

## **Report**

### **Sub Regional Workshop on Labour Law Reform: New Forms of the Employment Relationship**

**Rainbow Towers and Hotel**

**Harare, Zimbabwe**

**28 and 29 August, 2007.**

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The Southern African Sub-regional Workshop on Labour Law Reform: New Forms of the Employment Relationship was held in Harare, Zimbabwe, on 28 and 29 August 2007.

The Workshop was attended by participants from government, employers' organisations and trade unions from nine countries that are covered by the ILO Sub-regional Office for Southern Africa (SRO/Harare), namely, Botswana, Lesotho, Malawi, Namibia, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe. The Secretariat of the Southern African Development Community (SADC), the SADC Employers' Group and the Southern African Trade Union Coordinating Council (SATUCC) were invited to participate as observers. The list of participants is attached to this Report as an Annex.

The Workshop was held as a follow-up to the 2006 International Labour Conference (ILC) Resolution concerning the employment relationship which requires the International Labour Office, amongst others, to assist constituents in monitoring and implementing mechanisms for national policy on the employment relationship as set out in the 2006 Recommendation concerning the employment relationship (No. 198). The Workshop had the following as its objectives:

- (a) Familiarize the tripartite constituents with the implications of adapting labour legislation to international labour standards and comparative practice;
- (b) Share information and experience on new forms of the employment relationship and the assessment of the phenomenon in their respective countries; and
- (c) Assist participants to examine appropriate measures and good practices that will promote the protection of rights in the world of work.

As an expected outcome of the Workshop, participants were to have a more in-depth appreciation of the challenges posed by new forms of the employment relationship in their respective countries and be equipped to come up with a programme of action to address challenges posed by the phenomenon.

## **2. Opening Ceremony**

### **Director of the ILO Sub-Regional Office for Southern Africa.**

In his welcome remarks, the Director of the SRO/Harare, Mr. Tayo Fashoyin, indicated that the Workshop was a collaborative undertaking by the Sub-regional Office for Southern Africa and the Social Dialogue, Labour Law and Labour Administration Branch based in ILO Headquarters in Geneva (DIALOGUE) to assist participants drawn from the tripartite partners from the nine countries covered by the SRO/Harare. The importance of the subject had been recognized at the 11<sup>th</sup> Africa Regional Meeting (Addis Ababa, April 2007) whose conclusion state:

“Para 29 – The Regional Meeting identified the continuing growth of the informal economy in Africa as a major barrier to poverty reduction. Women are particularly prominent in the informal economy, partly because gender discrimination prevents them from finding formal jobs. Young women and men also often end up in informal work because of the paucity of formal sector jobs opportunities. Too many women and men engaged in informal activities are faced with insecure incomes, often bordering on the poverty level. They work under extremely poor working conditions with very little capital and rudimentary technology or access to legal protection. Many workers face difficulties in establishing whether or not an employment relationship exists and thus their rights under employment law. The ILO Employment Relationship Recommendation, 2006 (No. 198) provides useful guidance for strategies to extend the application of labour protections in order to remove workers from the informal economy.”

Noting the general objectives of the workshop, he stated that on-going global changes in the world of work have been accompanied by open labour markets brought about by factors such as cross-border movement of persons in search for work, technological changes and transformation in the organization and function of enterprises. These changes have brought about new forms of employment relationships which have resulted in a blurring of the distinction between an “employer” and an “employee” or “worker” and a difficulty in ascertaining their respective rights and obligations regarding one another. Another factor was the decline in employment opportunities in the formal economy and a corresponding growth of the informal economy which has provided employment and a source of livelihood to the majority of working people in southern Africa.

Recognition of the negative impact on Decent Work and the need to have an international regulatory framework for the new forms of employment relationship has led to the International Labour Conference to discuss the subject during its Sessions in 1997, 1998, and 2003, culminating in the adoption of the Recommendation on Employment Relationship in 2006. This Recommendation provides for the development of a national policy for the review of the laws and regulations that deal with employment relations and the protection of workers in an employment relationship and the putting in place of national measures directed towards providing guidance in the determination of the existence of an employment relationship. The Recommendation also encourages the setting up of appropriate mechanisms for monitoring the labour market and organization of work, which may lead to the adoption and implementation of suitable measures on the employment relationship.

In conclusion, he stressed the need for consultation and dialogue among the tripartite partners in the implementation of the provisions of the Recommendation, and hoped that this Workshop would help participants benefit from sharing of experiences on the phenomenon of employment relationship

across the sub-region, and that resolutions and programmes of action that would be arrived at by the participants would form the basis for future collaboration with the ILO.

