. This is the responsibility of the manpower agency that hires and supplies the workers, according to them. As there is no long term relationship between the user enterprise and the worker with the high turnover of agency hired labour, such record-keeping is simply not practical, said one human resource manager.

There were two observations made by factory officers on the demerits, from their perspective, of employing manpower workers in comparison to permanent workers. One is that they are untrained or insufficiently trained (perhaps two days only). The skill and competence level of permanent workers is rated higher than that of temporary workers, according to one factory manager. Second, permanent workers exhibit loyalty to the company unlike manpower workers. Some permanent have stayed on for up to 10 years, one manager proudly noted, which speaks to their satisfaction with their working terms and conditions in that enterprise. Another manager

separately also commented negatively on the “loyalty and responsibility” of manpower workers in contrast to permanent workers. However, he also observed that temporary workers can be more efficient than permanent workers, as their motivation is to finish the assigned work quickly and leave the factory as soon as possible. This is a privilege is only available to them and not permanent workers on fixed shifts.

Neither of the managers approved of companies establishing their own subsidiaries or related companies to ‘in-source’ workers. One manager went so far as to describe the practice as “unethical”. Their companies enter into agreements with manpower agencies. These agreements provide the terms and conditions of hire and supply of workers to the user enterprise including the sum of payment, type of work, quality control, number of hours, etc.

Unsurprisingly, neither of the managers was in favour of the abolition of manpower work. However, one conceded the necessity for its regulation or control in order to “protect the rights of workers”. According to them, so long as there is seasonal work, there is a need for temporary workers. Also, one argued that it is unfair on those who rely on it for their survival to be deprived of temporary work. He gave the example of university students who take up this work to support themselves in their studies. “So many people make a living out of it”, in the words of one manager, that it is unjust to abolish manpower work.

A representative of the apex body of enterprises licensed by the Board of Investment within the Zones, known as the Free Trade Zones Manufacturers Association, echoed the viewpoint of the individual factory managers above. He too insisted that manpower workers are not employed for core operations of his members’ business. According to him, “manpower workers are taken on a temporary basis to do unskilled jobs”. He went on to claim that the trend of increased hiring of manpower workers by user enterprises arises from the shortage of permanent workers, rather than the preference of employers for temporary workers. Young people, he said, are unwilling to take up permanent work.

As to manpower agencies, he recommended that they be given “legal status”. Presumably he meant as private employment agencies (as many are already incorporated as companies). The balance

that should be struck in the regulation of manpower agencies, he went on to say, is between the freedom of employers to engage temporary workers as and when needed, while ensuring the protection of workers' rights. A legal lacuna in his view is the absence of legislation on part-time work in Sri Lanka.

4.2 Manpower Agencies

Four manpower agencies, two from Biyagama and two from Katunayake were interviewed. One of the Katunayake agencies was a communications centre which also hired workers for free trade zone enterprises as an additional business venture. What is useful to note from that interview is the degree of informality among some actors in this industry. This is personified by the 'brokers' or one-man manpower agents whose 'office' is usually his home, and who conducts the business of hiring and supplying workers at the Katunayake main bus stand and other public spaces.

According to this informant, his agency has no written agreement with user enterprises nor with workers themselves. However, the agent claimed to be registered with the zonal office of the Labour Department for the purpose of deduction from wages for, and own contribution to, the Employees Provident Fund and Employees Trust Fund. According to this agent, only one of the user enterprises to which it supplies workers, is in the practice of paying EPF and ETF on behalf of workers. These monies are directed (as is the norm) through the manpower agent to the relevant state authorities. To put this another way, with the exception of one user enterprise, other enterprises to which this agency hires and supplies labour are evading their legal obligations; as the agent well knows.

Three of the agencies interviewed were selected because they are known to the contract workers who participated in the focus groups discussions in Biyagama and Katunayake. These established private employment agencies have enter into formal agreements with user enterprises; in at least one instance on an annual and renewable basis. The agreements contain the terms and conditions of their business relationship including: fixing the daily wage rate; stipulating the provident and trust fund deductions and contributions respectively by the user enterprise; and the margin or commission to be received by the employment agency. The understanding in those agreements

between the manpower agency and the user enterprise, is that it is the former who is the 'employer' of the hired workers.

One agency in Biyagama claimed to represent workers in labour tribunal cases against the user enterprise. This would make it more like a trade union or association of workers than the employer of workers with opposing interests. The same agency also claimed to settle compensation claims by workers against the user enterprise – with or without the cooperation of the latter – as well as pay gratuity and annual increments, as it owed a duty to the workers. One agency in Katunayake emphasised that the relationship with workers extended beyond the traditional employer-employee relationship. This was illustrated by reference to its grant of small loans (Rs. 2000) to workers in need of emergency assistance. The point being made here by the informant is its benevolence and humanity towards the workers, without any form of collateral, or guarantee of repayment, or means of recovery from them.

All four informants expressed no preference while hiring, for one gender over another. The main criterion appeared to be one of age. Based on the instructions received from user enterprises, one agency does not hire anyone older than 38 years of age. Other agencies hired in the range of 18-50 years for women and 18-55 years for men.

Two of the four agencies are registered as companies, as well as with state authorities ranging from the Labour Department to the *grama niladhari*. Significantly both are based in Biyagama, where anecdotal evidence indicates a higher degree of formality if not professionalism among employment agencies in comparison to Katunayake. One of the Katunayake agencies was only registered with the zonal labour office for the payment of superannuation benefits; while the other claimed to be registered only with the Divisional Secretariat. None of the agencies had close interaction with the Board of Investment (unlike user enterprises); except when obtaining gate passes for entry into the zones, of workers hired by them. There was a whiff of disappointment orslightthat the BOI appeared to be wary or disdainful of them. In fact, in Biyagama in particular, the BOIis known to actively discourage enterprises from in-sourcing workers through manpoweragencies; and instead encourages direct hiring for permanent appointment.

None of the informants admitted to any issues or problems in managing the workers that they hired. However, one among them did make reference, tinged with moralism, to the lifestyles of some agency workers who are apparently having “illicit affairs” and/or are “fun-oriented”. Theseare coded references to the relatively greater sexual freedom that some women and men who work in the free trade zones experience, in comparison to conventional social mores.

According to the same informant, agency workers differ from most permanent workers in another significant way. The objective of the latter group is to make and save as much income as possible within a predetermined and fixed period of employment in the zones. Their savings are for them to return to their natal villages, to find other livelihoods, and/or to marry and raise a family. Contract workers instead, suggests the informant, are motivated to continue in the same line of work, and for as long as possible. Their goal is to earn for their own wants, and enjoy themselvesincluding through non-marital relationships. In his own words, “what they want is a free life”.

4.3 Board of Investment

The two key informants from the Board of Investment are Industrial Relations Officers responsible for the Biyagama and Katunayake Free Trade Zones. Both independently observed that Free Trade Zones workers are attracted to manpower employment because they enjoy greater “freedom” than permanent workers. This was not elaborated upon by them.

However, taken in context it can mean the freedom from attachment to a specific place of work; the freedom from having to work each day and on a predetermined shift; and the freedom from the stresses of industrial work norms (production targets etc.) which the permanent worker accumulates and carries each day from the factory to the boarding house and back to the factory again.

Another motivation by workers for temporary work, in their opinion, is the higher daily income in comparison to permanent workers (between 30 and 50 percent greater), and the fact that it is received as cash-in-hand each day instead of at the end of each month. One informant expressed the opinion that manpower workers “only think of their daily needs”. The implied contrast being

with permanent workers, who apparently have medium to long-term goals and plans making them more concerned for their future, than are agency workers.

It was claimed by the same informant that workers are induced into manpower work in the zones by the promise of recruitment for overseas employment by the same or linked agencies, having acquired some work experience within the country. No corroboration for this statement was available from the sample of agency workers who participated in the focus group discussions or other sources.

Nevertheless, it is well-known that there is a circular migration of labour from the Free Trade Zones to the Middle East and back to the Zones thereafter, before once more seeking their fortune abroad. Some of the contract workers interviewed in this study are among them. For this group of workers, temporary work in the Zones may appear to be most practical for their situation. The purpose of their employment within the Zones is short-term – to support themselves (and sometimes family members) financially – while waiting for their next opportunity outside the country. There is a high turnover of manpower workers within the Zones as a consequence.

According to one informant, among the advantages of hiring manpower workers to factories within the zone is that apparently they don't take the same liberties with company resources as permanent workers. An example that was given is that whereas a driver who is permanent has the company at his disposal and may therefore use it for personal purposes, agency workers are less likely to do so as they only use the vehicle in the course of their work for the company and for its business. No rationale or corroboration for this argument was given. It contradicts the point of view of others who claimed that permanent workers are more "loyal and responsible" to the enterprise than contract workers.

Another advantage to the user enterprise that was mentioned is that it can hire temporary workers for trial operations, and is not obliged to extend their employment once those operations end. In other words, the ease and low cost to the employer of hiring and firing, is to the benefit of employers, especially in comparison to restrictions and high costs of retrenching permanent

workers who enjoy security of employment and protection from non-disciplinary termination and are entitled to substantial compensation.

However, above all, as one official admitted, the reason that BOI enterprises prefer manpower workers is because "they don't have to give attendance incentives, bonus, gratuity, or any other allowances" to the latter. So, this kind of employment is acknowledged as a strategy by the owners of capital, to drive down the returns of the labour-power of workers to them, for the purpose of driving up their profits.

