

## Position Paper

*International Labour Conference, 95th Session, 2006*

*Report V(1) - The Employment Relationship*

### EXECUTIVE SUMMARY

The 2006 discussion on the Employment Relationship is the heir of several Conference discussions that have taken place over the years and that have proved particularly complex.

The 1997 and 1998 Conferences discussed the issue of Contract Labour – the predecessor of the current discussion on the Employment Relationship. The 1998 Conference Committee failed to conclude its work on the subject due to several reasons, notably major conceptual problems regarding the notion of “contract labour” and the definition and identification of the workers requiring protection. Some of these conceptual problems also arose at the 2003 general discussion on the employment relationship.

Therefore, CIETT urges the ILO to take into account the below mentioned recommendations:

- CIETT endorses the conclusions of the 2003 International Labour Conference on the issue “The Employment Relationship” whereby the Committee on the Employment Relationship recommends that the ILO should consider the adoption of a **Recommendation in the area of “disguised employment relationships”<sup>1</sup>**.
- The 2006 Conference must avoid re-raising issues that have proved unsuitable for a standard setting discussion in the past and **must build on the consensus reached at the 2003 Conference as set in the Conclusions of the Committee on the Employment Relationship**.
- The 2003 Conference conclusions state that “the issue of triangular relationships was not resolved”<sup>2</sup>. However, the same document also states that “a particular form of triangular employment relationship relating to the provision of work or services through temporary work agencies has already been resolved by the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188)”<sup>3</sup>. **It would therefore appear redundant to address the issue of Private Employment Agencies again during the 2006 Conference. In any case, the Recommendation to be adopted should not intend to revise Convention 181.**
- Any reference by the 2006 Conference to triangular relationships should recognise the distinction between Agency Work and other forms of triangular relationships and **should note that agency work is already the subject of ILO Convention 181 and accompanying Recommendation 188.**

<sup>1</sup> 2003 Report of the Committee on the Employment Relationship – Conclusions – Point 25.

<sup>2</sup> 2003 Report of the Committee on the Employment Relationship – Conclusions – Point 25.

<sup>3</sup> 2003 Report of the Committee on the Employment Relationship – Conclusions – Point 9.

## EXPLANATORY NOTE TO THE CIETT POSITION

### ON THE EMPLOYMENT RELATIONSHIP

#### I - Background

The International Labour Conference 2006 will discuss the item “The Employment Relationship” with a view to adopting a Recommendation in a single reading.

The subject “the Employment Relationship” has been the subject of difficult discussions within the ILO over the years.

The 1997 and 1998 International Labour Conferences held discussions on contract labour with the intention to adopt a Convention and Recommendation aimed at protecting certain categories of unprotected workers. The work of the Committee failed to reach a conclusion due to conceptual difficulties surrounding the notion of contract labour and the identity of the workers needing protection.

The 1998 Conference adopted a resolution in which it invited the Governing Body of the ILO to place these issues on the agenda of a future session of the Conference with a view to the possible adoption of a Convention supplemented by a Recommendation.

The 91st Session of the Conference held a general discussion on the scope of the employment relationship in June 2003. During the discussion, many delegates emphasized that the concept of the employment relationship is common to all legal systems and traditions. There are rights and entitlements which exist under labour laws, regulations and collective agreements and which are specific to or linked to workers who work within the framework of an employment relationship. The Committee’s recommendation was that the ILO envisaged the adoption of a Recommendation in the area of “disguised employment”:

*“The ILO should envisage the adoption of an international response on this topic. A Recommendation is considered by the Committee as an appropriate response. This Recommendation should focus on disguised employment relationships and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level. Such a Recommendation should provide guidance to member States without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions and address the gender dimension. Such a Recommendation should not interfere with genuine commercial and independent contracting arrangements. It should promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level and should take into account recent developments in employment relationships and these conclusions. The Governing Body of the ILO is therefore requested to place this item on the agenda of a future session of the International Labour Conference. The issue of triangular employment relationships was not resolved.”*

#### II - The Employment Relationship: Report V(1)

The International Labour Office, in preparation for the 2006 International Labour Conference discussion on the ‘Employment Relationship’ has prepared a Report {V(I)} entitled ‘Employment Relationship’, which is accompanied by a legal questionnaire.

The Report analyses the evolution of discussions in the ILO on the subject over the past decade, and the results of the legal reviews undertaken in over 60 ILO countries.

The Report states that the employment relationship is a legal concept which underpins the operation of the labour market in many countries. The existence of an employment relationship remains 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, the Report concludes that in some countries, and in some sectors more than others, employment relationships have become more diversified and other forms of employment are rising alongside traditional full-time employees. This diversity has led to cases of lack of protection of workers who should fall within the protection of labour and employment law.

The Report analyses three different situations:

- Objectively ambiguous employment relationships or disguised employment relationships – which create uncertainty as to the scope of the law and can thus nullify its protection.<sup>4</sup>
- Triangular relationships – workers involved in triangular relationships have no doubt as to their employment status but may face difficulties in establishing who their employer is and who is responsible for their rights.<sup>5</sup>

### III - The Employment Relationship: CIETT Position

#### **Report V(1)**

The Report states that the cases of objectively ambiguous and disguised employment relationships are cause for concern in terms of identification of the employer, identification of the worker's rights and their guarantee by the employer whereas in the case of triangular relationships, the problem is identified as the uncertainty that may arise from the existence of a provider and a user and the allocation of responsibilities between them in relation to the workers' rights.

CIETT agrees with the differentiation established by Report V(1) between on the one hand cases of objectively ambiguous and disguised employment relationships and on the other hand triangular employment relationships, since the legal questions arising from the three types of relationships are different and distinct and should be treated separately.

