ITC-ILO Curriculum on

**“Building modern and effective labour inspection systems”**

MODULE

7

# Inspection of employment relationship

## What this Module is about

This Module examines some of the issues and trends relating to employment relationships in the world of work today and how this impacts on the role of labour inspection. There are a number of ambiguities and challenges with employment relationship and labour inspectors have to be aware of them and work through them if they are to carry out their tasks effectively.

The Module gives particular attention to the Employment Relationship Recommendation, 2006 (No. 198), which provides guidance to all ILO member States on how they can address the above issues comprehensively.

## Objectives

The aim of this Module is to explain the role of labour inspection in promoting worker protection within the context of the employment relationship, in accordance with ILO Recommendation No. 198.

At the end of this Module, participants will be able to:

- ✓ Explain how dependent workers lack labour protection, because of the too narrow scope of legislation, ambiguities in its interpretation, or lack of clarity in its application;
- ✓ Make reference to Recommendation No. 198 and in particular to the areas in which labour inspection should play a role, and explain this role.
- ✓ Discuss the situation and trends on employment relationship in their respective countries and their national regulation.

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# 1. OVERVIEW

## 1.1 Background

Recent decades have seen major changes in patterns of employment, both nationally and globally. In particular, the rapid growth of small firms has followed the demise of many state-owned enterprises, with the creation of contractors, sub-contractors and the self-employed in developed, transition and developing countries. Such changes have been accompanied by marked changes in employment relationships, with many employers now contracting out certain functions that they used to carry out themselves. Global supply chains have proliferated, and multi-national enterprises have sometimes introduced stringent contractual terms and conditions for their suppliers, who are often based in developing countries.

At the level of the enterprise, contractors, sub-contractors, the self-employed, agency workers, volunteers and other categories of workers increasingly work alongside 'normal' employees. Some workers may be providing services under a civil or commercial contract, while others are actually employed by another employer, who is providing work or services to the enterprise under a commercial contract. The provider could even be a workers' cooperative. Such diversity in employment relationship is becoming increasingly common across different employment sectors.

## 1.2 Different forms of employment relationship

The employment relationship is the legal link between employers and employees and exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security.

However, in the world of work today employment relationships and contracts are varied and complex, often making it difficult to ascertain employers' rights and obligations and leading to a lack of protection for many workers in practice. Different forms of employment relationship and contracts include:

- Permanent contracts, written or otherwise, where employer and employee are clear as to their respective obligations and rights. Such contracts may be full time or part time.
- Indeterminate contracts where obligations and rights are often less clear and less onerous than for permanent contracts. This may be the

case for casual or seasonal work, as in construction or agriculture. Involuntary part-time or overtime may also arise.

- Other kinds of employment contract, which may be ambiguous or disguised in some way with the intention of weakening the employer's obligations and worker rights under labour law.

Indeterminate, ambiguous or disguised employment relationships can all lead to poor working conditions. For example, employees may have to accept involuntary part-time work, or in some cases they may have to accept a dismissal letter at the same time as they sign their contracts. Aspects of ambiguous and disguised employment relationships are considered further below.

How to determine the existence of an employment relationship is discussed in Chapter 4, which also provides guidance on distinguishing employees from self-employed individuals.

**Diversity in employment relationships – Modern supermarkets**

Modern supermarkets provide an example of diversity of employment relationship within a single workplace. As well its own regular employees, a supermarket may have legally distinct businesses operating within it, such as those selling dairy products, fresh meat or fish. Shelf-stackers, product demonstrators and security workers may also be employed by other companies, while specialised contractors may have a contract for equipment maintenance and repair. Cashiers may have been sent by a temporary employment agency and home-workers may handle certain administrative tasks and communicate with the supermarket via the Internet.

Such diversity in employment relationships are justified on grounds of efficiency and competitiveness, but it means that different employment conditions will apply to different groups of workers within the same workplace.

### *Unclear situations*

The situation of the "self-employed", "temporary" workers, or those from other enterprises might often not be as clear as it appears, and working conditions for them may vary considerably, even if they work on the same premises and ostensibly for the same main enterprise. For example, there may be:

- Different positions for collective bargaining and representation by trade unions.
- Different standards of safety and health and representation by safety and health representatives or committees.
- Different working time requirements and leave allowances.

- Different social security arrangements.
- Different degrees of solvency of their own employers, with implications for job security.

Some or all of the workers may appear to be direct employees of the main enterprise, but their employment relationship may have been disguised and consequently they may have been deprived of some of the benefits of social protection law. It is common practice for enterprises to contract workers with no employment relationship, even when all the elements which characterize an employment relationship in law are present.

Alternatively, employees may be considered as self-employed persons by the providers of work and paid as such because their employment relationship is made ambiguous or is disguised. It is also possible that an employee working for a contractor company, or provided to such a company by an agency, is providing services to another person (the user), and does not really know who her/his employer is, and what rights she/he has, nor who is responsible for their safeguard. The result is that these workers lack labour protection, with important repercussions, especially for women and migrant workers and their families, but also in the resulting poorer enterprise productivity and competitiveness, and an increased number of accidents.

The presence of contractor or subcontractor workers in a company may negatively affect the finances of the social security system, and can also be a source of social conflicts.

### *Disguised employment relationships*

Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status. This can occur through the inappropriate use of civil or commercial arrangements. It is detrimental to the interests of workers and employers and an abuse that is inimical to decent work and should not be tolerated. False self-employment, false subcontracting, the establishment of pseudo-cooperatives, false provision of services and false company restructuring are amongst the most frequent means that are used to disguise the employment relationship. The effect of such practices can be to deny labour protection to the worker and to avoid costs that may include taxes and social security contributions (Recommendation No. 198, Art. 4).

### *Triangular employment relationships*

In the case of the so-called *triangular* employment relationships the work or services of the workers are provided to a third party (the user). These modalities need to be carefully examined in so far as they may result in a lack of protection to the detriment of the employee.

In such cases, the major issues at stake consist of determining *who the employer is*, what rights the worker has and who is responsible for them.

Therefore, mechanisms are needed to clarify the relationship among the various parties in order to allocate responsibilities among them. This issue is obviously also relevant for the Labour Inspectorate.

One of the frequent modality of triangular employment relationship relates to the provision of work or services through Temporary Work Agencies; two ILO instruments provide guidance to member states for addressing this issue: the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188).