The downside for the user enterprise, according to the same informant, is that it cannot be assured that agency workers will reach the same production targets as permanent workers, nor deliver the same quality of work. Presumably, he means that agency workers are not subject to the same regime of incentives and penalties as permanent workers. It is the permanent workers who have to return to the same workplace each day; join the same team of workers; and answer to the same supervisor. They are under tremendous control and pressure to perform to expectation. Whereas with agency workers, their payment is fixed in advance regardless of issues of productivity and the condition of their output; and there is no bond of loyalty or affiliation to the user-enterprise as they float from one workplace to another.

The same informant asserted that for this reason, manpower workers are hired for non-core business operations by the user-enterprise, and are segregated in their job roles from permanent workers so as to minimise conflicts that may arise between these groups of workers. However, based on the responses from the sample of agency workers interviewed in this study, as well as information received from other key informants and sources, there is no such general rule in the demarcation of roles by user enterprises. In the Free Trade Zone sector, as elsewhere in the private sector (and in the public sector too), agency workers are employed side-by-side with permanent workers doing the same tasks and with the same responsibilities, but always unequally in relation to security of employment, wages, social security benefits, and non-wage benefits.

As to the relationship between manpower agencies and the Board of Investment, both informants emphasised that there are no direct dealings – except presumably in the issue of gate passes for the

entry of manpower workers transported by the private employment agency into the zones -- between them. The BOI office in Biyagama claims to discourage manpower agencies by levying higher charges for the gate pass on them than for permanent workers. According to one of the informants, the BOI's mandate extends only to supervision of the rights of permanent workers. Only workers on permanent contracts are recognised by the BOI as employees of the enterprises with which the BOI has an agreement including on labour standards. Where there are disputes between manpower workers and the user enterprise, it is the Labour Department which is the appropriate enforcement authority in this matter, according to the BOI.

On the triangular relationship between the worker, the manpower agency, and the user enterprise, the view of the BOI is that it is the manpower agency that bears the responsibility of an employer towards the worker. The main argument made for this interpretation is that the worker has a direct relationship with the agency which hires her/him; assigns the place of work; pays the wages; and is accountable for deductions and contributions to the Employees Provident Fund and Employees Trust Fund. The site of work and identity of the user enterprise constantly changes, whereas the relationship between the worker and the manpower agency is perceived to be more stable.

As to documentation and formalities, the BOI officials believe that the user enterprise and the employment agency should enter into a written agreement where the terms and conditions of employment of hired workers are clearly specified. They recommend that a copy of this agreement should be deposited with the BOI. Furthermore, the user enterprise should maintain a shadow file on every manpower worker it has hired: recording payments made for wages and for social security benefits.

No such requirement currently exists in law or in policy. While there are written agreements between the manpower agencies and the user enterprise, there is no practice of these agreements being shared with the BOI at the moment; nor do user enterprises maintain records on manpower workers.

In the same breath in which these suggestions were made, one informant expressed his pessimism in their implementation, in view of the fluidity and flux in employment relationships in this sector.

He observed that as “agencies keep changing factories and workers keep changing agencies”, it is practically impossible to operate such a system of checks and controls, creating a vacuum in legal responsibility towards the worker.

One BOI official alleged that manpower agencies have more workers on their rolls than are declared to the Labour Department. Only some workers’ records are properly maintained and these are presented to the authorities when demanded; whereas a larger number of workers are hidden from view where there is fiddling of their statutory dues, he said.

Another BOI official speculated that there is a lack of political will to rein in manpower agencies as they fund the election campaigns of politicians in those electorates; and because people in government see these agencies as facilitating job opportunities for the jobless amidst public sensitivity to youth unemployment.

A related policy recommendation from one BOI official is that manpower agencies that hire workers for employment in the Zones should register with the BOI. He proposed that the BOI should be the licensing authority for these agencies. The licence would be granted on an annual basis; and renewable provided that the BOI is satisfied with the agency’s fulfilment of its duties and obligations towards manpower workers. This recommendation is illustrative of the belief of the BOI, that within the Zones, some of the functions of the Labour Department should be assumed by itself. There is no provision in Sri Lankan law for exclusion of the Labour Department from the Free Trade Zones in particular and BOI-licensed enterprises outside the Zones in general; nor for the Board of Investment as the administrative authority to be delegated supervisory and enforcement powers of labour laws.

4.4 Labour Department

The Department of Labour is the state agency responsible for the enforcement of labour laws for the protection and welfare of workers and the settlement of disputes between employers and workers. Its other functions include managing the Employees Provident Fund (EPF) and other social security schemes; registration of trade unions; supervision of occupational safety and health

at work; administration of workmen's compensation for injuries and accidents at work; and collection, compilation and dissemination of labour statistics, amongst others.

Two Assistant Commissioners of Labour and a Labour Officer were interviewed based upon their experiences at national level as well as for the Biyagama and Katunayake zones with particular reference to the role of manpower agencies in the labour market; the regulation and accountability of private employment agencies towards workers; and their perspectives on agency labour.

On manpower agencies, the consensus is that they have a necessary function amid current trendsin the labour market when there are thousands of vacancies in the free trade zones; and where the temporary workers they supply, are critical to the production needs of factories. It is recognised that the agencies themselves do not generate new jobs. However, by linking user enterprises to workers, it is thought that agencies perform a useful function in the labour market.

One Assistant Commissioner explicitly connected the growth of manpower employment to the era of globalisation and associated pressures on profitability of export-oriented enterprises. The demand for unskilled labour in the Free Trade Zones is for seasonal or short-term employment, in his view, making permanent employment uneconomical for reason of higher cost to user enterprises.

All manpower agencies should be registered with the Labour Department, according to the informants. The interest of the Department in these agencies is as the employers of workers, rather than as businesses. According to one senior official, manpower agencies are treated the same as any other employer is or would be, by the Labour Department. This includes routine inspectionsto verify whether the statutory deductions for, and contributions to, the Employees Provident Fund and Employees Trust Fund are in order.

Another senior official believes that in addition, manpower agencies are also registered as a business with the Registrar of Companies and with the local Divisional Secretariat in their area of operation. She suggested that this was desirable for the agencies concerned as it improved their

reputation among user enterprises, making the latter more likely to enter into a business relationship with them for the supply of labour.

The employment relationship, according to two of the key informants, exists between the worker and the manpower agency which hires her or him. The agreement between the user enterprise and the manpower agency is a commercial relationship. The statutory and fiduciary obligations of the employer towards the worker are understood to have been assigned to the manpower agency, under the agreement between the latter and the user enterprise. One senior official believes that the provision of a letter of appointment by the manpower agency to the worker indicates that the manpower agency has assumed the identity and role of the employer. However, she observed that there is confusion on this matter in the absence of clear law and policy.

In the event of violation of labour laws or grievances on the part of agency hired labour, the manpower workers are entitled to seek the assistance of the Labour Department through its zonal and district offices (as would workers in standard employment), assured all three informants. It isat this point that the Labour Department would commence conciliation with all the relevant parties (worker, user-enterprise and the employment agency) for resolution of the issue/s.

None of the Labour Department officials would be drawn on the current status of proposals to reform the Wages Boards Ordinance with a view to clamping down on agency work. According to them the various drafts are only proposals tabled at the tripartite National Labour Advisory Council (NLAC).

The personal opinion of both Assistant Commissioners of Labour is that manpower agency work should not be abolished. Instead this kind of work should be regularised and better regulated from their point of view. They say that manpower workers should enjoy greater job security than at present. Also, the terms and conditions of employment should be spelled out in writing for their better protection.

The rationale for regulation over prohibition is couched in concern for the worker in search of employment. These jobs benefit those without formal qualifications and work experience. It is also

a source of additional or alternative income to supplement that from their usual place of work, they say.

4.5 Employers Federation of Ceylon (EFC)

The EFC is the premier representative organisation of large and long established companies in Sri Lanka and a member of the National Labour Advisory Council. It is influential in informing and shaping the policy of the Ministry of Labour and the Government of Sri Lanka in employment relations.

The EFC representative distinguishes between two kinds of flexible labour practices: out-sourcing and in-sourcing. In his view, it is entirely legitimate for an employer to "export the task to an outside entity". Examples of functions or jobs specified by the informant as suited for out-sourcing include security services, janitorial work and maintenance services. Another, in his view, is where the user enterprise subcontracts with another enterprise to achieve its "extra targets during the peakseason". However, he disapproves of in-sourcing, where "you bring people into the factory, under your authority, to do your work", but deny responsibility to them as their employer.

It is this practice that the informant describes as "contentious" in current controversies around contract work. In fact, out-sourcing as much as in-sourcing is the subject of contention among many trade unionists and women workers organisations. Further, there is ample evidence of the violation of workers' rights in the subcontracting supply chain. The out-sourcing of production is precisely a device of owner and managers of large enterprises to evade their accountability as employers to workers.

On the role of private employment agencies, the EFC representative argues that this third party is a natural institution in the labour market because of "rigid labour laws in Sri Lanka". These laws restrict 'labour flexibility', that is the discretion of the employer to hire and fire at will. Temporary or transitional arrangements for employment are what employers and workers too now seek, says the EFC. Manpower agencies facilitate both parties by "taking care of the recruitment, safety and payments" of a group of workers whose labour-power they supply to the factories through a

commercial agreement. As there is no direct relationship between the user enterprise and the worker, “hiring and terminating is easier”.

