



## NOTE ON THE IMPROPER USE OF CONTRACTS WITHIN THE UN SYSTEM

*"The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties."<sup>1</sup>*

Contracts are a key element for both the international organisations and for the staff members. They notably establish the conditions under which international staff perform the duties assigned to them, the protection and guarantees attached to employment, its foreseen duration and place of implementation. The variety of tasks to be performed within international organizations do justify the coexistence of several types of contracts – which should normally fall under one of three categories: contracts without other limit of time than that corresponding to compulsory retirement, contracts with fixed duration, results-oriented contracts whereby the organization entrust a task to a collaborator.

In practice, there was over time a multiplication in types of contracts, across and within individual organizations, for reasons that are not really linked to the nature of the work to be performed, or to the need for the organizations to limit their commitments over time. Progressively, a situation has developed where a number of contracts issued by the Organizations are to be considered as improper, according to general principles of labour law, and even to the commitments made by the organization vis-à-vis the host government for their Headquarters and external offices – which resulted in a situation where the UN family becomes widely known as an employer generating precarious employment conditions. This trend obviously casts a negative image of the UN system, and corresponds to a deterioration in overall employment and working conditions for all staff – since a lack of protection for some is synonymous of a threat against decent treatment for all.

Among most widespread cases of improper use of contracts – the current typology of contracts in the UN includes some 15 different categories – one may quote the following:

- Use of successive contracts of short duration for recurring tasks, instead of issuing one contract for a total period of work;
- Use of non-labour contracts<sup>2</sup> to perform tasks under direct supervision of the employer;
- Alternative use of labour and non-labour contracts for performing the same tasks;
- Change in employment conditions on the occasion of contract renewal, instead of simply extending contractual arrangements;
- Implicit change in employment conditions within the period or upon renewal of a contract without the assent of the official concerned;
- Incorrect or incomplete information on employment conditions;
- Non-recognition in employment contract of qualifications required to perform given tasks, etc.

The reasons behind the improper use of contracts by the Organizations are multiple, but none is acceptable to the staff, and all contradict general principles in law. Among the most typical reasons behind the improper use of contracts, the following appear to be prominent:

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<sup>1</sup> ILO Administrative Tribunal, Judgment 701, November 1985, B. against PAHO (WHO)

<sup>2</sup> "Non-labour contracts" are in fact contracts where the collaborator of the Organization is treated as if he or she was self-employed (not a dependent worker).

- Desire to minimize costs at the expense of staff members;
- Desire to circumvent proper recruitment procedures, to avoid monitoring by established mechanisms;
- Desire to keep working arrangements flexible, in order not to have to comply with legal requirements considered as cumbersome;
- Desire to keep staff members “under pressure” and to avoid occurrence of legitimate demands;
- Dire need of any type of employment by candidates, making them vulnerable to abuse through imposed improper conditions.

Improper use of contracts may be efficiently combated only when clear rules and procedures specify the type of contract to be issued in given circumstances. The situation now prevailing across the UN system has in fact many similarities with what happens on the national labour markets, where there is<sup>3</sup> “the increasingly widespread phenomenon of dependent workers who lack labour protection because of one or a combination of the following factors:

- The scope of the law is too narrow or it is too narrowly interpreted;
- The law is poorly or ambiguously formulated so that its scope is unclear;
- The employment relationship is disguised;
- The relationship is objectively ambiguous, giving rise to doubt as to whether or not an employment relationship really exists;
- The employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for them; and
- Lack of compliance and enforcement.”

Staff Associations and Unions cannot accept that the UN Organizations try to escape their basic responsibilities as employers by issuing substandard and in many respects illegitimate employment contracts. They therefore reiterate their commitment to fundamental principles that should be reflected in the practice of the organizations when issuing labour contracts, notably: that all individuals, including UN employees, should have the right to social security; that any decision legally affecting a person should be motivated; that contracts result from the positive will clearly expressed by the parties; that it cannot be tolerated that some deliberately infringe upon the rule of law.

Staff Associations and Unions might therefore decide:

- To review within their respective organizations existing types of contracts, to highlight related on-going procedures and practices that contravene solidly established principles that should govern decent employment relations, and to elaborate remedial measures to identified deficiencies and cases of improper use of employment contracts;
- To collaborate with each other to the extent necessary when conducting the above-mentioned review;
- To support legal and other pleas of staff members affected by improper use of employment contracts;
- To appraise staff of their findings and proposals for action, and to elicit support for these proposals when submitted to respective executive heads and governing body;
- To produce a compendium of malpractices concerning use of employment contracts in the UN and to request the ICSC, the HLCM, the international trade union movement and Member States to act in favour of their eradication at all appropriate levels of decision-making.