These issues have become more important in recent years because of the increasingly widespread phenomenon of poor protection for workers 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.
- Lack of compliance and enforcement.

## 2. INTERNATIONAL INSTRUMENTS

The employment relationship is a key question in labour law. The labour and social protection of workers depends on the existence of their employment relationship and, importantly, on whether it can be proved.

Several ILO Conventions and Recommendations have thus been adopted on various matters related to employment relationships, starting from the 1950's, notably:

- The Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and its accompanying Recommendation, which both refer to employees from contractors of public authorities, protecting their rights concerning their working conditions.
- The Home Work Convention, 1996 (No. 177) and its accompanying Recommendation, which define the particular conditions characterizing dependent home work. This is often not well regulated by law and tends to be ambiguous or disguised as false self-employment.

- The Private Employment Agencies Convention, 1997 (No. 181) and its accompanying Recommendation, which deal with the specific problem of agency workers.
- The Promotion of Cooperatives Recommendation, 2002 (No. 193), which refers to disguised employment relationships. Under this standard, national policies should "ensure that cooperatives are not set up for, or used for, non-compliance with labour law or used to establish disguised employment relationship, and combat pseudo cooperatives violating workers' rights, by ensuring that labour legislation is applied in all enterprises".[1]
- The Employment Relationship Recommendation, 2006 (No. 198), discussed further below.

## 2.1. The Employment Relationship Recommendation, 2006 (No. 198)

The adoption of Recommendation No. 198 was the culmination of several years of discussion and research on the subject. The International Labour Conference discussed on three different occasions the employment relationship, under different titles. First, there was a standard setting on Contract Labour in 1997–1998, without results; second, a general discussion on The Scope of the Employment Relationship in 2003; and finally, there was a new standard setting, this time on The Employment Relationship in 2006. The need for multiple rounds of discussions over several years demonstrated the complexity of the issue and the difficulty of achieving an international tripartite agreement on it.

Broadly speaking, the Recommendation deals with three main aspects of the employment relationship:

- The need for national policy of protection for workers in an employment relationship.
- The determination of the existence of an employment relationship.
- Monitoring, implementation and advice.

The full text of Recommendation No. 198 is given at **Annex 1** and a historical overview of the ILO debate is at **Annex 2.**

The adoption of Recommendation No. 198 gave a new dimension to the issue of the employment relationship, confirming it as a global issue and a common problem, shared by countries with differing cultures and stages of economic development. It offers a new approach to solving problems in a modern way through action at international, national and enterprise levels, for the protection of dependent workers throughout the world.

[1] Paragraph 8(1).

# 3. NATIONAL POLICY AND LEGISLATION

## 3.1. The need for clear national policy and legislation

National legislation can be ambiguous as to what constitutes an employment relationship and it is often far from comprehensive in its coverage. Such ambiguities and gaps can lead to confusion and different legal interpretation as well as weaknesses in application of the law. Moreover, some national legislation allows for different forms of temporary-casual work in sequence, so that workers can work for years within the same enterprise under different forms of short-term contracts.

Isolated ad hoc measures are insufficient to address these issues and clear and comprehensive national policy and legislation is vital. Thus, the first objective of Recommendation No. 198 is for the State to:

> "*formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.*"[2]

States therefore need to carefully examine their overall labour situation, by branches of activity, by kind of enterprise, by type of work, gender, and nationality of workers. They should determine how the problem of the lack of labour protection for dependent workers can be defined in their particular national situations, mapping ambiguous or disguised employment relationship, identifying the situations of unprotected dependent workers and the related causes and consequences. Subsequently, member States should establish specific national actions and objectives in the short, medium and long term according to available resources, and adopt concrete measures to address the problems.

### *Tripartite policy making*

"*National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.*"[3]

At the same time, the national policy for protection of workers in an employment relationship "should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due".[4]

[2] Recommendation No. 198, Paragraph 1.

[3] Ibidem, Paragraph 3.

[4] Ibid. Paragraph 8.

## 3.2. Policy implementation

Recommendation No. 198 also contains specific suggestions to make the national policy a real practical tool. Other than important diagnosis, definitions, principles and priorities, the national policy should include a minimum of concrete measures tending to make it effective, such as:

- Giving guidance to the parties concerned on establishing the existence of an employment relationship and on the distinction between employed workers and the self-employed.
- Combating disguised employment relationships.
- Regulating all forms of contractual arrangements including those concerning multiple parts (triangular relationships).
- Providing effective access to good procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship.
- Ensuring compliance with, and effective application of, laws and regulations concerning the employment relationship.
- Providing appropriate and adequate training in relevant international labour standards, comparative and case law for those responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.[5]
- Guidance for the parties concerned, in particular employers and workers.[6]

## 3.3. Inclusive approach

The lack of labour protection of dependent workers tends to exacerbate discrimination and inequalities in the labour market.

### *The gender dimension*

Data worldwide confirm increased participation of women in the workforce, particularly in the informal economy, where there is a high prevalence of ambiguous or disguised employment relationship. The gender dimension of the problem is reinforced because women workers predominate in certain occupations and sectors where the proportion of disguised and ambiguous employment relationship is relatively high, such as domestic work, the textile and clothing industry, sales/supermarket jobs, nursing and care professions and home work. Exclusions or restrictions in relation to certain rights, for example in some export processing zones, clearly disproportionately impact women.

[5] Ibid. Paragraph 4.

[6] Ibid. Paragraph 4(a).

There is a need to have clearer policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension of the problem can be effectively addressed. At the international level, the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), clearly apply to all workers, and the Maternity Protection Convention, 2000 (No. 183), specifies that it applies to all employed women, including those in atypical forms of dependent work.

### *Special categories of workers*

The national policy should give particular attention to workers especially affected by uncertainties in their employment relationship, in particular the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities".[7]

**Protecting vulnerable workers – India**

India has adopted special measures to protect persons from the *'unorganised labour'* market, i.e. those affected by "certain constraints, such as casual nature of employment, ignorance and illiteracy, small and scattered size of establishments", who represent the 93 per cent of the workforce. Special laws apply to them and governmental Group Insurance Schemes and some employment oriented schemes. The National Common Minimum Programme (NCMP) states that social security, health insurance and other schemes for such workers will be expanded. The Unorganised Sector Workers' Social Security Bill was sent to Parliament in 2007. A new health insurance scheme and another providing death and disability coverage to rural landless households were launched in 2007, and the National Old Age Pension Scheme was extended. Measures in favour of construction workers and migrant workers also were adopted.[8]

Government action should therefore include identifying those sectors and occupational groups with high levels of disguised employment and adopt a strategic approach to enforcement.[9]

Governments should also consider the case of migrant workers, including those engaged to work in foreign countries.