When asked who is the employer in a multi-party employment relationship including manpower agencies, the EFC’s response is that it is the agency and not the user enterprise. According to the EFC, there are three tests that are used in employment tribunals and in courts of law to establish the employment relationship: ‘control’; ‘integration’; and ‘economic reality’.

Invoking this three-fold test, the respondent ingeniously argued as follows. It is the manpower agency that “orders” where the worker is to report for work on that day. It is the manpower agency whose business is dependent on the worker’s willingness to hire her or his labour power. Therefore, as the manpower agency both controls the worker and is economically dependent upon the worker to conduct its business of supplying workers to enterprises, it and not the user enterprise is the true employer. Only where the worker is engaged in activities that are integral to the main business operation, is it “contentious” (in the EFC’s view) whether the true employer ofthe worker is the user enterprise or the private employment agency. A critical discussion of this three-fold test follows below in section 5.2.

As the EFC supports the view that labour contractors (manpower agencies) are the employers of agency-hired workers; it follows that it also endorses their greater regulation to monitor fulfilment of the statutory obligations entailed. Thus, the informant proposed the registration of contractorsto ensure that payments to the Employees Provident Fund and Employees Trust Fund, gratuity benefit, regulation of minimum wages and working hours and so on, are respected. He was ambivalent on whether the registering authority should be an existing state institution (that is the Labour Department), or whether a new and specialised body should be set up for this alone. Until such a system for compulsory registration is in place, he proposed that companies only enter into agreements with private employment agencies that have documentation to prove their credential as a good employer of contract workers.

In the informant’s view, it is the lack of institutionalisation of agency labour, that is through the registration of agencies, which contributes to the reluctance of user enterprises to invest in the

training of manpower workers. The deficit in skills level of manpower workers in comparison to permanent workers was commented upon by a number of stakeholder representatives. However, it is unclear why the private sector would commit resources to training workers who are not in permanent employment with them, as these workers are likely to float around different companies and even other types of work (e.g. construction, domestic work, agriculture, etc.).

On the regulation of contract work and specifically agency-hired labour, the EFC is in favour of an amendment to the Wages Boards Ordinance section 59A that clamps down on the hiring of manpower workers for core work in user enterprises. An exception would be where the core work is to meet seasonal demand (that is not continuous production), such as meeting higher targets by buyers in the ready-made-garments industry at specific times in the year.

At the same time, the EFC defends the viability and indeed desirability of agency-hired and other temporary forms of work. In its view, the private employment agency industry has exploded in numbers and expanded to a range of sectors, owing to the shortage of workers available for, and interested in, permanent work. This new industry does generate employment, in its opinion. Also, employers are shedding permanent workers, and wish to hire workers only as and when the need arises. None of this is wrong, according to the EFC, as long as "there are no exploitative practices involved".

The EFC presents the existence and perpetuation of manpower work as a 'win-win' situation for both firms and workers. No doubt it is an attractive proposition to owners of enterprises to relieve themselves of their lawful responsibilities as employers, by pushing down on wage bills and especially long-term obligations to workers (gratuity, compensation for termination, and retirement benefits). But how can it be in the long-term interests of low-paid temporary workers who lack stability of employment, sickness and holiday paid leave, medical insurance, retirement benefits, and in some cases are paid less than permanent workers in identical job roles; nor of permanent workers whose own jobs and terms and conditions of employment are eroded and undermined under threat of their substitution by manpower workers? Aren't all workers, and contract workersin particular, in fact being "exploited" through manpower work?

4.6 Trade Unions and Women Worker Organisations

Three male and one female trade unionists and two women worker organisation leaders were interviewed in the study. There were two trends of opinion expressed by them which cut across the traditional union-NGO divide. One point of view is that the most effective way to protect the rights of temporary workers is the abolition of agency work. The other is that the only realistic way of protecting agency-hired labour is through its strict regulation, as there is no short to medium term prospect of its eradication.

Workers rights advocates, in contrast to other key informants interviewed above, underscored that it is the low wages in the garment export sector that influences some workers towards manpower work. The high cost of living for basic necessities, and the spread of consumerism with the marketing of new wants, combine to spiral the daily expenses of migrant workers who do not have the cushion of household income and/or produce for subsistence from their homes and fields. The monthly wage cannot stretch between pay-days. So some workers prefer to be paid daily, to satisfy their day-to-day needs. The daily wage of contract workers is also higher in comparison to what permanent workers receive as their monthly wage. The user enterprise pays manpower workersmore than permanent workers (as computed on a daily basis and assuming that both groups work for the same number of days and hours each month), from what it saves on the payroll costs of permanent workers such as EPF and ETF, and particularly gratuity and termination benefits.

The shift to manpower work among a larger section of the Free Trade Zone workforce is also a deliberate strategy of employers to cut costs and shrug off their responsibilities to workers, protested one leader who described it as an “extreme form of exploitation”. His union has been battling with enormous difficulty for decades to organise workers within the Zones. He points to how companies claim that temporary workers are necessary for work that is seasonal [that is, not all year round] but contract workers are hired for core work within the factories. Manpower work “threatens the job security of permanent workers, makes the employer arbitrary, and also puts the contract worker in a precarious position.” According to him, contract labour reduces the bargaining power of permanent labour. He gave the example of a recent dispute in the Biyagama

Free Trade Zone where when the permanent workers went on strike for better working conditions, "the management hired manpower workers, and fired those who took strike action."

It was also conceded by some that there is a group of wage labourers in the Free Trade Zones for whom this is casual or short-term employment only. They take up manpower employment for a few weeks or months, when there is no work in their fields or when their savings are depleted. This kind of work is only supplementary to their main occupation or livelihood and a fall-back option in times of economic distress. Some women migrants, particularly Tamils from the North and East, are reported to favour temporary work because of the flexibility it allows for them to travel frequently or at short notice, in case of emergency, back to their families in their home villages.

One trade unionist summed up the reasons for growth in popularity of manpower work among workers as "freedom, flexibility and higher pay". This same unionist invoked a broader and deeper notion of the "freedom" that workers crave, in comparison to other stakeholder informants. Whereas most informants referred only to the choice that manpower workers have in deciding whether to work each day, for which shift, and when to take (unpaid) leave; this informant was conscious that the freedom that many workers yearn is also for partial relief from the industrial labour process in the factories of the Free Trade Zones. To elaborate on this insight, what some workers are rejecting is their construction as a part of the sewing machine; the intensity of work especially production targets; the strict regime of controls on mobility, working time and interaction with others while on the factory floor; and the monetary and other disincentives for taking sick leave and annual leave.

A women workers' leader drew attention to how changes in the gender composition of the Free Trade Zone workforce have changed the thinking and choices of women workers too. While the proportion of women workers especially within the ready-made-garments industry has always been much higher than that of men, over the past two decades the number of men working in export-oriented factories has increased considerably.

"Earlier women preferred permanent work to save money for their [marriage] dowry. Once they have saved enough, they return to their villages to marry and settle down. But now there are male

workers in the Zones itself. So affairs begin here, marriages take place here, and women and men stay on in the area instead of going back. Then they have children; and to take care of children [without extended family support] while continuing to earn, you need flexible job options. Manpower work is ideal for that. You can stay back [at home] if the children fall ill, take extended leave if there's an emergency, and your job will still be there. In some households, the woman works the day shift and the husband works the night shift, so there is always one parent available to care for the child/children."

All informants were critical of manpower agencies. These labour contractors are perceived as preying on the ignorance or innocence of young workers. It is alleged that the agencies attract workers by promising high salaries and fringe benefits such as transport or even mobile telephones. However, according to the workers' rights activists, the reality is that the wages are lower than advertised, there are deductions for transport, and there is default or even fraud in the matter of EPF and ETF payments.

There is unanimity among the trade unionists and women workers' leaders interviewed on one central issue: the differences between permanent and temporary workers should be eliminated. "Manpower workers should get whatever permanent workers get", said one. This would ensure that temporary workers receive equal treatment and equally advantageous terms and conditions of work as permanent workers. It would also remove the financial benefit that employers currently derive from hiring temporary workers instead of expanding their permanent cadre. There wouldbe a level playing field where employers' decisions to hire temporary workers could not be solelyor mainly to avoid their legal obligations towards workers, but rather for more legitimate reasons such as genuinely casual work and seasonal tasks.

There is divided opinion on how to move forward.

Some trade unionists and women worker activists believe that the only way to deal with the problems of manpower work is to abolish it. In their view it should not exist and therefore neither should the agencies that supply contract labour to user enterprises. Therefore there is no need for legal regulation of what should not be tolerated in the first place. "No permanent work should be

done by contract workers", says one veteran trade unionist and "contract workers who do permanent work should be regularised for their own protection and betterment."

Another group of union and women's organisation leaders believe that neither temporary work nor manpower agencies can be eradicated from the labour market in the neoliberal era. One senior trade unionist alleged there is a nexus between manpower agencies and politicians or their cronies, which make the possibility of their prohibition unlikely. Further, at least some workers, and indeed most of the sample interviewed in this study, "want to be manpower workers"; and this preference should be respected. Until there is structural transformation of the economy and society, there need to be measures taken for the immediate protection of manpower workers.