*ILO Staff Union, March 2004*

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<sup>3</sup> International Labour Conference, 91st Session, 2003, Report V, *The scope of the employment relationship*

## Measures to prevent the recurrence of inappropriate use of employment contracts

1. It is of particular concern that all persons employed in the Office - on whatever contractual basis - be accorded fair and equitable treatment in terms of appropriate remuneration and other working conditions and that we avoid creating situations whereby temporary employees are led to harbour expectations of continued employment in the Office without there being a reasonable prospect of that goal being realized.

2. All temporary contracts (whether they be Short-Term [ST], Special Short-Term [SST], or External Collaboration [Ex-Col] contracts) are widely relied upon in the Office to engage staff, or otherwise have work undertaken, for a period of temporary and definite duration. These contractual arrangements are perfectly appropriate when used for the purpose for which they are intended. However, when such contracts are used improperly and/or over extended periods, they may give rise to a situation of what has become described, incorrectly, as "precarious employment." Inappropriate contract usage is normally considered by the Office to have occurred when a person has been engaged under a number of temporary contracts and has accumulated at 1 July 2002, at least 24 months of employment under such contracts with the Office within the past 36 months.

3. There are some occupations and situations, which are not considered to come within the scope of this definition. For instance, persons employed principally as information technology consultants, audio-visual technicians and linguistic personnel (e.g. free-lance interpreters and translators, editors, revisers, and proof-readers) whose services may be contracted by the Office for extended periods of time are excluded from this definition as their work is either that of independent contractors or of a regular seasonal nature. Technical cooperation experts and certain persons engaged under special extra-budgetary funds who are properly employed on ST, SST or Ex-Col contracts are also excluded as the funding for the activities of the project of which they are part is only anticipated to be for a limited period. (i.e. while extra-budgetary funding is available).


4. As it is the direct responsibility of managers to initiate the recruitment of short-term staff and to contract external collaborators, it is necessary to emphasize the importance of ensuring that each specific use made of ST, SST or Ex-Col contracts is temporary and of definite duration and that the policies and rules which govern the use of such contracts are strictly adhered to.


5. Accordingly, the present circular is being issued: (i) to recall to managers and staff the main rules governing ST, SST and Ex-Col contracts; and (ii) to outline the measures which the Human Resources Development Department (HRD) has been asked to implement to enforce these rules. The Director-General has also issued a note to managers outlining his expectations and providing more specific guidance to prevent the inappropriate use of employment contracts in the future. (...)

7. *A Short-Term Appointment, whether regular short-term or special short term, is timebased and comprises several office tasks to be completed over a specified period of time.*

*The work concerned is defined in terms of the duties and responsibilities to be performed (normally, these are the same as, or similar to, those performed by core Office staff); the person's presence is required at the Office during normal working hours and for a prescribed period during which Office space and other facilities and services are provided; the work is supervised within the established hierarchical structure; payment is made on a daily or monthly basis; and the person employed is regarded as an ILO official enjoying the immunities and status necessary for the discharge of her or his duties, including tax exemption (and, as such, s/he is entitled to a laissez-passer for mission travel and a carte de légitimation to reside in Switzerland).*

8. *A short-term appointment (ST or SST) is envisaged in the following situations:*

 *for (a) specific assignment(s) of short duration;*

 *where a regular staff member needs to be replaced for temporary reasons (e.g. a replacement consequential on maternity leave, leave without pay, or other type of extended leave);*

 *pending the filling of a vacant job;*

 pending the creation of a job.(...)

*12. An External Collaboration Contract (Ex-Col) is task-based. Such a contract may be used only where there is a specific well-defined task to be performed and the output can be considered as a specific end-product (e.g. a research study, report, translation, or typed document) or where the task assigned is one that is advisory in nature (e.g. engaging an academic or other specialist to present a paper and be a discussant at a workshop). A person employed on an Ex-Col contract is not, and does not act in the capacity of an official of the ILO and is not authorised in any circumstances to undertake any commitment on behalf of the Office. The conditions under which the Ex-Col contract may be used are that the work to be carried out is not an ongoing activity; the work performed is to meet a specified deadline at working times determined by the contractor within the overall work plan set by the relevant Office unit and at any place of his/her choice; office space, facilities, or services normally should not be provided; and full payment is normally made only when the work has been completed and judged satisfactory. As non-staff members, Ex-Cols do not enjoy the immunities of an official. Since they should not work on ILO premises, a carte de légitimation is not provided to them. However, if an Ex-Col needs to have consultations in Geneva, any relevant visa(s) may be obtained by the Office to facilitate official travel to Switzerland.*

*13. It should be noted that no person shall commence employment in the Office, for a temporary or longer period, before an appropriate contract has been authorized and signed. Moreover, a person should not be employed under simultaneous contracts with the Office. Accordingly, before recruiting a person for temporary employment, a line manager should clarify whether s/he holds any other ILO contract. In such a case, the manager should seek advice from HRPOLICY before a further contract is issued.*

### **Measures to enforce the rules**

**14.** In no case will any future individual employment situation be allowed to evolve into a situation of inappropriate use of a contract or contracts.

