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CLR News

Migrant labour in times of crisis

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Contents

Note from the editor

Jan Cremers,
AIAS,
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Still a strong polar wind is blowing over Europe. And, although the world of finance suggests that we are steadily going "back to business as usual", the full consequences of the economic crisis have not yet arrived.

If we examine the 'exit' strategies that are proclaimed then there are serious concerns that the welfare state will be further demolished and labour laws and social security systems watered down, saddling people with insecure jobs, all in the name of economic recovery.

If the basic philosophy is deregulation, often proclaimed under the more popular but also misleading terms self-regulation, decentralisation or "tailor made" policy, the result is a divergence between winners and losers. This applies first and foremost to the workers that belong to the most vulnerable groups on our markets: migrants, young people, men and especially women in precarious labour relations. Equal treatment is reserved for those that have the possibilities and the means to shape their labour market positions or role in society. For those that stay in the dependent positions, the outcome is exploitation and marginalisation. As stated in an earlier contribution to CLR-News (1-2006): a penetrating insight into the harrowing effects of the "free market" policy.

Surprisingly the political bill is not paid by the real 'hooligans' of this free market philosophy. Recent results of parliamentarian elections all over Europe show serious losses by the left or socialist parties, whilst politicians who advocate the neo-liberal vision are in a winning mood. In my own country economic conservatism goes hand in hand with an authoritarian and xenophobic populist movement that has become the third strongest party in our parliament. The defenders of a so-called freedom who, once in power, will turn into the biggest danger for a free and open society.

In such a situation a plead for better regulation and for the strengthening of the rights and interests of migrant workers is almost a public

provocation. And that is what this issue of CLR-News is about.

We have always refused to look at labour as a commodity and in that perspective the European labour market cannot be seen as a supermarket that only serves the 'haves'.

In the actual crisis, migrant labour has come under serious pressure and this makes the political aim of equal treatment even more topical.

The articles in this issue were prepared for an ESRC seminar in Newcastle (14 April 2010) under the title *The impact of migrant workers on the functioning of labour markets and industrial relations*. Most contributions were of such a substance that we decided to dedicate the second volume of CLR-News to the item of migrant labour in cooperation with Northumbria University and ESRC. The organisers of the seminar Ian Fitzgerald, Steve French and Sonia McKay were more than willing to act as sub editors.

The other contributions fit in the theme.

As ever, contributions and feedback are welcome.

Ian Fitzgerald, Steve French and Sonia McKay

The impact of migrant workers on the functioning of labour markets and industrial relations: the case of construction

This special issue of CLR is based on a one day seminar held in the School of the Built Environment at Northumbria University, the second of six seminars funded by the UK Economic and Social Research Council (ESRC) examining the impact of migrant workers on the functioning of labour markets and industrial relations.

In the UK the relevance of migration is highlighted by the recent report on the Economic Impact of Immigration by the Select Committee on Economic Affairs in the House of Lords (2008) and, significantly, its recommendations to the government that there be further research on migrant workers and the labour market. The issue of migration in the UK, in particular, will continue to be of significance for the foreseeable future as a result of three key developments: its high saliency within policy and media arenas; the impact of policy changes within the UK (the introduction of points based system) and European enlargement, in particular, the opening up of national labour markets to workers from the EU accession states; and, crucially, the political and economic impact of recession upon migration and settlement patterns, recruitment strategies and unemployment, and the regulation of pay and conditions.

The aim of the seminar series is, therefore, to disseminate some of the latest research into the impact of migration on labour markets to the academic community and to a wide range of state agencies, employers, trade unions and voluntary sector support organisations that have a direct interest, and role, in policy formation, regulation and

enforcement. A key objective has been to provide a focused series of seminars to disseminate and debate the most recent research into migrant workers and their impact on the operation of labour markets and the employment relationship in the UK. In this way each of the seminars has attempted to examine the issue of migration based upon specific themes, for example by considering different occupations, economic sectors, geographical areas and types of migrants (by nationality and by status) with the aim of providing theoretical and empirical insights into issues such as employer strategies, the scope for exploitation of migrant workers and the motivations and experiences of migrant workers themselves.