[7] Recommendation No. 198, Paragraph 5.

[8] India Report, The Ministry of Labour Annual Report 2008-2009, Chapter 8: http://labour.nic.in/annrep/annrep2008.htm .

[9] International Labour Conference, 91st session, Geneva, 2003, General Discussion report, Conclusions, paragraph 19.

**The 'Kafeel' system for foreign workers - Arab Gulf countries**

In the past, the so-called 'Kafeel system' for importing foreign workers has operated in Arab Gulf countries ('Kafeel' means 'the person who sponsors another'). Under the system, governments registered foreign workers under the name of the employers importing them. Employers had full control over such workers, who had little choice other than to stay with their employers or return home. Only if their employers issued 'release letters' could other employers legally employ them. The system enables employers to take advantage of foreign workers and to exploitation.

Some Gulf countries have now abandoned the system and others are considering doing so.

Module 9 of this training package deals specifically with vulnerable groups of workers.

## 3.4. Legislative framework

Many countries have adopted new law or revised existing ones to tackle this issue, from different perspectives and with a variety of provisions.

As examples, Chile, Peru and Ecuador have adopted new rules on triangular employment relationships, which seem to be the more problematic to them, reflecting the need for clear policy frameworks on this issue. In the case of Ecuador, the relevant rules are even contained not in a normal law, but in a text adopted by the Constituent Assembly, before it produced the new Constitution.[10]

In the same vein, Spain adopted in 2006 a law on Subcontracting in the Construction Sector, taking into account the high figures of accidents in this sector and the extended subcontracting to which this phenomenon is due among other reasons. The law limits the levels of subcontracting, establishing conditions for subcontractors' enterprises, and requires transparency in the construction activity. *Inter alia*, it also defines the notion of contractor, subcontractor, and self-employed worker, fixes obligations and responsibilities, and establishes sanctions for the non-observance of the law.[11]

In the case of Finland, legislation deals in detail with the employer's obligation to inform the employee about her/his principal terms of work. But

[10] See Bibliography and additional readings.

[11] LEY 32/2006, de 18 de octubre, reguladora de la subcontratación en el Sector de la Construcción, in : http://info.mtin.es/itss/web/Sala_de_comunicaciones/Noticias/Archivo_Noticias/2006/10/03_web.html .

by the same token, this means that the employer has to decide whether the worker will be considered as an employee or as self-employed, since the obligation only exist towards employees. Workers who do not receive information on their condition of employment and see themselves as employees may file a complaint with the competent authority.[12]

Under the Labour Code of Quebec (Canada), any employer wishing to change the status of an employee to that of contractor without employee status must inform the association of employees concerned by means of a written notice containing a description of the changes. If there is no agreement between the employer and the association as to the consequences of the change on the employee's status, the latter may apply to the *Commission des relations du travail* for a decision.[13]

**European Union: Resolution on Modernizing Labour Law**

In 2007, the European Parliament adopted a new resolution to meet the challenges of the 21st century. This was to be a "new approach to labour law that aims to cover all workers regardless of their contractual situation" and specifically notes "the need to reduce the insecurity sometimes associated with non-standard forms of employment and to enhance the protection of vulnerable workers".

The Resolution calls on EU member States to promote the implementation of Recommendation No. 198. It also refers to the so-called ILO core Conventions like the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the ILO decent work agenda. In particular, it states that "any form of employment, whether non-standard or otherwise, should carry with it a core of rights regardless of the specific employment status and "requests that all workers have access to the same level of protection".[14]

## 3.5. Law enforcement

It is common practice in many countries to contract workers with no employment relationship, even when all the elements which characterize an employment relationship in law are present. Companies that adopt this practice demonstrate their intentions to reduce the high costs arising from the payment of labour fees. When such practices occur, the existence of an employment relationship may be questioned in different ways.

[12] Finland Employment Contracts Act, Ch. 2, s.4.

[13] Labour Code, s. 20.01, as amended on 21 June 2001. See 2006 Report V (1), p. 50.

[14] European Parliament resolution of 11th July 2007 on modernising labour law to meet the challenges of the 21st century. See particularly paragraphs 17, 19, 40 and 41 at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0339+0+DOC+XML+V0//EN and http://www.ilo.org/public/english/dialogue/ifpdial/areas/legislation/employ.htm.

### *Judiciary*

The first way is for the individual without any formal employment relationship to file a claim in the courts. In such a case, the judge may recognize the employment relationship between the parties if there is enough evidence that relevant employment factors were present. If this happens, the company will have to give the individual all the labour rights to which he or she was entitled during the period of work.

### *Labour Inspection*

Labour inspectors may also take remedial action based on *prima facie* evidence that an employment relationship exists, even if there is some doubt about this. It is not necessary for inspectors to finally prove that an employment relationship exists, as it is for the employer to demonstrate that one does not exist where there are indications to the contrary. In any case, in most countries it is only a judge who can finally say whether or not an employment relationship actually exists.

**France - the construction sector**

In France, a chart on good practice for the construction sector informs users of contractors or subcontractors about their penal and civil responsibilities for the indirect use of disguised employment and advice about the kind of measures that can be adopted to avoid these problems. It also mentions relevant legal provisions.[15]

Courts should be best placed to settle disputes regarding the existence and terms of an employment relationship. Labour inspectors are, however, often closer to workers and can more easily be accessed by them. It is important therefore that the choice of several procedures and mechanisms, including the labour inspectorate, be offered to workers and employers to settle their disputes or to help them in this regard.

[15] *Sous-traitance et travail illegal dans le BTP. Que dit le droit ? La charte du BTP*. DILTI, 2005: http://www.travail-solidarite.gouv.fr/dossiers/travail/travail-illegal/travail-illegal-secteur-du-btp/charte-bonnes-pratiques-sous-traitance-travail-illegal-btp.html?var_recherche=BTP .

### *Dispute settlement mechanisms*

In addition to these means, many countries have adopted mechanisms for dispute resolution, which contribute to law enforcement.
One of the most common problems that unprotected dependent workers face, as for those who are legally protected, is the lack of an accessible and efficient process for the settlement of disputes.