### **Remarks by a Representative of the Employers' Group**

In his address on behalf of the Employers' Group, Mr. John Mufukare stressed the importance of the subject for employers in the SADC region, they were faced with rigid labour codes, which tend to protect the worker rather than the employer which makes doing business a challenge.

Mr. Mufukare pointed out that with globalization, new forms of employment relationship were emerging. The formal economy was decreasing while there was an increase in the informal economy. It could be that the new form of employer was reluctant to conform to labour standards because his/ her primary objective was survival in a challenging economic environment. In conclusion, he stated that there was need for dialogue within the SADC region generally for a better understanding of the new forms of employment relationship.

### **Remarks by a Representative of the Workers' Group**

Mr. Sam Phiri in his address on behalf of Workers' Group, expressed their appreciation for the efforts made by ILO in organizing this Workshop whose purpose was to sensitize participants on Recommendation No. 198 of 2006. He noted that since its inception in 1919, the ILO has been working diligently to uphold the dignity of labour through its mandate of protection of workers as enshrined in its Constitution, the Philadelphia Declaration, the International Labour Standards, the Declaration of Fundamental Principles and Rights at Work and the Decent Work agenda.

He expressed his concern over the reluctance of some governments in relation to the protection of some workers' rights, and where these rights were provided, some employers were flouting them with impunity. He noted that unemployment and under-employment were rife in many countries resulting in many women and men workers being employed in the informal economy where labour laws did not cover them. He also pointed out that some vulnerable groups such as domestic workers, "illegal" migrants and agricultural labourers were not in many cases recognized as workers.

In conclusion, Mr. Phiri expressed the hope that the Workshop would assist participants in learning best practices in the area of employment relationships in their respective countries whose aim was the protection of the rights and the human dignity of vulnerable workers' groups.

## **The Minister of Public Service, Labour and Social Welfare**

In his opening speech, which was read on his behalf by the Permanent Secretary, Mr. Lance Museka, the Minister of Public Service, Labour and Social Welfare, the Honourable Nicholas Goche, stated that the fight for social justice at the workplace has not diminished and that the fight has actually intensified with the advent of globalization of the economy. The rapid integration of the world economy has given rise to a global village and there was a rise in migration within the region and to Europe. The Minister pointed out the prevalence of discrimination and casualization of migrant labour has led to contract and casual workers being denied benefits such as social protection, protective clothing, including being underpaid and working for excessively long hours.

The Minister pointed out that the emergence of individual bargaining to determine remuneration had also become a concern on the labour market as this compromised collective bargaining and threatened the existence of trade unionism.

The Minister indicated that with regard to disputes settlement, there was a need to find ways of making the national labour disputes resolution systems more efficient, people-centered and protective of workers since the current systems tended to be legalistic and underrated human relations. He also expressed concern over the focus by the current labour laws on the formal economy. He indicated that the self-employed and vast numbers of women and men sustained by and working in the informal economy had largely been ignored as far as labour administration and its services were concerned. In conclusion, the Minister made a call for labour law reforms that would cater for the changing economic situation in the sub-region. He wished the Workshop participants success in their deliberations.

### **3. Election of Officers**

The Workshop elected its Officers as follows:

- (a) Chairperson: Mr. Francis Mafuratidze, Government Representative, Zimbabwe.
- (b) Vice-Chairpersons: Ms. Lindiwe Sephomolo, Employer Representative, Lesotho and Mr. Sam Phiri, Worker Representative, Zambia.
- (c) Rapporteur: Ms. Josephine Mandangu, Government Representative, Zimbabwe.

#### **4. Introduction to recent challenges to labour law and history of ILO action concerning the employment relationship.**

Mr. Guiseppe Casale, Chief DIALOGUE introduced evolution of discussions within the ILO concerning the new forms of the employment relationship:

- Discussions started on “contract labour” by the ILC 1997/98 with a view to adopting a Convention and Recommendation. However, the ILC could not adopt a standard because of legal and linguistic complexities that obtained in the different legal systems and languages of member countries.
- A Meeting of Experts on Workers in Situations Needing Protection was held in 2000 to analyze employment relations in different legal jurisdiction.
- In 2003, the ILC had a general discussion on the scope of employment relationship and concluded the adoption of a recommendation as an appropriate response. The recommendation should focus on disguised employment relationship and the need for mechanism to ensure national level protection of persons with employment relationship. In addition, the recommendation should be flexible enough to take into account different economic, social, legal and industrial relations traditions; address the gender dimension; promote collective bargaining and social dialogue as a means of finding solutions to the problems at national level; take into account recent developments in employment relationship; and should not interfere with genuine commercial and independent contractual relationship.
- In 2005, a questionnaire was designed and sent out to member states to solicit their views to facilitate preparation of a draft recommendation.
- In 2006, a summary of replies and the office commentary were compiled leading to the discussion and adoption of Recommendation concerning the Employment Relationship, No. 198.