Their opinion is that legal and institutional reforms are necessary to reduce the precariousness of temporary work; to ensure that private employment agencies conform to minimum standards include payment of superannuation benefits; and guaranteeing manpower workers all rights of permanent workers including the regulation of working hours, rest breaks and leisure, paid medical and holiday leave; and beyond, especially freedom from sexual harassment.

5.0 LAW AND POLICY ON AGENCY WORK IN SRI LANKA

Following from section four above that presents and interrogates the point of view of a diverse set of key informants on issues of manpower work and manpower agencies, section five reviews the law and policy framework in Sri Lanka to understand its current limitations. Reference is made to relevant international standards that can offer guidance on the development of national policy and legal and institutional reform of labour institutions for the regulation of contract labour or agency-hired labour.

5.1 Types of Employment in Sri Lanka

In Sri Lanka, there are seven types of employment that are recognised by law and custom.[41]

Permanent: Where the contract is automatically renewed each month until the age of retirement. Security of employment is guaranteed with benefits such as Employees Provident Fund; Employees Trust Fund; bonus; gratuity; workmen's compensation, etc.

Temporary: Where the contract is for a job of a temporary nature: the duration of which is limited by the job or by time. Workers are entitled to EPF and ETF benefits. Where the duration of employment exceeds 180 days in a continuous period of 12 months and the enterprise has 15 or more workers, the worker is also entitled to protection from non-disciplinary termination (under the provisions of the Termination of Employment of Workmen Act).

Fixed-Term: Where the contract expires on a specified date and not the happening of an event or completion of a particular task. There is no obligation on the employer to renew the contract upon its expiry. Where a fixed-term contract is renewed, even after a break of some days in-between, the employment relationship ceases to be of a fixed term, and the worker may have a legitimate expectation of continuous renewal of contract. All labour legislation (with the exception of the

[41] This section is based on Goonesekere, R. K. W.; K. Wijayaratnam; J. C. Weliamuna; S. R. Adikari and A. Thiruppathy (eds.) (1997), *Handbook on Labour Relations*, Friedrich Ebert Stiftung: Colombo, pp. 11-15; and Adikaram, Arosha S. (2008), *Labour Law and Relations: A Human Resource Management Approach*, Stamford Lake: Pannipitiya, pp. 52-69.

Termination of Employment of Workmen Act and the Industrial Disputes Act) applies. This means the fixed-term worker is eligible for payment of EPF and ETF; for workmen's compensation; and for maternity benefits.

Probationary: Where the worker is under assessment by the employer for a permanent position in the business. The period of probation must be specified and limited (that is not indefinite). Probationary workers are entitled to most benefits of permanent workers (EPF, ETF, maternity, leave, etc.) and are entitled to join a trade union.

Casual: Where one is employed in work of an irregular nature and which is not the main business activity of the employer. No contract of employment. No expectation of regular employment. If the same employer calls upon the same worker to perform the same task on a regular basis, then the relationship ceases to be casual. Some factors in determining whether a worker is in casual employment or not include: mode of payment (daily or weekly but not monthly nor on the payroll); duration of employment (very short); nature of work (not the main business activity nor of a regular nature).

Casual workers are protected by the Factories Ordinance and Industrial Disputes Act and are entitled to extra payment for work on statutory holidays and *poya* holidays. The casual worker is protected under the Termination of Employment of Workmen Act if s/he has worked in an undertaking with 15 or more employees, for more than 180 days, for a continuous period of 12 months. Casual workers are entitled to EPF and ETF if the duration of employment is over a day. There is no entitlement to maternity benefits nor workmen's compensation. They are entitled to join a trade union.

Seasonal: Where the worker is employed for a season only and the employment ends with the end of the season (e.g. festivals, harvests, tourism). Where the same worker is employed by the same undertaking and for the same tasks in successive seasons, it can give rise to legitimate expectation of re-employment in the future. Seasonal work is predictable unlike temporary and casual employment. During the period of employment, seasonal workers are entitled to EPF and ETF. Most other labour legislation (e.g. maternity benefits) does not apply. However, where the seasonal

workers has been in continuous employment of more than 180 days for a continuous period of 12 months and in an undertaking with 15 or more employees, s/he is protected under the Termination of Employment of Workmen Act.

Trainees (Apprentices or Learners): Where the worker takes up employment in exchange for training or to learn the trade from the employer and maintenance or allowance during that periodin lieu of a wage or standard wage. The period of apprenticeship depends on the relevant legislation (Wages Boards Ordinance; Tertiary and Vocational Education Act; Trainees Act)under which the trainee is employed, as well as factors such as the nature of the trade, level of skill, and aptitude of the trainee. It is not always obligatory for the employer to offer the trainee employment at the end of the apprenticeship. Depending on the legislation that applies, the trainee is eligible for EPF, ETF and workmen's compensation.

As is clear from the summary above, there is virtually no type of employment in which some rights or protection at work is not available to the worker. Further, labour tribunals and courts have been conscious of the potential for abuse of certain types of employment – especially casual, temporary and probationary – by employers seeking to evade their obligations to workers, and have intervened accordingly.

5.2 Who is the Employer?

Sri Lankan labour statutes have defined the term 'employer' as used in the respective legislation as follows: "any person who on his own behalf employs or on whose behalf any other person employs, any worker in any trade, and includes any person who on behalf of any other person employs any worker in any trade".[42] However, it is to the common law as elaborated in the judgments of the courts of Sri Lanka that one must turn for elaboration.

[42] Section 64, *Wages Boards Ordinance* No. 27 of 1941. Section 48 of the *Industrial Disputes Act* No. 43 of 1950 has a near identical definition except that it expands the statutory definition to include "a body of employers (whether such body is a firm, company, corporation or trade union) ..."

5.21 Carsons Cumberbatch & Co. Ltd vs. *Nandasena*

In *Carsons Cumberbatch & Co. Ltd* vs. *Nandasena (President, Labour Tribunal) and 2 Others*[43], Tennekoon, J. on behalf of the Court of Appeal dissected the definition as it appears in the Industrial Disputes Act, as follows:

> "'employer' means-
>
> (1) any person who employs any workman,
>
> (2) any person on whose behalf any other person employs any workman,
>
> (3) any person who on behalf of any other person employs any workman."

From a plain meaning reading of the legal provision, there is scope both for the user enterprise and the private employment agency to be the employer of a worker. However, the judiciary has been largely influenced by the common law in its interpretation of the concept of employer, seeking to investigate the "factual context in which the question of who is or are the employers ... arises".[44]

5.22 De Silva v. *The Associated Newspapers of Ceylon Ltd.*

Therefore in the case of *De Silva* v. *The Associated Newspapers of Ceylon Ltd.*[45], the Court of Appeal determined that the question of who is an employee should be answered by reference to not one but multiple tests, drawing on case-law from the United Kingdom and the United States of America. This is the three-fold test of 'control', 'integration' and 'economic reality' that the representative of the Employers Federation of Ceylon posited in section 4.5 above, to assess whether a relationship of employment exists between the user enterprise and the worker.

The 'control test' asks, "Who gives directions to the worker?" Is it the worker herself? In which case she is classified as an "independent contractor". Is it the private employment agency which

[43] (1973) 77 NLR 73.
[44] Cited in Arulanantham, J. and D. Dissanayake (2010), *Contract of Employment: Cases and Commentaries*, Law & Society Trust: Colombo, p. 5.
[45] (1978/9) (2) Sri L. R. 173.

hires the worker? In which case the agency is the employer. Is it the user enterprise where the worker is based and performs her tasks? In which case the user enterprise is rightfully the employer.

The 'integration test' asks, "Is the work performed essential to the business?" If it is, then the owner or operator of the business is the employer. If it is not part of the core business of the undertaking, the worker may either be self-employed (an independent contractor) or employed by another undertaking or business that supplies specific services to others.

The 'economic reality test' asks, "Is the worker dependent upon the business to which her or his service is rendered?" There are a series of follow-on questions to establish whether "dependence" exists, and if so between whom. Does the user enterprise gives the orders which determine the tasks of the workers, and how those tasks are to be performed? Does the worker have a capital investment in the enterprise? If so, of what proportion in relation to that of the manager or operator of the enterprise? Does the worker determine her or his consideration or payment for services rendered or is it determined by the user enterprise? Does the work performed require special skill and initiative on the part of the worker (above and beyond the technical skill for that role; or does the worker depend on the user enterprise to exercise its business and managerial skills for the daily operations and sustenance of that undertaking?

5.23 Ceylon Mercantile Union vs. Ceylon Fertiliser Corporation

The case of Ceylon Mercantile Union vs. Ceylon Fertiliser Corporation[46] concerns the termination of employment of over 500 casual workers by the Fertiliser Corporation. These workers had been supplied to the Corporation by a succession of labour contractors and in this instance by a Cooperative Society. The workers received their wages from the Corporation but directed through the Cooperative Society. This was their only connection with the labour supplier as their wages were determined and work supervised by the Fertiliser Corporation and not the Cooperative Society; none of them were members of the Society; and most had been employed in the same capacity before the labour supply agreement between the Corporation and the Society. This group

46 (1985) (1) Sri L. R. 401.

of workers were terminated for having struck work in protest against the dismissal of one of their number by the Corporation. Their union alleged that the termination was unjust whereas the Corporation claimed that there was no basis for action as it was not their employer. The question of 'who is the employer?' came on appeal before the Supreme Court.