> This is so even in countries with acceptable legislation. Very often employees have to wait for the termination of their contract before they are in a position to make any complaints against their employers and they cannot always afford the cost of such. For unprotected workers, their unclear legal situation also undermines their position for complaining, giving rise to practical difficulties in proving their circumstances.

Dispute resolution machinery and/or administrative procedures for determining the status of workers are important services which should be provided by the appropriate agency. It could have general competence or it may be limited to specified sectors of the economy. It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms and procedures to resolve disputes about employment status (Recommendation No.198, Art. 14).

## 3.6. Information and advice

Workers and employers should have the possibility to easily get technical information and advice on the nature of the relationship in place between them or the one they are entertaining. It can be useful in many circumstances to know whether there is, or will be, an employment relationship, and, consequently, whether the worker is or will be an employee or a self-employed person, especially for small or micro enterprises that do not have access to a legal advice, in practice.

Information is the minimum action that should be taken to combat disguised employment relationship, to explain to the population which are the elements of an employment relationship and how it can be disguised and what can be done to solve this situation.

**The Netherlands – Web site of the Ministry of Social Affairs and Employment**

In the Netherlands, the Ministry of Social Affairs and Employment web site informs workers in very concrete terms on what a contract of employment is and what can be done in case of ambiguous contract. The web site contains the following information:

"An employment contract is an agreement between you and your employer. It is also known as salaried employment, a paid job, or a paid position. There is an employment contract when the following conditions have been met:

- ✓ You are in the service of an employer. The employer can give you orders concerning the work.
- ✓ You receive wages for your work. The payment will generally be in money, but it may also (partly) be in kind. Payment in kind can include the provision of or payment for meals by the employer or board and lodging. Options and the resulting profits can also be counted as wages.
- ✓ You must carry out the work yourself; you may not allow anyone to do so on your behalf.
- ✓ If the nature of your employment relationship has not been clearly laid down, confusion may arise about what has exactly been agreed. There may be a difference of opinion about whether there actually is an employment contract and if so, for how many hours per week it applies. You have an employment contract if you work for the same employer every week for three months or at least twenty hours per month. This means, for example, that your employer must pay you the minimum wage and may not fire you without good reason. If your employer does not agree, it is up to him to prove that you have no employment agreement."

## 3.7. Training

All the persons responsible for dealing with the resolution of disputes and the enforcement of national laws and standards concerning employment relationship should have a clear understanding of the matter; we refer in particular to judges, arbitrators, mediators, conciliators, labour inspectors, but also to employers' and workers' representatives.

They should know different types of employment relationship and other contractual arrangements between employer, employee and the self-employed, between user and provider, and the rights, obligations and responsibilities of each party. Ideally, they should know not only the national law applicable to the different arrangements, the competence limits of the different authorities and the rules governing relevant procedures and mechanisms (including the burden of proof and the existence of presumptions), but also the international labour standards, comparative law and case law referring to employment relationship related issues.

Useful guidance on the practical application of the Employment Recommendation is provided by the "Annotated Guide to ILO Recommendation No. 198" (ILO, 2007).

# 4. DETERMINING THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

## 4.1. Definition and identification

Employment relationship can be complex even when the working environment is relatively stable, but becomes even more complicated and sometimes confusing when it is changing. For example, business takeovers, new work organization and the promotion of civil or commercial contracts in place of labour law contracts all have an impact on employment relationship. In such circumstances, workers can feel isolated and sometimes in difficulties when asking their employers for appropriate legal protection. For many workers there will often be no choice but to accept the situation imposed to them.

Thus, according to Recommendation No. 198, Governments "may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence. [16] They should also consider defining, in legislation or otherwise, "specific indicators of the existence of an employment relationship". [17]

Many countries have established such conditions or indicators, either in formal definitions of an employment relationship or in other provisions. In other countries it is for judges to do the same in the context of tests, like those of control, integration in the enterprise, economic reality (who bears the financial risk) and mutuality of obligation. [18]

### *Conditions*

Very often it is considered, for instance, that an employment relationship exists when a person works for another in conditions of *dependence or subordination or for his or her benefit*. To define, or to indicate a specific condition defining the employment relationship is very useful for distinguishing between dependent work and self-employed work and to minimize or simplify conflicts on this matter between workers and employers. Some central authorities have fixed internal criteria for this.

However, conditions or criteria are still related to abstract concepts that need in turn to be defined. What does it mean in practice to work under somebody, to depend on somebody? Should it be a legal, or an economic dependence, or both? When and how can it be recognized? Judges have given practical replies to these kinds of questions, identifying a number of concrete indicators that confirm the existence of an employment relationship. Such indicators are particularly useful for labour inspectors in

[16] Recommendation No. 198, Paragraph 12.

[17] Ibid. Paragraph 13.

[18] Report V, 2003, p. 23.

their dealings with employers and workers, whether during enterprise visits or otherwise.

### *Indicators*

Recommendation No. 198 contains a number of examples of indicators, taken from comparative law, which are given in the box below.

**Classical indicators of the employment relationship: ILO Recommendation No. 198[19]**

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

In Ireland a list of indicators for determining employment and self-employment was developed in a Code of Practice, drawn up during tripartite negotiations of the 2000-2002 Programme for Prosperity and Fairness.

[19] Recommendation No. 198, Paragraph 13.

| Ireland: list of indictors in the code of practice for determining employment or self-employment status of individuals[20] | |
|---|---|
| EMPLOYEES | SELF-EMPLOYED |
| *An individual would normally be an employee if he or she:* | *An individual would normally be self-employed if he or she:* |
| ✓ Is under the control of another person who directs as to how, when and where the work is to be carried out. | ✓ Owns his or her own business. |
| ✓ Is not exposed to personal financial risk in carrying out the work. | ✓ Is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract. |
| ✓ Supplies labour only, and does not supply materials for the job in hand. | ✓ Provides equipment and machinery necessary for the job, other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account. |
| ✓ Receives a fixed hourly, weekly or monthly wage; works set hours or a given number of hours per week or month. | ✓ Has control over what is done, when and where the job is done and whether he or she does it personally. |
| ✓ Cannot subcontract the work. If the work can be subcontracted and paid by the person subcontracting the work, the employer/employee relationship may simply be transferred on. | ✓ Is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken. |
| ✓ Does not assume responsibility for investment and management in the enterprise. | ✓ Assumes responsibility for investment and management in the enterprise. |

[20] Programme for Prosperity and Fairness, Employment Status Group: *Code of practice for determining employment or self-employment status of individuals* (Dublin, July 2001). Taken from The employment relationship. Report V (1). Geneva, International Labour Conference, 95th Session, Geneva, 2006, p. 34.

| | |
|---|---|
| ✓ Does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements. | ✓ Has opportunity to profit from sound management in the scheduling and performance of engagements and tasks. |

For the Singapore Ministry of Manpower, there is no single conclusive test to distinguish a contract of employment from a contract for services, but they provide a number of different criteria that should be considered – as shown in the box below.