The Recommendation covers the following:

- National policy for reviewing at appropriate intervals, and if necessary, clarifying the scope of laws and regulations;
- The determination of the existence of an employment relationship;
- Monitoring and implementation with emphasis on the collection of relevant information and statistical data, undertaking of research on employment relationships and that the most representative employers’ and workers’ organisations should be represented on an equal footing in the implementation and monitoring mechanisms.

The Recommendation is accompanied by a Resolution on the Employment Relationship which provides that the International Labour Office should maintain

an up-to-date information on law and practice dealing with employment relationship; undertake comparative studies on changes in the patterns and structure of employment relations; and assist constituents in implementing Recommendation No. 198.

## **5. Presentation of Country Papers**

In an attempt to ascertain the situation of the employment relationship in the participating countries, each country had been requested to prepare in advance and present a country paper at the outset of the Workshop proceedings using a common format. The paper was to indicate whether there was a national policy in place for the reviewing of the scope of laws and regulations dealing with employment relations; what national measures are in place to provide guidance on the effective establishment of the existence of an employment relationship; how the determination of the existence of an employment relationship is done; what is the role of labour administration and labour inspection in clarifying the nature of the employment relationship; and what are the mechanisms for monitoring developments on the changing nature of the employment relationship. The following paragraphs summarize the papers:

### **Botswana**

#### ***National Policy***

There is currently no policy in place for the review of the scope of laws and regulations dealing with employment relations.

#### ***National measures***

The Employment Act provides for minimum rights to the parties to any employment relationship. It also provides a definition of “employer” and “employee”. The Industrial Court uses common law address cases where the true employment relationship is not identifiable. The Court uses the “dominant impression test” to determine if a person is an agent (self-employed) or an employee. The Employment of Non- citizens Act seeks to address employment relationships entered into by / with non-citizen employers and employees. There is a speedy system of dispute settlement in place which provides for alternative dispute resolution mechanisms such as conciliation and arbitration which are accessible to everyone. However, where a dispute arises concerning a contract of employment involving an “illegal immigrant”, the Court has declined to intervene on the grounds that it cannot “legalise” a contract of employment that has been concluded illegally. This has therefore left “illegal” migrants without protection.

#### ***Determination of existence of employment relationship.***

Collective bargaining, collective agreements and social dialogue are widely used in the solution of problems surrounding employment relationships.

### ***The role of labour administration***

Labour inspection services are provided for in the Employment Act. However, the Act prohibits an inspector to inspect any dwelling house without the consent of the occupier thereof, thus making it difficult for the inspector to inspect places where domestic workers are engaged. Even though the ILO, through the Project on Improving Labour Systems in Southern Africa (ILSSA) has been very resourceful in the training of labour and factory inspectors, the inspectorate still faces some challenges in terms of skill and human resources.

### ***Monitoring and implementation***

The Central Statistical Office (CSO) has always played a vital role in coming up labour market indicators through labour force survey, census and other collection of data regarding employment and the changing nature of the employment relationship. The Department of Labour has joined hands with the Ministry of Finance in setting up a Labour Market Observatory (LMO) together with the CSO and the Botswana Training Authority.

## **Lesotho**

### ***National policy***

Lesotho does not have a written national policy whose purpose is to review laws and regulations of employment relations. However, the country depends on the “common law and legislative approach” where there is a dispute about employment relations.

### ***National measures***

The country lacks a specific definition of “employment relationship” in the statute. When a dispute on employment relationship arises, national measures aimed at providing guidance on the existence of an employment relationship include the common law considerations drawn from the South African case law. Resort may also be had on the Labour Code Order No.24 of 1992 which provides the meaning of an “employer” and “employee”. Where it is established that employment relationship exists, the law offers protection to the aggrieved party. The law is protective on employees over issues of unfair dismissals, underpayments, retrenchments, health and safety at workplaces, freedom of association, non- discrimination of the grounds of HIV and AIDS among others.