- ***However, CIETT would have welcomed an additional distinction between triangular relationships at large and the particular form of triangular employment relationship relating to the provision of work or services through temporary work agencies (Agency Work hereafter), which as Report V(1) indicates is the best known form of triangular relationships.***<sup>6</sup>

This distinction is necessary because the legal uncertainty that may arise in relation to the employers identity, the workers' rights and who is responsible for them in the case of "triangular" relationships does not arise in the case of Agency Work where these elements have been thoroughly examined and addressed through ILO Convention 181 and its accompanying Recommendation 188.

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4 Report V(1) – Paragraph 39.

5 Report V(1) – Paragraph 40.

6 Report V(1) – Paragraph

Report V(1) concludes that “the determination of the identity of the employer and other possible parties to “triangular” employment relationships, of the workers’ rights and of the persons responsible for ensuring those rights raises legal issues which are not easy to resolve.”<sup>7</sup>, and that “it is essential for such employees to know who the employer is, what their rights are and who is responsible for them.”<sup>8</sup>

The questions posed by the questionnaire, in particular those Questions 3(2) and 6(2)(c) which relate to “triangular” relationships, are aimed at clarifying those elements.

- **CIETT fully agrees that workers have a right to know who their employer is, what their rights are and who is responsible for them. However, CIETT would like to point out that whereas these legal issues may not have been resolved in the case of other types of “triangular” relationships, they have been resolved already in the case of Agency Work through Convention 181 (see section below).**
- **Therefore, it would appear redundant to try and address them again through an instrument, in this case a Recommendation, not intended to revise Convention 181.**

### **ILO Convention 181<sup>9</sup> and Recommendation 188**

The Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188) were adopted taking into account:

- the importance of flexibility in the functioning of labour markets;
- the role which private employment agencies may play in a well functioning labour market;
- the different environment in which private employment agencies operate, when compared to the conditions prevailing when Convention 96 (which Convention 181 replaces) was adopted in 1949;

Unlike in the original discussions on Contract Labour, there exist now two ILO instruments that comprehensively regulate work through Private Employment Agencies. The provision of work or services through temporary work agencies has already been addressed by the above-mentioned instruments and therefore work through Private Employment Agencies does not raise concern as to either:

- The existence of an employment relationship and the identity of the employer
- The rights of the worker
- The allocation of responsibility in relation to the rights of the worker between the agency (“the provider” in the terminology of Report V(1)) and the user.

#### **1. Identity of the Employer in the case of agency work**

Article 1(b) of Convention 181 establishes that the term Private Employment Agency means any natural or legal person, independent of the public authorities, which provides notably the following labour market services: “services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a “user enterprise”) which assigns their tasks and supervises the execution of these tasks”.

Therefore, in the case of agency work, it is clear that there is an employment relationship and that the employer of the agency worker is the private employment agency.

<sup>7</sup> Report V(1) – Paragraph 56.

<sup>8</sup> Report V(1) – Paragraph 57.

<sup>9</sup> Adopted on 16th June 1997, revising the 1949 Convention 96 on Fee-Charging Agencies.

## 2. Rights of agency workers

The following Articles of Convention 181 clearly specify the rights of agency workers:

Article 4 - freedom of association and the right to bargain collectively

Article 5 - non-discrimination

Article 6 – processing of personal data of workers

Article 7 – right of workers not to be charged fees or costs

Article 11 – obligation on Members to take measures to ensure protection for workers in relation to:

- a) freedom of association
- b) collective bargaining
- c) minimum wages
- d) working time and other working conditions
- e) statutory social security benefits
- f) access to training
- g) occupational safety and health
- h) compensation in case of occupational accident or diseases
- i) compensation in case of insolvency and protection of workers' claims
- j) maternity protection and benefits, and parental protection and benefits.

The above enumeration unambiguously shows that the rights of agency workers are clearly established by Convention 181.

## 3. Allocation of responsibilities in relation to the rights of agency workers between PrEAs and user enterprises

The Office rightly identifies the complexity of triangular relationships as caused by the fact that there is a third party to the employment relationship. CIETT agrees that the existence of a user enterprise is a specific feature of agency work that calls for a clear allocation of responsibilities between the employer, the Private Employment Agency, and the user enterprise.

This point is addressed by Article 12 of Convention 181 which establishes that Members shall determine and allocate responsibilities between PREAs and user enterprises in relation to all the above cases except (a).

Through Article 12, Convention 181 also addresses the concern of allocation of responsibilities between PrEAs and user enterprises.

As illustrated by this enumeration of provisions on agency workers protection, Convention 181 provides adequate protection for workers of private employment agencies.

### **About CIETT**

CIETT is the International Confederation of Private Employment Agencies. It brings together 33 national federations of private employment agencies and 6 of the largest staffing companies worldwide (Adecco, Kelly Services, Manpower, Randstad, USG People, Vedior).

CIETT is the only international organisation authoritatively representing the interests of agency work businesses in all social labour matters at international level and is recognised as such by national and international organisations and governments, notably the International Labour Organisation, and the European Commission with which Euro-CIETT has Social Partner status. CIETT has built close working relations with other international Government and non-Government bodies dealing with matters that fall within its sphere of activities.

The CIETT mission is to seek greater recognition for the contribution that private employment agencies make to labour markets, especially in relation with 3 key aspects: employment creation; access to and integration in the labour market of diversified categories of workers (disabled, first-time entrants, long-term unemployed...); economic growth and financial contribution.

Over the years, CIETT has developed close relationships with the International Labour Organisation. CIETT has attended Annual International Labour Conferences on several occasions, notably to participate in the negotiations on Convention 181 on Private Employment Agencies in 1994 and 1997 and in the discussions on Contract Labour in 1997 and 1998 and on the Employment Relationship in 2003.