Wanasundera, J. who delivered the majority judgment of the bench (Chief Justice Samarakoon dissenting), considered two factors: the actual relationship of the workers to both the Corporation and the Society and the nature of their work. His conclusion was that the workers were under the direction and supervision ('control test') of the Fertiliser Corporation and not the Cooperative Society; and that the workers were engaged in activities intrinsic to the business ('integration test') of the Fertiliser Corporation no different to its permanent workforce. Therefore it was the Fertiliser Corporation and not the Cooperative Society that was the true employer of the dismissed workers and therefore liable for their termination.

Wimalaratne J. in support of the majority, observed that even the existence of an agreement for hire of labour by the Cooperative Society for supply to the Fertiliser Corporation is not conclusive,"if the facts establish a relationship of employer and employee between the Corporation and [the workmen]"; and that "a common law contract of service can yet be implied" between the Corporation and the workmen even without any interview of the latter by the former not issue of a letter of appointment nor entry of their names in the register of permanent employees.

5.3 National Workers Charter 1995

The regulation of contract work and a general tightening of the definitions and status of certain categories or types of employment, to reduce the abusive practices of some employers and to strengthen the protection of workers, was proposed in the National Workers Charter of 1995. This policy document of the Ministry of Labour was promoted by then Labour Minister Mahinda Rajapaksa, consequent to the election promise of the Peoples' Alliance government the year before, to "formulate and implement a Workers Charter" following the erosion and undermining of labour rights in the 'open economy' reforms after 1977.

The clauses of most relevance to contractualisation and casualisation of employment are in Part 3 on 'Wages, Terms and Conditions of Employment'.

Part 3 provides that "The State shall" *inter alia:*

> "(d) ensure that workers employed by contractors are granted full protection under existing Labour Laws. The employment of workers in the guise of 'Apprentices' or 'Trainees' for regular employment will be prohibited."

There are two aspects here. The first is to equalise the right of contract workers to be protected under labour law with that of permanent workers. This would end unequal treatment of contract workers and remove the incentive to employers of hiring labour on this basis solely or mainly for avoidance of their obligations under the law.

The very next clause goes onto provide that the State shall:

> "(e) ensure that employers in prescribed appointments shall issue letters of appointment to their employees specifying terms and conditions of employment. The recruitment of casual workers for regular employment will be prohibited and permanent status will be conferred on workers after a specific period of probation. The period of probation shall not exceed one year in the case of employees in supervisory or technical capacity and six months in the case of any other employee, which may be extended by a further period not exceeding 3 months and at the end of the probation period the employee shall be deemed to be confirmed in his post. The definition of a 'casual employee' and a 'temporary employee' will be introduced into the law to prevent exploitation of labour. A 'casual employee' will be defined to mean any employee who is employed to perform a work of a casual nature. A 'temporary employee' will be defined to mean any employee who is employed to perform a work of a temporary nature. Such definitions in the statute will ensure that workers are not recruited as casual or temporary employees and kept on for regular employment. Fixed term employment contracts for regular and continuing employment shall be prohibited other than in respect of employees in a managerial capacity."

There are a number of promises made here.

Firstly, most employers will be obliged to provide workers with a letter of appointment stipulating their terms and conditions of employment. Presently, only workers regulated by the Shop and Office Employees Act have this protection.

Secondly, to prevent abuse of the status of 'casual' worker by employers, it shall be prohibited to hire someone in this status of employment to perform what is or ought to be done by a permanent worker, that is the regular or continuous or core business or activity of that undertaking.

Thirdly, the abuse of the status of probationary employment shall be ended by fixing a maximum period of probation of no longer than 1 year for those in senior positions and a norm of 6 months (up to a maximum of 9 months) for all other appointments. In any case, under current labour laws, a worker on probation is entitled to the protection of most labour laws including social security benefits.

Fourthly, the categories of "casual" and "temporary" worker shall be defined in statutory law. This would reduce the scope for discretionary or subjective perceptions of this kind of employment whether by employers or by judges. Unfortunately the proposed definition of both is a tautology, withno clarity on the meaning of 'casual' and 'temporary'. However, the intention is clearly stated, which is to make sure that employers do not abuse this status of employment to hire workers forwhat is permanent work, but minus the security of employment and the regulation of their working terms and conditions that is enjoyed by permanent workers.

Fifth and finally, the status of 'fixed term' workers which is also abused by some employers shall be restricted in areas of regular and continuing work only to personnel in senior positions. This aims to protect workers in manual, clerical and so-called unskilled or semi-skilled categories from being continuously rehired by the same employer to perform the same type of work but without the obligations owed to a permanent worker. However, rather than differentiate on the basis of labour grade, in keeping with the common sense meaning of the term, it is more appropriate to restrict

fixed term contracts to employment for execution of a specific assignment or for a definite and limited period of time.

The Workers Charter was perceived by its champions in the trade unions and within the Peoples' Alliance government as rebalancing the equation in labour relations towards employers' and capitalists of the preceding United National Party governments. For this reason, the policy document was also opposed by employers' and the business lobby and has been conveniently forgotten by government (though never officially withdrawn or revoked).

Only the clause on unfair labour practices has been legislated, through Amendment Act No. 56 of 1999 to the Industrial Disputes Act, albeit to no great avail.[47] Nevertheless, the clauses on contract labour could be the basis for future state policy and law-making in this area.

5.4 ILO Convention No. 181 on Private Employment Agencies

In 1997, recognising the role of private employment agencies in the labour market, the International Labour Organisation (of which Sri Lanka is a member) adopted a new Convention (No. 181)[48] to regulate their operation and also protect the workers using their services. Thirty-two countries have ratified this Convention, which entered into force in 2000, as of end 2016. However, Sri Lanka is not among them. In fact, only two Asian countries (Japan and Mongolia) have signed up.

The term 'private employment agency' is defined in the Convention as any natural or legal person, independent of the public authorities, which provides *inter alia* "services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person ... which assigns their tasks and supervises the execution of these tasks" (Art. 1 (1) (b)). This neatly captures the function of manpower agencies in Sri Lanka and the triangular relationship between the agency as employer, the workers, and the "user enterprise" that has actual control over them.

[47] Compa, Lance (2003), *Justice for All: The Struggle for Worker Rights in Sri Lanka*, Solidarity Center: Colombo, p. 11.

[48] International Labour Organization, *Private Employees Agencies Convention, 1997 (No. 181)*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326.

Among the salient provisions in the Convention and of immediate relevance to the present study, is that the "legal status" of private employment agencies is to be determined by national law and practice and after consulting employers' and workers' representatives (Art. 3 (1)). There should be a system of licensing or certification of agencies (Art. 3 (2)). Private employment agencies should not charge direct or indirect fees to workers for their services (Art. 7 (1)); although exceptions to certain categories of workers are permissible. Workers hired by private agencies should be guaranteed: freedom of association; collective bargaining; minimum wages; working time and other working conditions; statutory social security benefits; access to training; occupational safety and health; compensation in case of occupational accidents or diseases; compensation in case of insolvency and protection of workers claims; maternity protection and benefits and paternal protection and benefits (Art. 11 (a-j) respectively). In short, there should be no discrimination between workers in non-standard employment and those in standard employment in the enjoyment of their labour rights.

ILO Recommendation No. 188[49] on the same Convention goes further in stipulating that workers employed by private employment agencies should have a "written contract of employment specifying their terms and conditions of employment ... before the effective beginning of their assignment" (Art. 5). There should be penalties including prohibition for agencies engaged in unethical practices (Art. 4). The obligations of private employment agencies extend to not providing 'scab' workers to enterprises where the workforce is on strike (Art. 6). Neither should they knowingly provide workers for jobs with "unacceptable hazards or risks or where they may be subjected to abuse or discrimination of any kind" (Art. 8a). The confidentiality of personal data of the worker should be respected by the agencies (Art. 12). There should be no restrictions placed on workers by the recruiting agency, for being hired for standard employment by the user enterprise; from changing job roles; and for accepting employment in another enterprise (Art. 15 (a-c)).

[49] International Labour Organization, *Private Employment Agencies Recommendation, 1997 (No. 188)*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:SUP,en,R188,/Document.

5.5 ILO Recommendation No. 198 on Employment Relationship

In 2006, the International Labour Organisation adopted Recommendation No. 198[50] to provide guidance to member states on who is considered a worker in an employment relationship; what rights the worker has; and who is the employer. This Recommendation therefore is of crucial relevance to labour reforms in Sri Lanka for the regulation of agency labour and of private employment agencies. The thrust of the Recommendation is for member states to develop a national policy on the employment relationship, in accordance with national law and policy, and in consultation with the most representative organisations of employers and workers.

Such national policy should provide guidelines (Rec. 4 (a-g)): to effectively establish the existence of an employment relationship and to distinguish between employed and self-employed persons;to combat disguised employment relationships including other forms of contractual arrangements that hide the true legal status; to ensure standards apply to all forms of contractual arrangements, including those involving multiple parties, to protect workers; to ensure that the standards establish who is responsible for the protection of workers; to provide effective access to employers and workers in particular to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for dispute settlement concerning the existence and terms of an employment relationship; to ensure compliance with and effective application of, laws and regulations concerning the employment relationship; and appropriate and adequate training on international labour standards for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for the resolution of disputes and enforcement of national employment laws and standards. The national policy should in particular ensure effective protection to women workers, the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

ILO Recommendation No. 198 also provides guidance on how member states should determine the existence of an employment relationship. Members states are invited (Rec. 13) to introduce or

[50] International Labour Organization, *Employment Relationship Recommendation, 2006 (No. 198)*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R198,/Document.

use specific indicators in their laws and regulations for determining whether a relationship of employment exists between two parties, including:

> "a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise;is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
>
> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker."