The Labour Code provides for procedures to be followed for the conclusion of trans-national contracts of employment. Recruitments agencies are used in the facilitation of conclusion of transnational employment contracts. The Directorate of Dispute Prevention and Resolution (DDPR) offers dispute settlement services to all, and this includes the resolution of disputes on the nature of employment relationship.

### ***Determining the existence of the employment relationship***

There is a legal presumption that an employment relationship exists where there

are indicators to that effect. These include whether a person is subject to control or direction of another person; whether the hours of work are subject to the control of another person; whether a person forms part of an organization; whether a person is economically dependant on another person; and whether a person supplies services to one person. The prevailing facts on each case are also relevant to determine the existence of an employment relationship.

#### ***The role of labour administration***

Labour inspection in Lesotho has the administrative function to enquire into the conditions and compliance with the provisions of the Labour Code at the workplace, and the Labour Commissioner is empowered to institute court proceedings on behalf of an employee if there has been breach of the provisions of the Act.

#### ***Monitoring and implementation***

There is no specific machinery assigned or established to collect data on the changing nature of the employment relationship.

## **Malawi**

#### ***National policy***

There is currently no national policy for reviewing the scope of laws and regulations dealing with employment relations. However, the development of a National Employment and Labour Policy is still in the pipeline.

#### ***National measures***

Various laws are in place and these regulate the employment relationship. The law, apart from setting minimum standards of employment, also provides procedures for settlement of disputes when they arise in a speedy and impartial manner. In a spirit of tripartism, there are also meetings on tripartite social dialogue and aimed at information sharing and joint problem solving by social partners.

#### ***Determination of the existence of employment relationship.***

The employment relationship exists in both the formal and informal sectors, labour, and employment contracts, whether written or oral, determine the relationship between the employer and employee. In the agricultural sector, measures are being taken to pass a Tendency Labour Bill so that the employer – employee relationship is better regularized and formalised. The ILO, through DIALOGUE, has given technical assistance on the Bill. There has however been limited use of collective bargaining on issues concerning employment relationship due to limited capacity of social partners.

### ***The role of labour administration***

There is a labour inspection system which monitors and enforces the various labour laws.

### ***Monitoring and implementation***

Monitoring of the labour market is done through monthly, quarterly and annual “reports”, which are on a regular basis.

## **Mozambique**

### ***National policy***

Mozambique has no policy on the employment relationship but the constitution defines among other things the market economy as a way of national development and open space for political pluralism. The country is also in the process of putting in place a package of labour law reforms, which are the result of the new economic model adopted by Mozambique, and in 2007 the new Labour Act was adopted with technical assistance by DIALOGUE.

### ***National measures***

The new Labour Act applies to contracted workers in public service employment. It also covers the employment of foreigners and the setting up of quotes in that regard.

### ***The role of labour administration***

The general labour inspectorate has the role of Administrator and can impose fines where applicable. The Constitution states that there will be a labour court for dispute settlement but, this body has not yet been established. The ILO, through DIALOGUE, is carrying out some training for the current courts and magistrates on international labour standards and HIV and AIDS.

### ***Monitoring and implementation***

There are currently no systems in place for the monitoring and implementation..

## **Namibia**

### ***National policy***

The Labour Act of 1992 is the legal instrument regulating employment relationships in Namibia. It has been substantially amended in 2007 in the form of a new Labour Act.

### ***National measures***

National measures aimed at providing guidance on the existence of an employment relationship are found in the Labour Act. The Act defines an “employee” and distinguishes between an “employee” and “casual employee”.

### ***The role of labour administration***

An Employment Services Bureau is being proposed in the Employment Services Bill which is being finalized by the Ministry of Labour and Social Welfare with technical assistance from ILO, GIALOGUE. The Bureau will, among others, assist job – seekers to find suitable employment, provide vocational and career guidance, keep register of private employment services, collect and disseminate information related to employment, and work with educational and training institutions to identify available and needed skills for the labour market. The Ministry has also instituted a course in conciliation and arbitration with the support of the ILO – Swiss project. A pool of trained conciliators and arbitrators is envisaged to be in place once the new Labour Act is implemented.

### ***Monitoring and implementation***

There is no specific machinery assigned and established to collect data on the changing nature of the employment relationship.