**Singapore:**
**Criteria for deciding the existence of an employment relationship**

Control

- ✓ Who decides on the recruitment and dismissal of employees?
- ✓ Who pays for the employees' wages and in what ways?
- ✓ Who determines the production process, timing and method of production?
- ✓ Who is responsible for the provision of work?

Ownership of factors of production

- ✓ Who provides the tools and equipment?
- ✓ Who provides the working place and materials?

Economic Considerations

- ✓ Does he carry on business on his own account or carry on the business for the employer?
- ✓ Does he involve in any prospect of profit or is he liable to any risk of loss?
- ✓ How are his earnings calculated and profits derived."[21]

[21] http://www.mom.gov.sg/publish/momportal/en/communities/workplace_standards/employment_standards/the_employment_act/Contract_of_Service.html

## 4.2. Primacy of facts

As a complement to the above conditions and indicators, Recommendation No. 198 restates a fundamental principle, common in labour law, of the primacy of facts.[22] This means that when a person in fact works for another one for remuneration, under certain circumstances, an employment relationship exists irrespective of whether one of these persons or both say that this provision of work is done under a civil or commercial contract, or under another kind of arrangement. What matters are the facts related to work and the remuneration, and not what it is said in a contract or in another document if it is in contradiction with reality.

The principle of the primacy of facts is very important. In too many occasions the worker is provided labour without a written contract, or under an apparent civil or commercial contract, drafted by the employer, sometimes in a language the worker cannot understand. To ensure worker protection, therefore, the labour inspector (or whoever is making a judgement about the situation) needs to looks at the actual working conditions to ascertain whether an employment relationship exists or not.

South Africa has established a presumption based on some indicators, in favour of employees who earn less than a certain threshold:

**South Africa: Presumption of employee status[23]**

A person is presumed to be an employee if one of the following indicators is present:

- ✓ The manner in which the person works is subject to the control or direction of another person.
- ✓ The person's hours of work are subject to the control or direction of another person.
- ✓ In the case of a person who works for an organization, the person is a part of that organization.
- ✓ The person has worked for that other person for an average of at least 40 hours per month over the last three months.
- ✓ The person is economically dependent on the other person for whom that person works or renders services.
- ✓ The person is provided with tools of trade or work equipment by the other person.
- ✓ The person only works for or renders services to one person.

[22] Recommendation No. 198, Paragraph 9.

[23] S. 83A introduced in the Basic Conditions of Employment Act 1997 (BCEA) by the Basic Conditions of Employment Amendment Act 2002, s. 21. Taken from 'The employment relationship'. Report V (1), International Labour Conference, 95th Session, Geneva, 2006, p. 36.

The South African Economic Development and Labour Council has also issued a code of good practice for determining whether a worker is an employee.[24]

### 4.3. Facilitating proof of employment

To assist workers who have difficulties in proving the existence of their employment relationship and in accessing competent settlement procedures, Recommendation No. 198 suggests the adoption of the following measures:[25]

- Allowing a broad range of means of proof.
- Providing for a legal presumption that an employment relationship exists where one or more relevant indicators are present.
- Deeming workers with certain characteristics to be either employed or self-employed; this would be appropriate for workers whose situation is borderline between employed and self-employed, as such situations are often subject to contradictory judicial decisions.
- Deciding that the settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities, to which workers and employers should have ready access in accordance with national law and practice.

Several countries have developed their own guidance to facilitate proof of the employment relationship.

## 5. MONITORING, REVIEW AND UPDATING

### 5.1. Rapid changes

With ongoing changes in patterns of employment, good policies for the protection of dependent workers can become obsolete and ineffective if they are not regularly reviewed and updated.

Changes in employment patterns have been constant and sometimes dramatic. Agency work, for instance, has meant radical changes in employment practices, which have become well developed in many countries and need specific regulation and follow-up.

[24] South Africa, Government Gazette, 2006-12-01, Vol. 498, No. 29445, pp. 3-53: http://www.ilo.org/public/english/dialogue/ifpdial/areas/legislation/employ.htm) .

[25] Recommendation No. 198, Paragraphs 11 and 14.

Furthermore, many enterprises make a wide use of "indirect employment" practices, through a complex network of agreements with other enterprises providers of services, even from a different country, where employees often do not know who their real employer is. This situation of lack of protection has become a serious and extended problem. For example, teleworking in one country or for transnational services may leave workers unprotected. The same situation can result from certain new forms of "civil" or "commercial" contracts.

## 5.2. Tripartite approach in monitoring

The Tripartite mechanism, created for this purpose or already existing, should be used to monitor developments in the labour market and the organization of work and to give advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.[26] The monitoring mechanism should be supported by the most representative organizations of employers and workers, represented on an equal footing. They should be consulted as often as necessary and, wherever possible and useful, on the basis of experts reports or technical studies.[27]

In the most important and complex cases of transnational provision of services, the Recommendation suggests that specific national mechanisms be established in order to ensure that employment relationship is effectively identified. Transnational networking and exchange of information is also to be encouraged, [28] and this is increasingly happening, for example as it is between labour authorities across the European Union. One obstacle that needs to be overcome is the lack of harmonization of specific criteria for preventive action in different countries. For example, in Spain, the validity of medical certificates issued in other countries is of particular concern.[29]

## 5.3 Data and research

Evidence-based policy making needs objective and updated information, statistics, data and research. Recommendation No.198 invites member states to collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors".[30] Research has sometimes been initiated at regional levels, as in the European Union.

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[26] Recommendation No. 198, Paragraph 19.

[27] Ibid. Paragraph 20.

[28] Ibid. Paragraph 22.

[29] Spain, Ministry of Labour and Immigration, Labour and Social Security Inspection Annual Report 2008, pp. 41-42, 89: http://info.mtin.es/itss/web/Que_hacemos/Estadisticas/ .