The construction industry and the key issue of health and safety were, therefore, selected as important themes to examine at the seminar held in Northumbria. Construction remains a 'migrant dense' and precarious industry with the vast majority of workers on short-term temporary contracts. For example Harvey and Behling (2008) identify that almost all recent Central and Eastern European workers in the industry have been self-employed with many 'bogus' self-employed. The sector itself is still one of the easiest to slip into and out of, as migrants establish themselves in a new foreign location. The relevance of this to European debates on migration and social dumping is clear. But of more importance is the potential danger facing workers in an industry whose use of undocumented workers or bogus self-employment can undermine regulations and reduce the scope for legal enforcement. The consequences of this for worker health and safety, most patently in the high levels of accidents and deaths, are only too apparent (see CCA 2009). This special edition of CLR news picks up these themes based upon the main contributions made at the seminar.

In his piece, Jan Cremers (Amsterdam Institute of Advanced Labour Studies) provides an important introduction to the European Union framework, focusing upon the free

movement of workers in the EU and the Posting of Workers Directive. He notes the shifts within EU social policy formulation from one of upward harmonization to the creation of EC Employment Law based upon a 'lowest common denominator' approach to locate social policy within a free market model. Crucially, he highlights consequences of this approach for legal enforcement, most notably in the latest Laval, Rüffert and Luxembourg ECJ rulings, where the application and control of host country labour standards are seen as restrictions to the free provision of services aims.

The issue of EU policy and supra-national legal frameworks is developed by Elaine Dewhurst (Dublin City University) in her article, which examines the protection of the health and safety of undocumented workers in the EU. She provides an overview of the traditional approach of EU Member States to the problem of undocumented workers, notably to punish the undocumented worker and their employer once a situation comes to the attention of the State authorities, but highlights how this reactive policy stance fails to address the 'pull' factors that encourage undocumented workers to immigrate to a state and provide increasing opportunities for such workers to be super-exploited and placed in dangerous working environments. By analysing national and EU developments she argues that a more proactive approach to undocumented workers is emerging.

The remaining articles provide more detailed empirical research into construction and health and safety. Linda Clarke (University of Westminster) provides a comparative piece examining health and safety and disability in the UK and Dutch construction sectors. She provides a detailed analysis of employment trends within the UK construction industry, highlighting, despite the over-proportionate use of migrant workers, the origins and exclusionary nature of employment in the sector, focusing upon the case of the construction of Terminal 5 at Heathrow. The UK position is contrasted with the more inclusive employment patterns in the Netherlands,

which are explained through the more active role of the Dutch state, notably in shaping the Vocational and Educational Training system and through supporting collective bargaining.

Roger Maddocks (Partner at Irwin Mitchell Solicitors) discusses migrant workers workplace deaths in Britain. He highlights the significance of the employment status of migrant workers in the UK, notably in terms of an employer's duty and liability under the law and entitlement to benefit. He moves on to analyse the level of migrant worker deaths in construction, identifying an upward trend from reported deaths of migrant workers in construction in relation to the sector overall and migrant worker deaths across the economy. This is supported by a number of case studies and by examining verdicts, legal support and prosecution in cases of migrant deaths. This included the information from the recent CCA (2009) study. He highlights the need for more research and stronger enforcement measures, notably from the UK Health and Safety Executive (HSE).

Maddocks call for more active work by the HSE is responded to by Jeremy Bevan and Simon Hester (HSE) who provide a regulatory perspective on migrants, employment and health and safety in their contribution. They highlight the research that has identified the greater risk that migrant workers face, notably in construction work, in relation to UK workers undertaking the same work. Crucially, they provide an analysis of the problems encountered by the HSE in trying to access migrant workers to provide information about the HSE and their rights and to facilitate enforcement, highlighting the limitations of telephone helplines and translated materials. The response, based upon closer inter-agency working and more focused local campaigns with migrant workers in construction in London, provide an important insight into the complexities of reaching migrant workers, the importance of identifying differences between, and different routes into, migrant communities and the impact

that has had upon enforcement and policy development by the HSE.

The significance of these contributions becomes more apparent since the election and the formation of a ruling Conservative-Liberal Democrat coalition as they adopt a harder position in relation to social Europe, instigate a cap on non-EU migrants, re-consider further limitations on strikes and, most importantly, announce significant cuts in public service provision which will reduce the opportunities for active state activity in vocational and vocational education and crucially, curtail or severely limit the enforcement activities, which are identified by the contributors.

References:

- CCA (2009) Migrants' Workplace Deaths in Britain, report in association with Irwin Mitchell, March 2009.
- Harvey, M. and Behling, F. (2008) The Evasion Economy: False Self-Employment in the UK Construction Industry, a report for UCATT.