## **South Africa**

### ***National policy***

Currently there is no national policy in place in South Africa but there is a process in place for developing one; it started in 2003 with the involvement of all social partners. The Department of Labour commissioned research on the changing nature of work and typical forms of employment.

### ***National measures***

There is provision in terms of legislation for the regulation of temporary employment services. However, the research carried out by social parties revealed that there is need for change of definition of temporary employee. There is a Code of Good Practice: Who is an employee adopted by the national social dialogue body called NEDLAC in 2006, which sets out detailed guidelines and indicators for determining whether or not a person is an employee.

### ***The role labour administration***

There is labour inspection system in place to monitor and enforce compliance with the law. A speedy and accessible dispute settlement system is done by the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and the Labour Appeal Court.

### ***Monitoring and implementation***

There are no mechanisms in place for the monitoring of developments in the labour market on the changing nature of the employment relationship.

## **Swaziland**

### *National policy*

The National Development Strategy (NDS) is a policy document that aims, with regard to industrial relations at fostering an environment conducive to good industrial relations by among others rationalization and harmonising the various acts and pieces of legislation governing employment and strengthening the structures and mechanisms for the review and reform of labour laws. It however does not directly address the determination of the employment relationship.

### *National measures*

There is currently no legal protection of workers in atypical forms of employment relationship. The Employment Bill prepared with DIALOGUE's technical assistance, will address this issue by introducing a section on part-time employment that seeks to provide for equal protection before the law. The Industrial Relations Act established the Conciliation, Mediation and Arbitration Commission (CMAC) with the responsibility to provide a speedy, accessible and fair dispute resolution and preventive services in order to promote harmonious, equitable and peaceful industrial relations. The ILO/Swiss Project has been instrumental in providing skill training for its members and staff.

### *The role of labour administration*

The Department of Labour has an Inspectorate Division which ensures that labour legislation is complied with.

### *Monitoring and implementation*

There are currently no mechanisms for monitoring relevant developments in the labour market on the changing nature of employment relationship.

## **Zambia**

### *National policy*

The National Employment and Labour Market Policy serves as the major instrument through which laws and regulations dealing with employment relations can be reviewed. Amongst others, it provides for the review and formulation of labour policies and legislation.

### *National measures*

Various forms of employment relationships are emerging in Zambia following the liberalization of the economy coupled with an increase in foreign direct investment. A number of measures have been put in place by government in collaboration with its social parties in order to address the attendant problems. These include among others, the redefinition of casual employee and the prohibition of continuous employment of any person for a period of more than six months on a casual basis. The Employment Act also provides for guidance on standards that are applicable to the different types of employment contracts. It

provides for security and attestation of contracts of foreign service and the imposition of a penalty on any person who induces another to proceed abroad without a contract of foreign service.

Regulation of triangular and multi –triangular relationships has been a challenge since there are no standards applicable to such forms of contractual arrangements. Tripartite discussions have been held on this with technical assistance of the ILO.

Collective bargaining and internal grievance procedures are the preferred means of resolving disputes. However, under the provisions of the Industrial and Labour Relations Act, labour officers have the power to resolve disputes on rights and employment relationships. If mediation fails, an aggrieved party has the right to proceed to the Industrial Relations Court.

***Determination of existence of employment relationship.***

The Employment Act covers the rights and obligations that may arise out of a contract of employment. These rights and obligations are used to determine the existence of an employment relationship. At national level the Industrial and Labour Relations Act provides for the establishment of the Tripartite Consultative Labour Council for the purposes of social dialogue

***The role of labour administration***

The Ministry of Labour and Social Security has the labour inspectorate and employment and industrial relations units to enforce labour legislation.

***Monitoring and implementation***

The Central Statistical Office (CSO), in collaboration with the Ministry of Labour and Social Security, conducts labour force surveys for the purpose of collecting information of the changing nature of employment relationship. In addition, the Ministry is developing labour market information system for the same purpose.

## **Zimbabwe**

***National policy***

There is currently no national policy for reviewing the scope of laws and regulations dealing with employment relations.

***National measures***

The Labour Act defines what constitutes “employer” and “employee” as a guide to existence of an employment relationship. The Act also provides fair measures to combat disguised employment relationships by providing, *inter alia*, that the definition of employee includes circumstances where a person performing the work supplies his/her own tools or works under flexible conditions of service, the hirer providing the substantial investment in or assumes the substantial risk of undertaking.

***Determination of existence of employment relationship.***

The Labour Court determines cases from their facts, while Employment Councils are the main instrument for setting conditions of employment through collective bargaining.