[30] Recommendation No. 198, Paragraph 21.

**European research on undeclared work, 2007**

In 2007, the European Commission undertook a study to measure undeclared work in a more rigorous and comparable way across the entire EU. This study looked at both the share of people buying undeclared goods and services as well as the profile of workers who take up such jobs. Many important findings were issued from this study, in particular concerning the age and sex (62 per cent of the undeclared 'workforce' is male, two-thirds is under the age of 40, 50 per cent national residents).

The study also found that the two most over-represented categories of undeclared workers were self-employed.

National consultation, documentation and research should be carried out in an appropriate manner for each country and within the available resources. These measures do not need to be too complicated or expensive, but they should make an important contribution to improving and updating knowledge of the situation of unprotected dependent workers, their problems and progress being made to protect them. Statistics on the employed and self-employed are very useful, although national figures often lack information about disguised employment relationships and the "self-employed" who are actually economically dependent of one or more "employers". Furthermore, information on the frequent change of status of many workers from self-employment to wage employment and vice versa is scarce. Widespread implementation of the Recommendation would be very helpful in this respect.

Information on triangular employment relationships, at national and sectoral level, and disaggregated according to sex, is also very important for the formulation and implementation of a national policy, but is very rare practice and often insufficient. Countries should know how many persons work for contractor and sub-contractor companies, including private employment agencies, the problems regarding the protection of workers that this kind of employment raises and also existing good practice.

# 6. THE ROLE OF LABOUR INSPECTION

## 6.1. A challenging context

The lack of effective application and enforcement of legislation by labour inspectorates is a problem in many countries, and as a result unprotected

workers are especially affected. Thus, the ILO Report for the General Discussion in 2003 comments as follows:[31]

> *"Enforcement of labour law by the administrative and judicial authorities is affected by financial constraints in most countries. Moreover, the limited powers of these authorities and their enforcement mechanisms, such as they are, often mean that they are unable to discharge their supervisory obligations.*
>
> *The labour inspectorates face considerable difficulties in carrying out their tasks. In some countries, the probability that an inspector will visit a particular enterprise, detect shortcomings, impose corrective measures and enforce them is very low or non-existent. Particular difficulties arise where the premises are extensive or located in remote places and, for different reasons, in small and micro-enterprises.*
>
> *The situation is even more uncertain as regards the possibility of action by labour inspectors concerning workers in disguised or objectively ambiguous employment relationships, even in countries where inspectors are empowered to identify such cases and remedy them…."*

So, in addition to the lack of resources and internal problems that labour inspectorates may face, a lack of clarity in the employment relationship itself also makes it difficult to apply and enforce the law effectively. For example, the relationship may be a borderline one between dependence and independence, where the employer in good faith considers the dependent worker as a self-employed person. Something similar can occur with triangular relationships, especially if the legislation is silent or vague concerning them. Often the employment relationship is disguised, and the disguise can be successful especially if the gap between legislation and reality is very wide, sanctions are not dissuasive enough and labour administration, labour inspection and the judiciary are weak.

## Key functions

### *Inspection and enforcement*

The role of labour inspectors is therefore to identify the main parties in the employment relationship, as far as possible, bearing in mind that in most countries it is only the courts that can finally establish such matters. Inspectors can nevertheless look out for certain indicators that point towards a type of employment relationship and work on that basis.

Importantly, inspectors should assess the working conditions that workers are actually facing and whether the law is being complied with, and take action accordingly. This would include the usual range of options, including enforcement action where justified, taking action against evidently responsible persons.

[31] Report V, 2003, pp. 34-35.

### *Provide inputs for policy formulation and revision*

The labour inspector should be ready to identify disguised employment relationships during inspections or in other circumstances and to alert her or his office of the current practices. Doing so, labour inspectors will make effective the application of the law but also they will be making an important contribution towards the preparation or update of the national policy to which the Recommendation refers.

### *Information, advice, training*

As mentioned in chapter No.3, innovative programmes of information and education, services, guidance and advice are important pillars of a strategy of law enforcement and policy implementation.

These tasks are part of the duties of a labour inspector, and could play a key role in assisting the social partners in this matter. In collaboration with other bodies and the media, awareness-raising campaigns could be organized, targeting a wider audience.

**Improving working conditions for foreign workers - Jordan**

Authorities in Jordan suspected that some employers were importing foreign workers allegedly for employment purposes, but who could also be engaged in a form of trafficking. Such workers could be subject to a degree of coercion, for example with employers charging variable amounts for issuing or renewing visas or withholding passports. If such workers moved on to other forms of employment in the same country, they might well not be able to obtain valid work permits.

Thus in 2008, the Jordanian labour inspectorate set up the so-called "Reverse inspection" system, whereby inspectors focused on employers responsible for importing foreign workers rather than targeting the workers themselves. With this novel approach, inspectors obtain lists of foreign workers registered with the Ministry of Labour as working in named enterprises and compare these lists with the situations actually found in the same enterprises. Where there are large discrepancies between the Ministry list and the situations found, inspectors make further investigations. If employers are found to have acted illegally, appropriate sanctions are issued including black-listing and prosecution.

The Ministry of Labour has also tightened its immigration procedures and employers now have to give certain financial and legal assurances before any approval is granted. Workplaces are also inspected to ensure that employers:

- are genuinely in need of foreign workers,
- are able to meet their contractual obligations,
- provide decent working conditions,
- have a good history of compliance with the law.

Such measures have greatly helped to improve working conditions for foreign workers in Jordan.

## 6.3. Qualified human resources

Employment relationship and the responsibilities that it confers, has an impact on labour relations and working conditions daily, so the issues are actually fundamental to inspectors' work, whatever their mandate and whatever legislation they have to enforce. Moreover, changes in patterns of employment as well as the growing informal economy and undeclared work represent formidable challenges for labour inspectorates. It is therefore vital that inspectors receive thorough training on these issues and their complexities, so that they can make good judgements when it comes to making decisions about responsibilities and taking appropriate enforcement action. Labour inspectors should become experts in distinguishing self-employment from dependent employment and they should be familiar with the main forms of disguise of the employment relationship into a civil contract, or a bilateral employment relationship into a false triangular employment relationship. They should have good knowledge of the relevant laws and regulations, including court decisions, relating to how to determine the existence of an employment relationship.

The labour inspectorate should have a wide range of tools – including training materials, guidelines and checklists - to enhance the skills of the inspectors and their capacity to tackle effectively the problems associated with disguised and ambiguous relationship.