Introduction by Jan Cremers, ESRC seminar, Northumbria University, 14th April 2010

The free movement of workers in the EU – risks and challenges?

Social legislation and jurisdiction

If we look at the development of the social policy in general and the social legislation and jurisprudence of the last twenty years, an important shift in reasoning can be observed.[1]

The basic principle of the famous European model was the respect for the well-balanced regulatory framework for social policy, including social security and labour standards that existed in the EU Member States. This regulatory framework was characterised by a mixture of labour legislation and collective bargaining and, as this mixture was different in every country, European social policy was also about how to live and deal with that diversity.

Collective bargaining as such was seen as a constitutional right (and in some countries, it had indeed the same status), not marginalized as so-called secondary legislation.

Rules applicable for posted workers

This principle of respect for the national social policy frame was applied as the EU legislation on working conditions for workers temporary posted to another Member State was concluded. There was a hard core of minimum prescriptions formulated and, next to that, Member States could decide on general mandatory rules (or public policy provisions) applicable within their territory as long as these rules did not lead to discrimination or protection of their market.

The Posting of Workers Directive (96/71/EC) provided a possibility to apply, in a non-discriminatory manner, conditions of employment that can be seen as public policy provisions. In earlier court cases (Arblade) public-order legislation was defined as provisions that are crucial for the protection of the political, social and economic order. We always thought this an interesting statement that seemed to widen opportunities for national regulation. But it was later on used to restrict the possible derogation as the ECJ stated that the Member States could not determine unilaterally on mandatory rules. And, according to the European Commission, it is not up to the Member States to define unilaterally the notion of public policy or to impose all the mandatory provisions of their employment law on suppliers of services established in another Member State. This leads immediately to the question: who can decide in this regard which provisions are crucial for the protection of the political, economic and social order in a Member State? In whose hands lies the competence if not with the Member State? Is it the European Court of Justice, the Commission, the Council and what about the European Parliament, the co-legislator?

Social security in cross border situations

Posting was originally introduced in the area of the coordination of social security in Europe. Before the recent revision, the so-called coordination rules were governed by Regulation 1408/71. In 2004 the European legislator concluded revised social security coordination rules (Regulation EC 883/2004) in order to simplify the current procedures and the related Implementing Regulation was concluded in April 2009. The general policy remains, however, unchanged and is based on the principle of application of one legislation at a time in cases of employment being executed in one or more than one Member State. Persons moving within the EU are subject to the social security scheme of only one Member State. The rules aim to guarantee equal treatment and to counteract discrimination by the application of the "lex loci laboris" or the host country principle. This means that, as a general rule, the legislation of the Member State in which the person pursues his/her activity as an employed or self-employed person is applicable. In the coordination framework as formulated, derogation from the general rules is made possible in specific situations that justify other criteria of applicability. Posting is one of the exceptions, as formulated in article12 of Regulation 883/2004.[2]

Posting was initially an exception to the general rules in the field of social security and is now so widely used that it appears (incorrectly) in itself the general rule in cross border situations. For working conditions nothing was regulated.

Working conditions, labour law and labour contracts

The introduction of free movement principles in the European Union created an attractive open market for businesses. Along with the removal of the internal borders in Europe, the Member States and the European Commission started to work out an unrivalled deregulation agenda. After the introduction of the internal market principles we faced a situation where some Member states had clear rules which working conditions to apply for everyone working on their

territory, other Member States had rules with regard to the applicable labour standards and legislation that proved not to be EU-proof. The real problems became manifest as the relationship was construed between the working conditions of workers involved in temporary cross border activities and the free provision of services.
An employment contract is defined by the bond of subordination it establishes between a worker and another party (or an undertaking that belongs to someone else). The worker delivers services to the other party in the form of labour for wages. The other party is traditionally conceived as the owner of an undertaking or business unit, which engages a group of workers in the production of goods or the delivery of services. In this situation it was and is relatively easy to define the employment relationship and to distinguish between a contract *of* service (a labour relationship) and a commercial contract (for the provision of services). To a certain extent all countries had serious problems in the past in defining at national level a regulatory scheme for the demarcation between these two forms: contracts of and contracts for services. But most states reached a compromise through case law and national regulation for the distinction between, on the one hand, employers, genuine self-employed and small entrepreneurs, and, on the other hand, employees.
After the free movement principles were introduced these national solutions no longer functioned adequate. What is well regulated in one Member State can be completely absent in another Member State. The consequences in cross-border situations are risks of regime shopping and social dumping. And of course the equal treatment of workers comes under serious threat. For undertakings this can create a complete distortion of competition and a race to the bottom as the level-playing field is completely missing.