***Role of labour administration***

The Labour Inspectorate Services inspect workplaces for compliance with the labour legislation. The inspectors come from labour office, employment councils and the National Social Security Authority (NSSA).

***Monitoring and implementation***

Information on data collection is a challenge due to lack of resources and equipment.

## **6. Common Themes in the National Experiences**

During the lively debate around each presentation, it was observed that there was generally no national policy for reviewing the scope of laws and regulations dealing with the employment relationship. Exceptions were the National Development Strategy for Swaziland and Zambia's National Employment and Labour Market Policy and possibly the 2007 Namibian Labour Act once it was implemented and the South African Code of Practice: Who is an employee, 2006.

In terms of national measures directed at providing guidance on effective establishment of the existence of an employment relationship, legislation in most countries have a definition of "employer" and "employee"; the wording was not always clear and helpful in practice. However, none defined "employment relationship". Most pieces of legislation also provided for the protection of workers.

Countries such as Zambia and Namibia had elaborate legal provisions that dealt with forms of contract arrangements. Legal arrangements exist in Lesotho, Mozambique and Zambia for the employment relationship in a framework of a transnational provision of services.

One important commonality – seen in the context of SADC – was that mediation/ conciliation, arbitration, and labour courts existed as part of the dispute settlement machinery in all countries. The exception was Mozambique where a Labour Court was provided for but was still to be established. Autonomous alternative dispute resolution (ADR) institutions existed in Lesotho, South Africa and Swaziland while in the rest of the countries, dispute settlement was still within the ministries of labour.

With regard to the determination of existence of employment relationship, a key common feature was that a legal presumption to that effect existed in most countries either through statute or under common law, while primacy of fact

existed by statute in South Africa and under common law in most countries as well.

In terms of labour administration, all countries relied on labour inspection and all mentioned that they had to grapple with the challenges of staffing, resources as well as the knowledge of the law.

Central Statistical Offices and labour market surveys appeared to be the mechanisms mostly used by most countries for monitoring relevant developments in the labour market with the specific reference to the collection of information on the changing nature of employment relationship.

## **7. Comparative Labour Law Reform Trends: Issues Concerning New Forms of Employment Relationship: Ms J. Hodges (DIALOGUE ILO/GENEVA)**

Ms. Jane Hodges, Senior Labour Law Specialist, DIALOGUE, presented on comparative labour law reform trends using the Annotated Guide to Recommendation No. 198 on the Employment Relationship (available at this website <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/guide-rec198.pdf>). The presentation was an in-depth extrapolation of the provisions of Recommendation No. 198 and how they have been implemented in the various countries; and led the participants to reflect on how their national situations measured up in the light of this new international standard.

### ***National policy***

She explained that Recommendation No. 198 proposed that member States formulate and apply a national policy which should be gender sensitive and the product of social dialogue for reviewing, clarifying and adapting the scope of relevant laws and regulations in order to guarantee effective protection for workers in the context of employment relationship. Belgium was given as an example which has passed an Act on homework; in Italy collective bargaining agreements provide for permanent observatories for verifying the effectiveness and efficiency of the negotiated provisions; and the social partners of Ireland which had passed a Code of Practice for determining employment or self-employment status of individuals in 2001.

The Annotated Guide contains a check-list for establishing a national policy, which, amongst others, includes the following:

- (a) Have there been consultation with social partners about labour market developments;
- (b) Whether such consultations have led to a holistic national policy;
- (c) Does the policy give clear guidance on determining the existence of an employment relationship;
- (d) Whether the policy is gender sensitive;

- (e) Does the policy make reference to any vulnerable groups requiring special attention;
- (f) Whether the policy contains special presumption that employment relationship exist;
- (g) Whether the policy allows a shift of the burden of proving the existence of an employment relationship from the worker;
- (h) Does the policy provide for the criteria of determining if an employment relationship exist;
- (i) Whether the policy provides for the establishment of monitoring institutions; and
- (j) What international cooperation can be leveraged to track developments concerning employment relationship in trans-national movement of workers.

Ms. Hodges that the following Conventions were useful when grappling with issues related to the employment relationship, and that many had been ratified by the countries present at the workshop:

- Forced Labour Convention, 1930 (No.29);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- Migration for Employment Convention (Revised), 1949 (No. 97);
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- Equal Remuneration Convention, 1951 (No. 100);
- Maternity Protection Convention (Revised), 1952 (103);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and
- Private Employment Agencies Convention, 1999 (No.181).