Exchange of experiences and working methods in different countries could be achieved through detachments of professional staff, particularly between the labour administrations and the labour inspectorates, where applicable, of developed and developing countries.

## 6.4. Cooperation

As noted earlier, inspectors should also cooperate as necessarily with other government agencies, notably the social security and tax authorities, to ensure a coordinated approach to promoting compliance with national law and policies. In the case of migrant workers, inspectors may also need to work with their colleagues in other countries through network and information exchange mechanisms. Good national and international collaboration and cooperation is therefore essential in this area.

# SUMMARY

There are rights and entitlements which exist under laws, regulations, and collective agreements which are specific to workers who work within the scope of an employment relationship. The employment relationship is a notion which creates a legal link between a person, called the employee, with another person, called the employer, to whom she or he provides labour or services under certain conditions, in return for remuneration.

Self-employment and independent work, based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.

Changes in the structure of the labour market and in the organization of work are leading to changing patterns of work both within and outside the framework of the employment relationship.

In some situations, it may be unclear whether the worker is an employee or genuinely self-employed. Sometimes the employment relationship is on the border between dependence and independence, and the employer can in good faith consider the dependent worker as a self employed person. Something similar can occur with triangular relationships, especially if the legislation is silent or vague concerning them. Very often the employment relationship is disguised and the disguise can be successful, especially if the gap between legislation and reality is very wide, sanctions are not dissuasive enough, and labour administration and the judiciary are weak.

Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide him or her through legal status. False legal employment, false sub-contracting, the establishment of pseudo-cooperatives, false provision of services and false company restructuring are among the most frequent means that are used to disguise employment relationship.

An ambiguous employment relationship exists whenever work is performed or services are provided under conditions that give rise to an actual and genuine doubt about the existence of an employment relationship.

Labour Inspectors should become experts in distinguishing self-employment from dependent employment, and they should be familiar with the main forms of disguise of the employment relationship into a civil contract or a bilateral employment relationship into a false triangular employment relationship. Labour Inspectors should be ready to identify disguised employment relationships during their visits and to alert her or his office of the current practices. In so doing, Labour Inspectors will make effective the application of the law, but will also be making an important contribution toward the preparation or update of the national policy.

# Exercise 1

| | |
|---|---|
| TITLE | **Formulating a national policy** |
| TASK | ✓ In small group, list five of the more important and frequent situations of ambiguous, or disguised and/or triangular relationships in your country, specifying the sectors, types of enterprises, and jobs where these situations occur, and also on the way women workers are concerned by them.<br>✓ Secondly, the group should summarize the "national problem" of lack of protection, taking into account the situations presented by each member.<br>✓ Finally, the group should establish which of these situations are priorities and which kind of actions should be taken for each of them. |
| TIME | ✓ 60' for group work.<br>✓ 10' for each group presentation.<br>✓ 20' to 30' for final discussion. |

# Exercise 2

| TITLE | Indicators |
|---|---|
| TASK | ✓ Individually, read the list contained in Paragraph 13 of Recommendation No. 198.<br>✓ In a small group, list 3 indicators concerning work and 3 concerning remuneration, by order of importance or frequency in your country.<br>✓ Discuss and add one more indicators to the list, not included in the Recommendation and taken from your national law or case law.<br>✓ In plenary, compare the lists made by its members and identify those indicators that are common to all of them. |
| TIME | ✓ 45' for group work.<br>✓ 5' for each group presentation.<br>✓ 20' for final discussion. |

# Exercise 3

| | |
|---|---|
| TITLE | **Inspection visit in the supermarket** |
| TASK | ✓ Individually, read the example of the supermarket described at the beginning of the module.<br>✓ In a small group, discuss how a labour inspector should examine the situation of all persons working at the supermarket.<br>✓ Draft a sort of "Guidelines for the inspector" visiting a similar situation. |
| TIME | ✓ 5' for individual reading.<br>✓ 45' for group work.<br>✓ 10' for each group presentation.<br>✓ 20' for final discussion. |

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# ANNEX 1:

# THE EMPLOYMENT RECOMMENDATION, 2006 (No. 198)[32]

The General Conference of the International Labour Organization…

…

…

adopts this fifteenth day of June of the year two thousand and six the following Recommendation, which may be cited as the Employment Relationship Recommendation, 2006.

## I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

(b) combat disguised employment relationship in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

[32] Full text available at http://www.ilo.org/ilolex/english/index.htm

.

(c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due;

(d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;

(e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;

(f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and

(g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

(a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationship, or where there is a lack of clarity of an employment relationship; and

(b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

(a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;

(b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

## II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

(a) allowing a broad range of means for determining the existence of an employment relationship;

(b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and

(c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

(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.

14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities. 16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

## III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationship can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

## IV. FINAL PARAGRAPH

23. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

**Cross references**
Conventions: C181 Private Employment Agencies Convention, 1997
Recommendations: R188 Private Employment Agencies Recommendation, 1997

# ANNEX 2:

# DEVELOPING AN INTERNATIONAL STANDARD ON THE EMPLOYMENT RELATIONSHIP - A HISTORICAL OVERVIEW:

*By Enrique Marin*

The International Labour Conference discussed on three different occasions the employment relationship, under different titles. First, there was a standard setting on Contract Labour in 1997-1998, without results; second, a general discussion on The Scope of the Employment Relationship in 2003; and third, there was a new standard setting, this time on The Employment Relationship in 2006. The need for multiple rounds of discussions over several years, not common at the Conference, confirms the complexity of the issue, the difficulty of having an international tripartite dialogue on it and the importance that the ILO has given to this issue.

Three sensitive questions emerged from the ILO Conference when it first discussed the matter of dependent unprotected workers in 1997-1998: the terminology, the conceptual framework and the radically opposed views of employers and workers that would also divide governments. Terminological and conceptual differences were overcome after several years of efforts and substantial progress was made, but the difference of views remained even if reduced.