One of the problematic aspects of the control and enforcement of the labour standards for posted workers is the question of the applicable labour contract. In general

terms the Rome Convention defines the rules in this area.
The Posting of Workers Directive stipulates in recital 9 that "Whereas, according to Article 6 (1) of the said Convention, the choice of law made by the parties is not to have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that Article in the absence of choice".
Later on this is further specified in article 2.2 "For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted."
So far the EC end the ECJ only refer to the rules applicable in the home country. The wording in the Posting Directive makes that reference of the labour legislation applicable at least questionable. In my view this is a serious inconsistency in the rulings.[3]

EU Policy

After the introduction of the free market principles (both in the EU and related to the WTO) liberalisation and deregulation became the leading principles for the modelling of our labour markets. And, as far as social policy was concerned, the only question being considered was whether it did not cost industry too dear.
There was not enough political support for an integral enforcement of the working conditions and provisions applicable in the Member State in which the person pursues his/her activity. Recent ECJ rulings and infringement procedures of the European Commission are the expression of a neo-liberal political vision that gives primacy to the supranational principle of the free provision of services. The 'red tape' argument is selectively put into practice. This is apparent in the EC communications and recommendations formulated so far.
In the debate about the narrow interpretation of the Posting of Workers Directive, the European Commission focuses mainly on problems that are related to the national

implementation. The EC notes that the Directive formulates clear obligations as regards cooperation between national administrations, and makes it the responsibility of the Member States to create the necessary conditions for such cooperation. This obligation includes the designation, in accordance with national legislation and/or practice, of one or more monitoring authorities organised and equipped in such a way as to function effectively and to be able to deal promptly with requests of information regarding terms and conditions of employment covered by the Posting Directive. Furthermore it formulates a clear obligation for the Member States to take the appropriate measures to make information on the terms and conditions of employment generally available, not only to foreign service providers but also to the involved workers.
Poor enforcement undermines the effectiveness of the Community rules applicable.
However, according to the European Commission, there are "justified concerns as to the way the Member States have implemented and/or apply in practice the rules on administrative cooperation".[4] The EC defines different administrative cultures, structures and languages, a lack of clearly established procedures and clearly identified actors and a lack of efficient working cooperation between Member States. According to the EC, the way forward is reinforced administrative cooperation between Member States, the provision of easily accessible, accurate and up to date information, exchange of experiences and good practices and the use of an appropriate and well functioning electronic information system designed to facilitate mutual assistance and information exchange between Member States. The recommendations have a relatively "soft" character that demonstrates a misbalance between administrative measures and incentives on the one hand and the lack of strong instruments for control and enforcement on the other hand.

I have always criticized the European Commission policy that

puts all its energy into infringement procedures aimed at the removal of every obligatory notification and registration of the service provider and the workers involved. As a result, control on contract compliance and on the respect for workers rights, a basic element in the fight against bogus agencies and social dumping, is frustrated and can no longer be guaranteed by the Member States.
The European Commission completely neglects, for instance, the problems related to the control of the existence of a labour contract and of the compliance with the corresponding working conditions. The ECJ has exclusively restricted this competence to the country of origin. The country where the work is executed depends on the cooperation of the home country. A reply to requests for information can take some time and the employer and the posted workers have often disappeared. In the latest ECJ rulings, the application and control of host country labour standards are seen as restrictions to the free provision of services. This free provision should not be hindered by additional administrative domestic rules and provisions. This fight against the 'administrative burden' makes systematic and effective control in the host country an illusion.

To end with

The application of the country of origin principle, according to which the Member States cannot regulate the labour conditions of the workers involved in activities of service providers from other Member States, can destroy the balance between the protection of employees on the one hand and market opening on the other hand. If the basic philosophy is deregulation, often proclaimed under the more popular but also misleading terms self-regulation, decentralisation or "tailor made" policy, the result is a divergence between winners and losers. And this also applies to those workers reliant on posted work. Equal treatment is reserved for those that have the possibilities and the means to shape their labour market positions or role in society. For those that stay in the dependent and vulnerable positions,

the outcome is exploitation and marginalization. Or, as stated in an earlier contribution to CLR-News (1-2006): there is nowadays a penetrating insight into the harrowing effects of the "free market" policy. For the first time since World War II we have a serious growth of the so-called working poor. In the name of the market, the welfare state has been demolished, people are being saddled with insecure jobs, and the labour laws and social security systems we have fought so hard to achieve are being under-mined.