The Recommendation emphasized the need for adequate training of labour inspectors and judges of labour courts and tribunals. Reference was made to the work that has been done in this regard by the various ILO technical projects such as ILSSA and ILO/Swiss Project. In addition, mention was made of the importance of the courses provided by the African Regional Labour Administration Centre (ARLAC) and the International Training Centre in Turin. Such awareness and knowledge sharing for the various national dispute resolution mechanisms was vital for them to be able to expeditiously resolve disputes concerning the existence and terms of an employment relationship.

The Recommendation also noted that the national policies should have appropriate measures in place to act as a disincentive to disguising a true employment relationship; to have legal provisions that shift the onus of proof to the employer to prove that it is not an employer (as is the case under the Labour Relations Act of South Africa); to have measures covering the trans-national provision of services (such as in the European Union).

Armed with this examination of Recommendation No. 198 and the comparative labour law approaches, the participants engaged in group work to decide whether the facts of five cases (based on real decisions from jurisdictions in Ireland, France, South Africa, Venezuela and the United States of America) were examples of women and men in an employment relationship or not. The participants appreciated the activity as it showed that situations, even though labeled “lease agreement” or a “freelance” were not easy to decipher, and using the test of “primacy of facts” helped. Participants judged the situations against their national laws too, using various criteria (type of payment, regulation of hours, who supplies equipment) especially whether the person doing the work was “economically dependent”. Another factor used was the “predominant impression” test. Recent decisions from the Directorate of Dispute Prevention and Resolution (DDPR) in Lesotho and the Industrial Court in Botswana were also shared.

## **8. The role of Labour Administration**

In a presentation on the role of labour administration, Mr L. Mandoro, Social Dialogue and Labour Administration Specialist, SRO/Harare, outlined the key functions of an effective system of labour administration and the conditions for its operation. In relation to employment relationship, he indicated that the key challenges for labour administration are as follows:

- the growth of the informal economy in which activities are either not included in the law or the law is not applied in practice;
- legal exclusion; in which certain categories of employees have been excluded by legislation from coverage or eligibility to some benefits/rights, such as casual workers and domestic workers;
- structural and organizational deficiencies of labour administrations which are still tailored to suit the interest of “commercial and industrial undertakings” which have a form of operational and management organization;
- increased labour migration of persons across borders without the guarantee of necessary legal protections in the receiving state.

As a way forward, there were many options open to countries of the sub-region, including:

- (a) Extension of labour administration services to the informal economy by, amongst others the extension of inspection services, social security coverage and strengthening of dispute settlement machinery;
- (b) Extension of protection to migrant workers through the development of a coherent migration policy and administration, regulating migration in countries of origin and through inter-country co-operation and bilateral migration agreements;
- (c) Restructuring of the organization of labour administration to address the needs of the informal economy; and

- (d) Creation of a legal framework to support rights of association and participation in social dialogue processes of the informal economy associations.

## **9. Role of Employers' and Workers' Organizations**

On behalf of employers' organisations, Ms. Lindiwe Sephomolo stated that employers' organisations have a role to play in ensuring fair employment relationships. She highlighted the following as being among some of the measures that can be taken by employers' organizations:

- To develop Codes of Conduct that encourage their members to conform to ethical, moral and others standards that are aimed at ensuring fair relations;
- To encourage dialogue among employers and between employers and workers on employment relationships;
- To participate fully in the formulation of national policy and the determination of criteria for employment relationship;
- They were also required to support and promote policies and programmes that address poverty and unemployment;
- To urge their member to identify and define any employment relationships that may exist for specific industries in Regulated Collective Agreements as well as seek ways of establishing equal or fair bargaining scenarios that address mutual gains; and
- To lobby government for the creation of an environment that encourages openness and not disguising of employment relations.

From the side of the Workers' Organisations, Mr. Sam Phiri acknowledged that workers' organisations have a role to play in ensuring fair employment relations because it is their members or prospective members who are in the losing end. He indicated that trade unions were faced with declining membership due to job insecurity, redundancies, casualisation and sub-contracting. The role of trade union was to lobby for revision of Labour Acts and even national Constitutions in order to provide for the right to organize and to represent interests of workers in all sectors, particularly the informal economy.

He also considered that trade unions should lobby governments to ratify and domesticate relevant ILO Conventions that have a bearing on employment relationships. He emphasized the speedy implementation of provisions of Recommendation No. 198 which the workers welcomed. Finally, he indicated that trade unions should engage in social dialogue with other partners in the periodic review of labour laws to be in line with current developments and to have monitoring and implementation mechanisms in place.