The indicators in recommendation 13 (a) are of direct relevance to the situation of agency workers in the free trade zones in Sri Lanka. These workers, though hired by manpower agencies, are engaged in work under the control of the user enterprise. They are also part of the workforce of that user enterprise employed alongside workers in standard employment. They do not work for themselves but for another. They cannot delegate their work to another but must perform it themselves. They cannot choose their hours of work or place of work as those decisions are made for them by another. Their working time is of a specific duration and is continuous and not intermittent. The work can only be undertaken where the worker is available; and where the required tools, materials and machinery are provided by the user enterprise to the worker.

5.6 Wages Boards Ordinance Draft Amendment of 2007

A recent and ongoing attempt to clarify the employment relationship between the worker and the user-enterprise and the powers of the Commissioner of Labour in this process, is a proposed amendment to the Wages Boards Ordinance. Section 59A of the Ordinance has certain safeguards for workers in multi-party employment relationships which were introduced in 1966. However,

these are limited and inadequate to the problem of unveiling the actual relationship of employment and therefore true identity of the employer, in order to assign accountability towards the worker.

Therefore in 2007, trade unionists on the tripartite National Labour Advisory Council made a submission proposing several new clauses to tighten the powers of the Commissioner of Labour to unveil the actual employment relationship; and to ensure that the statutory obligations of the employer and the rights of the worker are respected.

This submission is not in the public domain[51] and is therefore reproduced in full below:

> "(p) Where any person, by way of trade or for any commercial purpose, makes any arrangement, express or implied, with any person who engages workers to perform work of a permanent nature at the workplace of the first person, if the Commissioner, after such inquiry as he may deem necessary, finds such arrangement is merely a means to disguise the employment relationship that exists between the first person and the said workers, shall direct in writing such first mentioned person to refrain from having such work executed under such arrangement";
>
> "(q) Where any person, by way of trade or for any commercial purpose, makes any arrangement, express or implied, with any person for the execution by such other person of any work and where in pursuance of such arrangement such other person employs workers for the execution of such work, if the Commissioner, after such inquiry as he may deem necessary, apprehends that in the execution of such arrangement fundamental rights at work of such workers, are impeded or denied, may direct in writing-
>
> (a) instructing either party of such arrangement, where he considers it expedient to do so, to carry out specified corrective measures, within a given time frame.

[51] Mr. D. W. Subasinghe, General Secretary of the Ceylon Federation of Trade Unions, was kind enough to share with me the submission (co-sponsored by Mr. Leslie Devendra of the Sri Lanka Nidahas Sevaka Sangamaya and himself).

(b) on failure to carry out all or any of the corrective measures directed by him under sub-section (a) hereof, instructing the first mentioned person, where he considers it expedient to do so, to refrain from having such work executed under such arrangement."

"(r) Where any person, by way of trade or for any commercial purpose, makes any arrangement, express or implied, with any other person for the execution by such other person of any work, if the Commissioner, after such inquiry as he may deem necessary, apprehends the existence of an employment relationship between such persons, notwithstanding how such relationship may have been characterized, as contractual or otherwise, may direct in writing to the first mentioned person to fulfil his obligations as an employer, if deemed to be due and fair, with retrospective effect."

Anyone who does not comply with the directions of the Labour Commissioner shall be referred to an Employment Relations Tribunal that is to be created as part of the same draft amendment. Thisis the mechanism envisaged in ILO Recommendation No. 198 (discussed above) for the purpose, *inter alia*, of resolving disputes concerning the existence and terms and conditions of an employment relationship.

As is apparent from the text of the submission, the rationale for the proposed amendment to the Wages Board Ordinance is to empower the Commissioner of Labour to ascertain through independent inquiry: what is the nature of the relationship between the worker and the user enterprise; whether the work is of a "permanent nature"; and whether the core labour rights of the worker have been violated. Thereafter, the Labour Commissioner may direct the employer or the party that has hired the worker (for example, manpower agency) to ensure that labour rights are respected. Therefore this draft amendment is an attempt at regulation of temporary work. However, it is silent on the regulation of manpower agencies.

There has been pushback on the strict language of the draft text since 2007, with attempts to dilute its force; and also to shift the focus of the proposed amendment to the establishment of the

Employment Relations Tribunal. Subsequent drafts prepared by the Labour Ministry have been rejected by trade unionists within the National Labour Advisory Council who are standing firm on the 2007 draft amendment in its entirety.

6.0 CONCLUSION

The prevalence and spread of precarious work is sketched in section 1. It is noted how precarious work is associated with insecurity of employment; lower and/or variable earnings; longer and arbitrary working hours; poorer occupational safety and health; reduced opportunities for training and skills development; lack of representation and fundamental rights at work; and limited or non- existent social security benefits. Additionally there is a toll on the health and wellbeing of workers andtherefore also of their households and communities.

In Sri Lanka as elsewhere, labour despatching agencies (colloquially known as 'manpower') are an intermediary in the supply of hired labour to enterprises that are not looking to recruit directly to their permanent workforce. Through focus group discussions with fifty women and male contract workers and one-to-one interviews with key informants from labour despatch agencies, BOI enterprises, the Board of Investment, the Free Trade Zone Manufacturers Association, the Labour Department, trade unions and women workers organisations, the experiences and perceptions of a range of concerned parties was obtained to better understand the dimensions of precariousness and the constraints and options to realising decent work for all workers.

Section 2 presents an overview of the status of labour rights in Sri Lanka, with particular reference to industrial workers, both in the letter of the law and in the spirit of its implementation. It is observed that Free Trade Zone workers in general do not enjoy in entirety the rights that are promised to them in the labour code; and that the experience of contract workers is not dissimilar to that of permanent workers within the Zones in this respect. The particular role of the Board of Investment as the administrative authority of the Zones in mediating labour relations as well as its manual on labour standards and policy on contract labour are analysed. The Board appears to discourage contract labour within the Zones, but at the same time is unwilling to take action against investors who are in routine breach of its guidelines.

Section 3 draws on interviews with contract workers, male and female, in Biyagama and Katunayake Free Trade Zones to understand why some of them prefer contract work to permanent employment. Many manpower workers consider themselves to be better off than permanent workers in so far as they have greater flexibility in choosing their days and times of work. They are also able to take time off factory work when needed. Further, being irregular

workers of that enterprise, they are not subject to the same discipline of production targets and quality control pressures of permanent workers. It is clear that contract workers are also being exploited by enterprises and labour despatch agencies, in so far as their statutory entitlements especially to social security benefits are violated. The desirability of contract worker to one group of workers is an indictment of the rigours of the export factory labour regime and their own resistance to becoming just another cog in the industrial system.

Section 4 reviews the perspectives of a range of key informants on contract labour, on manpower agencies, and on the issue of the appropriate response. There was no possibility of consensus among the diversity and conflicting interests of those interviewed. With the exception of worker rights advocates, everyone else justified the necessity of contract work in the export-oriented sector.The squeeze on profit and challenges of competition from countries where labour costs are lower and there are fewer legal obligations on employers has fuelled the shift to contract work in the opinion of some. At most, it is recognised that contract workers should not be treated less equally than permanent workers in their terms and conditions of employment, with the exception of security of employment and termination benefits which only apply to permanent workers. Therefore there should be greater state regulation of both contract work and of labour despatch agencies. However, one point of view among some worker rights advocates is that there can be no compromise with contract work and it should be prohibited rather than regulated.

Section 5 reviews some relevant aspects of laws and policy in Sri Lanka to establish the status of contract work and the relationship of employment. It is observed that the courts have tried to go beyond the narrow and strict definitions of 'employer' in some labour laws, to apply its content to the particular facts of each case. A few cases are discussed to understand the thinking of the judiciary in its development of a mixed or three-fold test to establish the true identity of the employer.

If one applies these three tests in a disinterested manner in the case of manpower workers in the ready-made-garments sector in Sri Lanka's Free Trade Zones, it is evident firstly, that they are in fact employees and not independent contractors; and secondly, that the employment relationship exists between workers and the user enterprise and not the manpower agency. The tasks

performed within the factory are decided by the management and not the manpower agency; and have to be executed under the supervision and direction of the factory management. Therefore the worker is under the control of the user enterprise and not the manpower agency. The worker cannot determine her remuneration for the service she provides to the user enterprise; that is determined by the user enterprise in its agreement with the manpower agency and channelled through the latter. The worker has no financial investment in the enterprise. The worker also has no part in deciding what the factory will produce; to whom it sells its products; and how it promotes itself. These are decisions solely of the user enterprise which do not concern the manpower agency either. Therefore the worker is economically dependent upon the user enterprise. Finally, it is incontrovertible that manpower workers in the Biyagama and Katunayake Free Trade Zones are hired to perform factory operations that are essential to its main or core business for instance, stitching garments for ready-wear, and are deployed on production lines alongside permanent workers. Therefore the worker is engaged in work that is integral to the user enterprise. In summary, it is the user enterprise that is to all intents and purposes the employer of agency hired labour in the Free Trade Zones.