The posting of workers in the context of services provision can be seen as a legal form of temporary cross border migration and the Posting Directive was meant to soundly base that free movement of workers. The main principle of Directive 96/71/EC is equal treatment; posted workers are to be treated in the host state as workers who are normally working in that state and undertakings are to be monitored equally when they want to provide services in another state.

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1. In a longer article I have elaborated the different aspects of this shift and the consequences for the equal treatment on site, *Rules on Working Conditions in Europe: Subordinated to Freedom of Services?,* forthcoming in EIRJ, September 2010.
2. Cremers J. *Coordination of national social security in the EU - Rules applicable in multiple cross border situations,* AIAS Working Paper 2010, Amsterdam.
3. Cremers, J. (2008) *Conflicting interpretations of the posting of workers directive*, CLR-News 3-2008, Brussels.
4. Commission Recommendation of 31 March 2008, on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services (2008/C 85/01).

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The Protection of Undocumented Workers in the EU

Introduction

Every day across Europe, Member States patrol their borders for the detection of undocumented migrants, the detention of those attempting to cross the borders without the requisite legal permission and the deportation of those who have no right to enter and remain. The struggle to maintain control over undocumented immigration continues within the State. The concept of an 'undocumented worker' covers, not only the traditional 'illegal alien', who enters the State in a clandestine fashion either by avoiding inspection completely or by utilising false documentation to gain entry, but also those immigrants who enter the State legally but become irregular when their permission to remain expires and is not renewed or is, for any reason, terminated. The concept of an 'undocumented worker' could also include those persons whose permission to be present in the State is perfectly legal but who pursue employment outside of the terms and conditions of this permission. For this reason, Member States find it very difficult to calculate exactly the number of undocumented workers in their State. Estimates vary wildly; for example, it is estimated that there are between 4.5 and 8 million undocumented workers in the EU.[1]

These undocumented workers participate in all the traditional sectors of the economy, from the primary sector, (e.g. fruit picking), to the secondary sector (e.g. construction) and the tertiary sector (e.g. hospitality). They frequently work under substantially worse conditions than their documented counterparts, enduring working conditions amounting to exploitation that can lead to serious injury or even death. The death of eighteen undocumented Chinese cockle pickers in Morcambe Bay, Lancashire, UK on the 6th February 2004 highlighted very

starkly the dangers facing this vulnerable group of workers.
The various unknowns surrounding undocumented workers (e.g. the numbers present in the State, their employers and their conditions of work) present unique challenges to States. How can this phenomenon be addressed? The most traditional legal response of European Member States to the dilemma of undocumented immigration has been the introduction of restrictive legislation in the area of undocumented immigration aimed specifically at preventing and discouraging the employment of undocumented workers. In effect, most legislation dealing with undocumented workers provides for four specific types of action: (1) the criminalisation of undocumented workers and their employers, (2) the introduction of stringent detection mechanisms through the implementation of stricter border controls and inspection mechanisms, (3) the provision of detention facilities for undocumented workers and (4) the implementation of strict deportation policies. The rationale for these actions is based on the concepts of deterrence and punishment. However, daily reports of the exploitation, detection, detention and deportation of undocumented immigrants reveals that these policies alone have been unsuccessful in stemming the flow of undocumented immigration.
Is there an alternative? This short article will argue that the focus of EU Member States legislation in the area of undocumented immigration is largely reactive, the aim of which is mainly to punish the undocumented immigrant and their employer once a situation comes to the attention of the State authorities. This is an understandable approach considering the often clandestine nature of undocumented immigration. The difficulty with this approach, however, is that it is not proactive: it fails to address the 'pull' factors that encourage undocumented workers to immigrate to a state in the first instance. This article will identify one of the 'pull' factors that should be addressed in conjunction with the current traditional measures and will examine how this can be achieved through an analysis of current approaches in

EU Member States. It will conclude that a shift from the traditional policies of punishment and deterrence to the most proactive policy of addressing 'pull' factors is emerging and a combination of these approaches may be the most effective way of dealing with the issue of undocumented immigration.