**15.** To this end, managers and HRD have been requested to enforce strictly the abovementioned rules governing short-term employment and external collaboration. HRD will establish without delay a monitoring mechanism that will: (a) reject approval of temporary contracts which are not in line with established rules; and (b) trigger an “early warning” so as to prevent the routine extension of temporary contracts. In addition, and with immediate effect, every Personnel Action (PA) request must contain a justification for the issuance of an appointment, extension or re-appointment under an ST or SST contract. This should be indicated in the “PA remarks” field. Without adequate justification, the PA will not be approved. The PA should reach the appropriate Senior Human Resources Officer (SHRO) in HRD at least two weeks before the date of entry on duty of the appointee to the Office or before a proposed extension in his/her contract is to take effect; if this condition is not fulfilled, the PA will not be approved. The above-mentioned monitoring mechanism will also extend to the inappropriate use of Ex-Col contracts and arrangements are being established through consultation between HRD and FINANCE.

**16.** The Director-General is insistent that all inappropriate contract usage in the ILO be eliminated once and for all and counts on the full co-operation of all managers and staff to ensure the successful implementation of the above measures. (...)

## **Common statement by the experts participating in the Meeting of Experts on Workers in Situations Needing Protection (Geneva 15-19 May 2000)**

1. The Meeting of Experts has considered the technical report prepared by the ILO which draws on the various country reports.
2. The reports and the debate at the Meeting demonstrate that the global phenomenon of transformation in the nature of work has resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers are entitled to be protected by labour legislation) does not accord with the realities of working relationships. This has resulted in a tendency whereby workers who should be protected by labour and employment law are not receiving that protection in fact or in law. (The Worker and Government experts believe that this is a growing tendency but the employers do not feel that the extent of this tendency has been proven.)
3. The reports and the debate at the meeting indicate that the extent to which the scope of regulation of the employment relations do not accord with reality varies from country to country and, within countries, from sector to sector. It is also evident that while some countries have responded by adjusting the scope of the legal regulation of the employment relationship, this has not occurred in all countries.
4. The Meeting notes that various country studies have greatly increased the pool of available information concerning the employment relationship and the extent to which dependent workers have ceased to be protected by labour and employment legislation. In order to enhance the understanding of the issues outlined in the previous paragraphs, the Office should be authorized to:
  - (a) conduct additional appropriate studies;
  - (b) synthesize the studies;
  - (c) promote exchanges between the authors of the country reports and other experts and the representatives of the social partners, including the holding of an ILO Conference.
5. The Meeting agreed that countries should adopt or continue a national policy in terms of which they would, at appropriate intervals review and, if appropriate, clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities. The review should be conducted in a transparent manner with participation by the social partners.
6. The Meeting further agreed that elements of a national policy might include but not be limited to:
  - (a) providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
  - (b) providing effective appropriate protection for workers;
  - (c) combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
  - (d) not interfering with genuine commercial or genuine independent contracting;
  - (e) providing access to appropriate resolution mechanisms to determine the status of workers.
7. The Meeting agrees that the ILO can play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection.
8. The actions taken by the ILO could include:
  - (a) the adoption of instruments by the Conference including the adoption of a Convention and/or supplementary Recommendation;
  - (b) providing technical cooperation and assistance and guidance to member countries concerning the development of appropriate national policies;
  - (c) facilitating the collation and exchange of information concerning changes in employment relationships.

## **ILO R166 Termination of Employment Recommendation, 1982**

The General Conference of the International Labour Organisation,  
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and  
Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Termination of Employment Convention, 1982;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two, the following Recommendation, which may be cited as the Termination of Employment Recommendation, 1982:

### **I. Methods of Implementation, Scope and Definitions**

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2.

(1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

(3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation.

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3.

(1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

(a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;

(b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms **termination** and **termination of employment** mean termination of employment at the initiative of the employer.

## II. Standards of General Application

### Justification for Termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

(a) age, subject to national law and practice regarding retirement;

(b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6.

(1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.

(2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

### Procedure Prior to or at the Time of Termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.

10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

13.

(1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

(2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.

### Procedure of Appeal against Termination

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.

15. Efforts should be made by public authorities, workers' representatives and organisations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

Time Off from Work during the Period of Notice

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Certificate of Employment

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

Severance Allowance and Other Income Protection

18.

(1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to-

(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

(2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

III. Supplementary Provisions concerning Terminations of Employment for Economic, Technological, Structural or Similar Reasons

19.

(1) All parties concerned should seek to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

(2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

Consultations on Major Changes in the Undertaking

20.

(1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should

supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term ***the workers' representatives concerned*** means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

#### Measures to Avert or Minimise Termination

21. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

#### Criteria for Selection for Termination

23.

(1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

#### Priority of Rehiring

24.

(1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights-particularly seniority rights-in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

#### Mitigating the Effects of Termination

25.

(1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26.

(1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

(2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

#### IV. Effect on Earlier Recommendation

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.