This section concludes by drawing attention to a range of instruments which should inform current approaches to contract labour and to the eradication of precariousness. These are the 1995 National Workers Charter, ILO Convention No. 181 on Private Employment Agencies, ILO Recommendation No. 198 on the Employment Relationship, and the 2007 draft amendment to the Wages Boards Ordinance. The attempt is made in the Workers Charter to restrict the practice of contract labour to work of a non-permanent nature and to strengthen the rights of contract workers against employers. The objective of ILO Convention No. 181 is to provide states with a framework for the regulation of labour despatch agencies, as many countries including Sri Lanka, lack any suitable national legislation to monitor and supervise them. ILO Recommendation No. 198 provides guidance to states on how to unveil the employment relationship when it is disguised. It also proposes the creation of a tribunal to which complaints on this issue can be referred. The 2007 draft amendment to the Wages Boards Ordinance was proposed by trade unions. It empowers the Commissioner General of Labour to scrutinise the employment relationship and to give directions to the user enterprise to discharge their responsibilities as employer to contract workers.

The problem of agency labour in Sri Lanka cannot be treated in piece-meal fashion. It is necessary to place this issue within the context of deteriorating labour rights and intensifying economic pressure on the living standards of workers.[52] Therefore, campaigns against non-standard employment in general and precarious employment in particular, also have to raise demands for the right to organise; for a living wage; and for transformative social protection.

[52] Weerakoon, Wijepala (2015), "No decent work with precarious work", *Sunday Times* (Colombo), 14 June 2015, http://www.sundaytimes.lk/150614/business-times/no-decent-work-with-precarious-work-152966.html; Rasseedin, T. M. R. (2015), "Decent Work in Sri Lanka – a trade union assessment", *Sunday Times* (Colombo), 25 October 2015, http://www.sundaytimes.lk/151025/business-times/decent-work-in-sri-lanka-a-trade-union-assessment-169241.html.

7.0 2019 POSTSCRIPT

Three years after the original field research in 2016, the Dabindu Collective has updated this study based on the experiences of a new cohort of 'manpower' workers in the Gampaha district of Sri Lanka's industrialised Western Province.[53] This additional material presents the testimony of Sinhala and Tamil workers, both male and female; while also reviewing recent national legal developments in the regulation of contract labour.

7.1 Manpower Workers' in 2019

Fifteen workers from the Katunayake and Biyagama Free Trade Zones were interviewed in late August 2019. Of this number, eight are male and seven are female. Eight among them are of Tamil ethnicity, while the remaining seven are of Sinhala ethnicity. All of them are between 18 and 25 years in age; and exclusively in contract work.

The weighting of the sample towards Tamil workers is not representative of their proportion of the total labour force[54], but rather to record the recent entry of Tamils from the North-East into the export processing zones. Prior to the end of decades of war in 2009, it was unknown for Tamils, especially from the conflict-affected region, to be recruited into factories in the zones. In a situation of high youth unemployment, these jobs were earmarked for young Sinhala women from the electorates of ruling party politicians. Further, Tamil youth were suspect as potential operatives of the secessionist armed Tamil groups in the North and East: one of which also used young women in suicide bombings in the South of the island. Subsequently, with the pacification of the military conflict – and chronic shortages of workers from Sinhala-majority areas with no alternative work but the intense production norms, awful living conditions, and low status of export factory employment – managers began hiring Tamils from the North and East to fill vacancies, either directly, or through manpower agencies and sub-agents.

[53] This research and publication has been supported by the USAID-Increased Demand and Engagement for Accountability (IDEA) initiative. The encouragement received from Mr. Balachandran Gowthaman and Ms. Kalani Subasinghe is gratefully acknowledged.

[54] As of end 2018, 507,313 persons (of all grades) were employed in BOI-licensed enterprises (that is, inside and outside the zones), of whom 304,824 are in the textile, apparel and leather goods industry: Central Bank of Sri Lanka (2020), *Economic and Social Statistics of Sri Lanka 2019*, Colombo, p. 65, https://www.cbsl.gov.lk/sites/default/files/cbslweb_documents/statistics/otherpub/ess_2019_e.pdf. There is no disaggregation by gender and ethnicity.

A perception study among women free trade zone workers in 2013 argued that Tamils were discriminated against in comparison to Sinhalese, through differential treatment in "… monthly salary, work shifts, work duration, supervision, food, transport, and hostels".[55] A majority of Sinhalese workers in that survey, believed that Tamils worked longer hours and were granted less leave than themselves, and that management segregated Tamils from Sinhalese in the labour process as well as in the workplace more generally.

According to the responses received by the Dabindu Collective in its field research in late August 2019, the differential treatment of Tamils in relation to Sinhala workers has persisted. Worse, the hiring and placement of many Tamil-speaking workers falls squarely within the definition of 'human trafficking'. The respondents had been recruited in their places of origin, with the promise of regular employment in the ready-made garment industry, where they are assured their monthly salaries will average Rs45,000 a month; that safe accommodation will be provided by the employer; or in the absence of company housing, safe transport between their lodgings and their workplace.

Having migrated many hundreds of kilometres to an unfamiliar environment, where Sinhala is the *lingua franca*, and without connections to family and friends, the Tamil workers find that only a few are guaranteed accommodation in company-run hostels. Even these are expected to find outside lodging after a few months. The workers are housed in overcrowded and unhygienic boarding houses run by private landlords, with limited and unsatisfactory access to potable water and sanitation.

They find themselves to be temporary workers, on a daily wage of around Rs1000, rising to Rs1400 with overtime. Their place of employment is determined by a manpower agency. In some cases, the workers were not placed in the apparel industry at all, but in other trades where they are exposed to chemicals and without training in safe management nor provision of protective clothing; or even deployed as casual labourers to fill drinking water bottles, or collect and load king coconut (*thambili*) from estates in Gampaha. Other women are sent to households as domestic workers, reportedly enduring sexual harassment.

[55] Fernando, Mangala (2013), *Ethnic Discrimination: The Post Armed Conflict Economic Challenges of Tamil Women*, Women's Centre: Ekala, p. 12.

Their transport is by foot or private bus, unless the manpower agency transports them to a distant enterprise from a central meeting point (main bus-stand, etc.). A Sinhala woman contract worker in the Biyagama zone explained, "We have to leave the boarding house at 4am to travel to the pick-up point. The agent gives priority to younger women of good appearance. We go to work in the early morning, only returning to our boarding house after 10pm at night".

There are multiple instances of women being coerced into sex work in so-called 'spas'. One Sinhala respondent claimed that several manpower agencies solicit young women workers from her boarding house as commercial sexual workers: especially on their weekly day of rest from factory employment, which is Sunday. According to her "due to financial difficulties, as the income from regular employment is poor, there is a tendency to join the sex trade".

Enterprises in the apparel sector are known to remove manpower workers from the workplace in advance of a buyers' audit – as these workers are not on their payroll nor have personnel files confirming acceptance of contract, date of birth, and age of admission to employment, confirmation of social security deductions, and the like – in violation of the voluntary codes of conduct that manufacturers sign up to in return for orders from Western brands.

Inevitably, there are tensions at enterprise level between contract and regular workers. The contract workers are viewed as advantaged because they are paid in cash daily; their take-home wage is higher (as no statutory deductions are made); as their wages do not fluctuate depending on attendance and production targets; and as there are no financial penalties for poorer quality of work – unlike workers in regular employment.

An earlier study in 2013 revealed that these grievances, which are common across all sectors where contract labour is prevalent, become racially charged where there are ethnic differences: as Tamils are taunted as *kotiya* ('tigers' – associating them by virtue of common ethnicity with the banned Liberation Tigers of Tamil Eelam) or *thrasthawadiya* (terrorists – by reason of their ethnicity and place of origin).

7.2 Law and Policy developments

Since the first edition of this study, there has been mobilisation by manpower workers in the public sector, demanding regularisation of their employment on the same terms and conditions as permanent workers. A long-running strike at Sri Lanka Telecom from late December 2016 into early 2017, by contract workers who were being paid one-third the salary of permanent workers for the same work, drew much attention.[56]

An incisive editorial at the time commented:

> "Significantly lower salaries, exclusion from benefits and temporary employee status are characteristics of precarious employment faced by manpower workers. Indeed, precarious employment conditions lead to greater levels of exploitation and vulnerability. Employers benefit much from such insecurity faced by manpower workers to demand greater productivity and obedience. Often found in the lower strata of professional work, they are subject to severe supervision. As temporary and contract workers, the constant fear of losing their jobs hinders them from appealing for better conditions, leading to the deteriorating environment for manpower workers."[57]

In the apparel sector, contract workers have not mounted, let alone sustained, similar campaigns. Unlike in the private and mercantile sector, contract workers in the free trade zones consider themselves – as discussed earlier in the research findings from 2016 – to be advantaged through the temporary nature of their employment. This is not to say that there are no struggles for better terms and conditions of work, but rather that the outbreaks have been sporadic and brief: promptly squashed by management, who quickly identify and isolate the ringleaders before driving them out of the enterprise. Such instances were reported even by the small sample of workers interviewed in 2019.

In this context, there have been some encouraging legal developments; if as yet, unaccompanied by a shift towards formalisation of employment relations in sectors where contract work is rampant.