The item the Conference discussed in 1997 – 1998 was “Contract Labour”. Contract labour is a very common and popular English expression but it is vague and difficult to translate into other languages, and has been a source of confusion. The type of work associated with this expression was considered to be similar to work of a person engaged in an employment relationship, but there was no clear definition of it. For the purposes of the proposed Convention, the term "contract labour" meant “work performed for a natural or legal person (referred to as a "user enterprise") by a person (referred to as a "contract worker") where the work is performed by the contract worker personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice but where the contract worker is not the employee of the user enterprise.”[33]

Discussions in 1997 and 1998 caused confusion. Contrary to the tradition of the Conference, no instrument was adopted. Employers opposed adamantly the drafts proposed considering that the issue was not suitable for standard setting because of the variety of national situations and approaches; and that the proposed instruments would

[33] Proposed Convention concerning contract labour, article 1. ILC, 86th Session, Geneva, 1998, Committee on Contract Labour, Report V (2B) Addendum.
http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-vadd.htm

interfere with civil and commercial arrangements. Furthermore, employers and some governments said that these texts would create a third and ill-defined category of workers, between dependent and self-employed workers. In the end, delegates decided not to use anymore the expressions "contract labour" and "contract worker".

The lack of consensus to adopt instruments did not mean, however, that the Conference denied the existence of the problem. On the contrary, it was convinced that there were workers who were not being protected and employers recognised that something had to be done on disguised employment relationship. But for a new discussion to take place, further work was required to determine which workers were in need of protection, in the situations that had begun to be identified by the Committee on Contract Labour; how could they be protected and how such workers would be defined, bearing in mind the existence of different languages and legal regimes. The issue was provisionally called Workers Protection due to the wording of the resolution,

**From "contract labour" to the "workers' protection" and the "employment relationship"**

The Office launched a research programme on "Workers' Protection", which involved national studies and meetings to identify the workers that had caught the attention of the Conference as needing labour protection.

Using a common approach and methodology, national authors identified in their countries the characteristics of the following kind of workers: self-employed, dependent linked by a bilateral or triangular employment relationship, and self-employed but economically dependent persons from the provider of work. Furthermore, they examined the situation of certain specific workers, to facilitate comparisons between them from one country to another. This was the case of truck drivers, construction workers, clothing workers, sales staff in department stores, and workers from supermarkets and hypermarkets. The idea was to observe and describe situations of workers without putting on them preconceived and ill-defined labels like contract workers. This idea was very useful for the research and inspired later some aspects of the monitoring mechanism of Recommendation No. 198. It is also interesting as a tool for training of labour inspectors, and for the organization of strategic activities of the labour inspectorate.

The results of this research and technical discussions were presented to a tripartite meeting of experts that discussed the issue and produced a common declaration. The Experts concluded that the persons in need of protection as referred to by the ILO Conference, were the dependent workers either linked to the provider of work by an ambiguous or disguised employment relationship, which was difficult to identify as such; or placed in a confusing triangular employment relationship. The Experts confirmed that the central problem was the scope of the employment relationship, in the sense that many dependent workers were legally or *de facto* out of the protection of labour law. The common declaration of the Experts was an important sign of consensus. With it, the work of the ILO on this issue took a new turn.

Under a new approach, the issue of the Employment Relationship was discussed again at the Conference in 2003 and 2006.

In 2003, a "general discussion" provided an opportunity to continue the exchange of ideas on this issue. The discussion was extremely useful and productive. Linguistic and

conceptual problems were substantially overcome. Members of the Committee on the Employment Relationship seemed familiarised and concerned with the problems raised, and saw them as real and sensitive. After difficult negotiations the Committee adopted unanimously important Conclusions,[34] which contained the basis for a possible future international instrument.

According to these Conclusions, the ILO was meant to facilitate the adoption of a Recommendation, and place this item in the agenda of a forthcoming International Labour Conference. The ILO was asked to focus on disguised employment relationship and on the need for mechanisms for effective protection, at national level, of persons with an employment relationship. The ILO would provide guidance to States, without forcing a universal definition of the substance of the employment relationship. It would also be flexible enough to take account of different national realities, address the gender dimension and not interfere with genuine commercial and independent contracting arrangements. The ILO would promote collective bargaining and social dialogue as a means to find solutions to the problem at national level and would take into account recent developments in the employment relationship, as well as the Conclusions. The issue of triangular employment relationships was, however, not resolved on this occasion.[35]

The labour inspection was mentioned several times in the Conclusions. According to the latter, there should be a strong political commitment from the State to ensure compliance with the law, and to support all mechanisms that facilitated this, which also involved social partners where appropriate. To this end, cooperation would be promoted among the different government enforcement agencies, particularly the labour inspectorate. The Conclusions reminded how this strong political commitment is conceived in the Labour Inspection Convention, 1947 (No. 81) and how it is essential that labour administration staff, and particularly the labour inspectorate, where applicable, receive appropriate training. To this effect, the ILO was meant to strengthen its assistance to national labour administrations, and in particular, to labour inspectorates.[36]

The moment for standard setting finally arrived in 2006, when the Recommendation No. 198 was adopted. The proposed recommendation received a large support from workers and government delegates, as a basis for discussions. Employers, on the other hand, considered that it contained important principles but had gone beyond the issue of disguised employment relationship. The discussion was a very difficult but exciting exercise of tripartite dialogue, during which amendments and sub amendments from employers, workers and governments were adopted and important progress was made with their participation, including on the sensitive matter of triangular employment relationships. However employers, who had expressed their reservations from the

[34] See Annex 2, Conclusions concerning employment relationship, in: http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf

[35] Ibidem, Paragraph 25.

[36] Ibidem, Paragraphs 10,11,12 and 21.

beginning, decided not to support the Recommendation when the paragraphs concerning criteria, indicators and the presumption of the employment relationship were adopted.[37]

### The Recommendation No. 198

During the 2003 General Discussion it was agreed that a possible instrument on this matter could be a Recommendation. Employers strongly opposed the idea of a Convention and several States also shared this view. Contrary to a convention, recommendations only provide guidance. Nevertheless, Recommendation No. 198 asks for precise measures from member States and as a standard instrument, it implies "submission to the competent authorities" and reporting obligations to the ILO under article 19 of the Constitution of the ILO.[38]

[37] See Report of the Committee on the Employment Relationship, Provisional Record 21, paragraph 576; and its submission, discussion and approval in Plenary, Provisional Record; 23, p. 23/17, Geneva, International Labour Conference, 95th Session, at: http://www.ilo.org/public/english/standards/relm/ilc/ilc95/records.htm .

[38] Article 19 (…) Obligations of Members in respect of Recommendations.

6. In the case of a Recommendation:

(a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;

(b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;

(c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(d) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them. (See ILO Constitution at http://www.ilo.org/ilolex/english/constq.htm).