## **10. Group Work**

Participants were divided into three groups representing government, employers and workers, respectively, with each group tackling a specific question. The purpose of the group discussions was to give participants an opportunity to hold in-depth discussions and come up with a way forward. The government group dealt with the question on how can the role of labour administration, including inspection services, help in determining the existence or not of an employment relationship to better protect workers. Employers' and workers' groups dealt with the question of how can employers and workers' organisations assist in the formulation and implementation of a national policy on the employment relationship, respectively.

The responses emanating from the above questions constitute the Workshop's main conclusions, recommendations and the way forward in the sub-region with regard to new forms of the employment relationship.

## **Government group**

The group reported that labour administration could help in determining the existence of an employment relationship through the following means:

- Strengthening of social dialogue in the development and implementation of national labour and employment policies;
- Developing and reviewing national policies on the employment relationship;
- Carrying out legislative review in order to harmonize and clarify the concepts relating to employment relations;
- Developing guidelines or principles for defining the employment relationships;
- Enhancing enforcement and inspection strategies;
- Capacity building in terms of human resources;
- Mobilisation of financial and physical resources taking cognizance of budgetary constraints in order to facilitate implementation;
- Defining better “ employer”, and “employee” and the expansion of the definition of a workplace;
- Developing own test or measure to determine the employment relationships as is the case in the Irish system; and
- Better integration and coordination of labour inspections system.

## **Employers' group**

The employers' group resolved that employers in the region should:-

- Develop a Code of Conduct on employment relationships that is binding to all employers. The Code should be gender sensitive and take cognizance of the needs of vulnerable groups;
- Train members on the new forms of employment relationship;

- Lobby governments for creation of consultative structures with employers in the formulation of policy and the determination of criteria of determining employment relationships; to develop an independent and impartial dispute settlement procedures; to train and capacitate the judiciary on the new forms of employment relationship; and to engage in dialogue with all social partners on new forms of employment relationship;
- Develop a network among employers in the sub-region in relation to trans-national movement of workers; and
- Support and promote policies that address poverty alleviation, unemployment and development of the SMMEs.

## **Workers' group**

The workers' group resolved that workers' organisations in the sub-region should:

- Mobilise resources to capacitate workers organisations to contribute towards the formulation of national policy on employment relationship;
- Sensitize their members on the provisions of Recommendation No. 198;
- Undertake research in good comparative practices on employment relationships in other countries; and
- Advocate for legislative review.

## **11. Closing Ceremony**

In his closing remarks, the Director of SRO/Harare, Mr. Tayo Fashoyin, stated the importance of the sharing of information and experiences. Although the topic of new forms of employment relationship was new, he believed that the information that has been shared with and among participants was enriching and of great substance. The process should continue and the ILO was ready to provide technical support to all the ILO constituents upon request in trying to deal with the new forms of the employment relationship.

The Director thanked and congratulated all the countries and participants for having taken part in the workshop. He thanked the people who had facilitated the process, in particular Ms. Hodges and Mr. Casale of DIALOGUE for their invaluable contribution to the Workshop. He also thanked Mr. Mandoro of SRO/Harare and the secretariat for a job well done in the organization of the Workshop.

A Namibian Employers' participant, Mr. Sam Januarie, on behalf of the participants, expressed gratitude the SRO for organizing the Workshop and to DIALOGUE for facilitating the deliberations of the Workshop. He stated his belief that objectives of the Workshop had been achieved, and the informative presentations and the implementation of conclusions reached represented a

challenge to governments, employers and workers alike. He also thanked the host country, Zimbabwe, for the hospitality that they had extended to all participants from the sub-region and wished fruitful dialogue between all stakeholders back home.

In his closing remarks, Mr Casale, Chief of DIALOGUE thanked all participants for having taken part in the Workshop and urged all participants to make use of what they had learnt back home. He also stressed the importance of the guidelines contained in Recommendation No.198 and recommended that the Annotated Guide be used whenever needed back home.

In closing, the Workshop Officers led by the Chairperson expressed their gratitude to the organisers of the Workshop and reiterated that the participants would share information learnt with others back home. It was necessary to have a follow-up workshops in order to go beyond the discussion into implementation of various recommendations. What has been learned at the Workshop would be put in practice and that social partners would continue to dialogue.

## Annex

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