[56] Pussawella, Kasun, "Manpower workers continue their struggle", *The Sunday Leader*, 20 January 2017; "State sector manpower workers in limbo", *The Sunday Times*, 05 February 2017; Illanperuma, Shiran, "Manpower Strikes and Sri Lanka Telecom — What You Need to Know", *roar.media*, 07 February 2017; Wickrematunge, Raisa, "Manpower Plunder: The Plight of SLT's Contract Workers", *groundviews.org*, 16 March 2017.

[57] "Workers not victims", *Daily FT*, 25 January 2017, http://www.ft.lk/ft_view_editorial/workers-not-victims/58-593540.

7.21 Commercial Bank of Ceylon vs. *R. N. R. Bandara*

In the case of *Commercial Bank of Ceylon* vs. *R. N. R. Bandara*[58], the High Court of the Eastern Province having heard an appeal from the applicant, a contract worker employed at the respondent private bank against the order of the Labour Tribunal, unveiled the disguised employment relationship between the two parties. The applicant had been employed as an Office Assistant in a branch of the bank for almost two-and-a-half years, having been supplied by a manpower agency whom the respondent claimed to be his employer. His employment had been terminated for non-disciplinary reasons. He sought re-instatement in his former place of employment.

The High Court on an examination of the facts, upheld the Labour Tribunal's finding that despite the absence of a written contract between the parties and the payment of his salary by the manpower agency, there was an employer-employee relationship between the end-user and the worker. Further, the applicant had been integrated into the operations of the bank, and his duties at work were under the direction and control of bank officials. In accordance with principles of justice and equity, the respondent was ordered to reinstate the applicant to its employment.

Justice Dr. Sumudu Premachandra in his judgment held *inter alia*:

> "Outsourced Employee is a form of workman [and] comes within the definition of Industrial Disputes Act (as amended) and no one can circumvent labour laws under the shelter of Outsourced Employee … Outsourced Employees rights cannot be denied just simply [because] they do not have an express contract with the end user, in this case Respondent Bank. It is seen it would be a bad practice and curtail[ment] of labour rights if court thinks that Outsourced Employees are out of the purview and definition of the Industrial Disputes Act."[59]

It is significant that some judges recognise that contract work is favoured by some employers, not for irregular tasks or seasonal production, but rather as a device to deny workers the protection and rights afforded to them by law in Sri Lanka.

[58] EP/HC/AMP/LT/APP//405/2014. Thanks to Mr. Wijepala Weerakoon of the United Federation of Labour for a copy of the judgment.
[59] *Ibid*., p. 11.

7.22 Wages Boards Amendment Act No. 14 of 2019

Ten years after the amendment discussed in section 5.6 of this study was first drafted and approved by the Attorney-General's Department, the Wages Board Ordinance was finally amended to restrict the expansion of contract work.

Section 59A of the Ordinance is repealed and replaced by a new provision:

> "Where any person enters into a contract or work arrangement expressed or implied, for trade or commercial purposes, with any other person who employs workers to perform work on a *regular* basis which is an *integral part* of the business activities of the first-mentioned person, and such person employs workers pursuant to the said contract or work arrangement, such contract or work arrangement shall be deemed to amount to a *disguised employment* relationship." (emphasis added)

The above clause adopts the economic integration test, to determine whether the worker is engaged in the core business of the undertaking, and if so, regardless of the third party (manpower agency), an employment relationship shall be construed between the worker and the user enterprise. Such determination shall be made by the Commissioner of Labour, who is empowered "after due inquiries" to direct the user enterprise from using contract workers in its core business operations.

A person (user enterprise, manpower agency or worker) aggrieved by a directive made in respect of him, has 30 days to file an appeal before the Special Employment Relations Tribunal whichis established under the Amendment Act. This new mechanism consists of three members "with wide knowledge and experience in the field of labour laws": one of whom shall be a retired Judge of the Supreme Court or Court of Appeal, who shall also be appointed its Chairman. The appointments are made by the Minister of Labour. The Tribunal is empowered to summon all concerned parties before it, and to make a fresh determination either upholding or reversing the directive by the Commissioner.

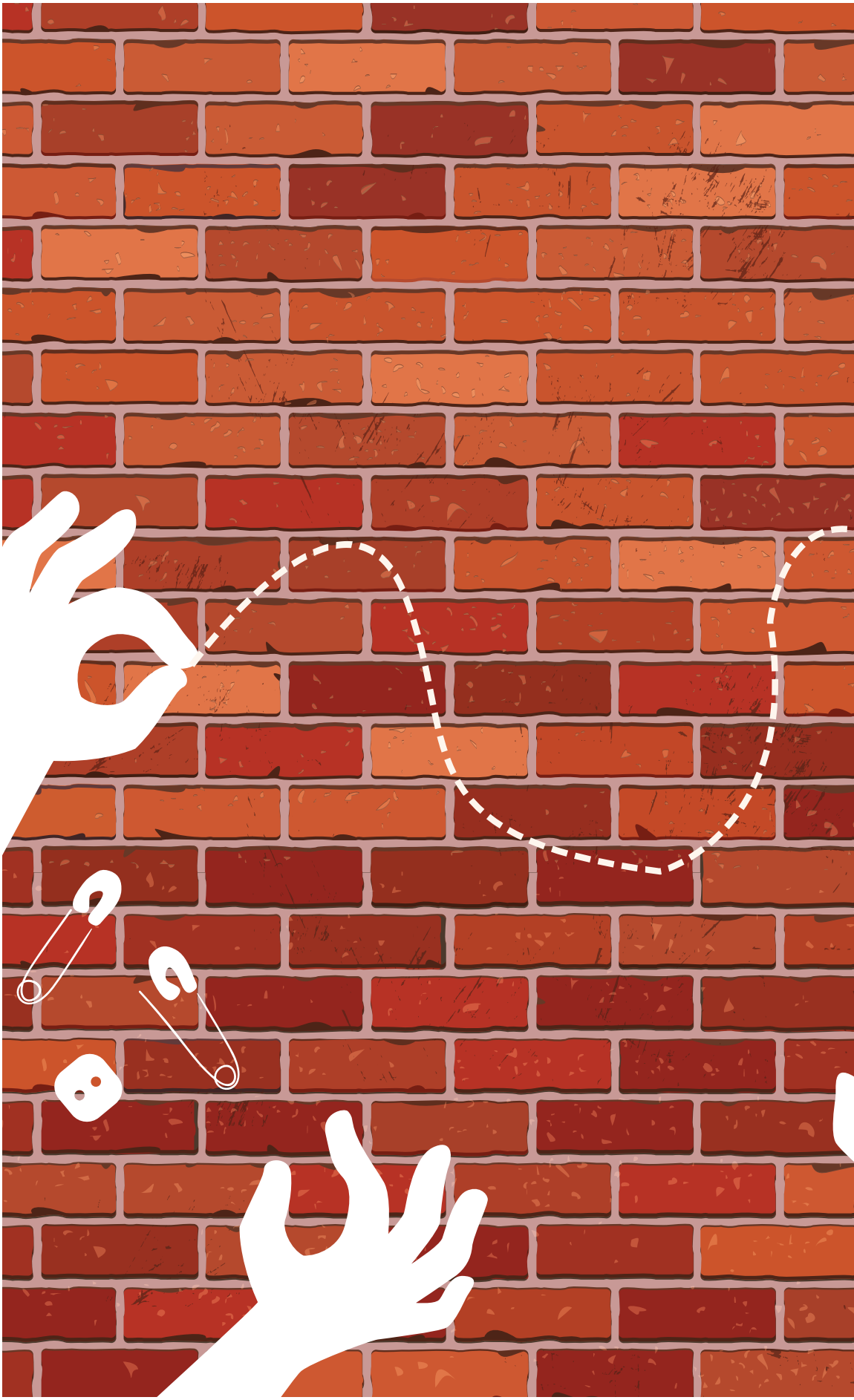
Prima facie, this amendment ought to discourage user enterprises from employing contract workers for core business activities. However, the Special Employment Relations Tribunal has yet to be constituted as of end 2019. Until it is, the new provision is a paper tiger: more threatening in rhetoric than in reality. The selection of members, and their rights consciousness,

will be important. If proceedings of the Tribunal are subject to similar delays that afflict the Labour Tribunals, then only lawyers will profit from its establishment.

Even after the Tribunal is functional, the new law does not protect the contract worker by compelling the user enterprise to regularise her/his employment as a permanent worker. The Commissioner of Labour, and also the Tribunal, can either authorise the continued employment of the contract worker where satisfied it is not in the core business of the undertaking; or direct the user enterprise to discontinue her/his employment where it is in core business activities.

The new law is also silent on the regulation of manpower agencies. As contract labour is not prohibited, and will prevail into the future, it is important that these agencies are fully within the scope of labour law, including in their duties towards workers who are currently denied written contracts of employment, free and informed consent in choice of trade and employer; medical insurance and compensation in case of disease, injury or death; sick leave and paid holiday entitlements; social security contributions; and freedom of association and collective bargaining.

Trade unions and others concerned with workers' rights should campaign to strengthen workers' rights, whether permanent or temporary, through further legal amendment, based on organising manpower workers instead of shunning them, and building alliances between workers regardless of contractual status to expand the collective power of the working class, instead of the current division that is only to the advantage of the exploiting class.



Dabindu Collective