Identifying and Addressing the 'Pull' Factor

It has been recognised by the EU that one of the most significant 'pull' factors encouraging undocumented immigration to EU Member States is the availability of work in the host state and the willingness of employers to assume the risk of penalisation in favour of making a profit.[2] Where the risk of criminalisation (taking into consideration the potentially low possibility of detection), as a result of hiring an undocumented worker, is less than the profit gained from hiring an undocumented worker, then many employers calculate that the risk is one worth assuming. These employers are willing to hire undocumented workers and this 'pulls' undocumented workers into the State to work.

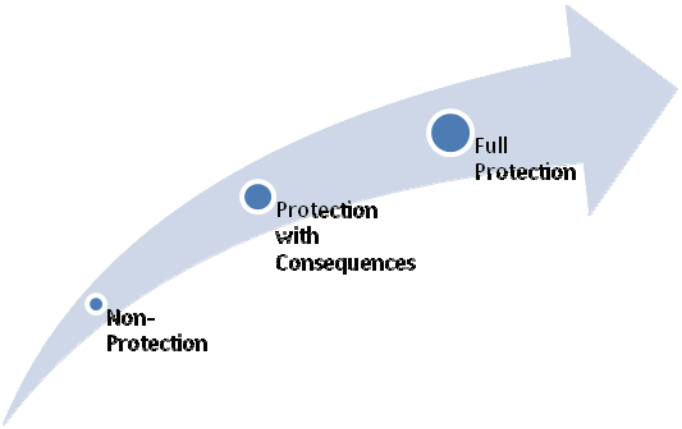
However, what if the risk of being criminalised was greater than or equal to the profit gained from hiring an undocumented worker? Would employers consider that the risk was not one worth taking? If so, this would significantly reduce the availability of employers who are willing to hire undocumented workers and as such the 'pull' factor enticing undocumented workers in the first instance.

Therefore, the best way to address this 'pull' factor is to concentrate on the economics of the employer / undocumented worker relationship. Presently, undocumented workers are significantly cheaper (in terms of remuneration and fiscal avoidance) than their documented counterparts. Undocumented workers can be paid less than the minimum wage (often at exploitative levels) or, as in some extreme cases, do not have to be paid at all, have no employment rights (and so are unable to enforce them against their employer) and the employer has no fiscal responsibilities arising out of their employment. Addressing this economic advantage, which employers of undocumented

workers have as opposed to employers of documented workers, by allowing undocumented workers to assert their employment rights (including their right to comparable remuneration) would consequently make undocumented workers as expensive as documented workers. This would, in turn, reduce the benefit of hiring undocumented workers as the cost, coupled with the potential risk of detection and punishment, could make them too risky an investment for employers.

Addressing the 'Pull' Factor in EU Member States: The Current Approaches

There are three main approaches, which can be adopted by States in relation to the provision of employment rights for undocumented immigrants. Two of these approaches, the 'non-protection approach' and the 'protection with consequences approach', are currently in operation in EU Member States. The 'full protection approach' has not yet achieved support within the EU but, as will be outlined, has the greatest potential to address the 'pull' factor enticing undocumented immigrants to the EU. This diagram illustrates the current models and the movement towards the 'full protection approach'.



1. Non-Protection Approach

a. Outline of the Approach
This is the most common strategy across the EU and is characterised by a denial of all employment rights to undocumented workers. Undocumented workers are considered to be working under an illegal contract of employment (as they are working in contravention of the law) and as such their contract is invalid and unenforceable. As a valid contract of employment is a prerequisite for securing employment rights, undocumented workers are not legally entitled to access employment dispute resolution mechanisms or to enforce their rights.

b. Rationale for the Approach
Two main policy justifications are proffered by States, which advocate this approach - protection and deterrence. The courts believe that by depriving illegally created agreements, and in particular contracts of employment, of their legal effect, they are in fact protecting the sanctity of the judicial process, as well as protecting documented workers and the State from a lowering of standards in the terms and conditions of employment. Secondly, the courts and the legislature feel that such a policy is the only way in which to deter irregular workers from taking up employment on the black market and threatening the security, both economic and national, of the state. In effect, the rule aims to ensure that the parties to an illegal agreement will never profit from their actions.

c. Critique of the Approach
The difficulties with this approach are twofold: first, it does not take into account the moral culpability of the parties (e.g. the undocumented worker may not know that they are undocumented) and, secondly, it allows for unjust enrichment of the employer at the expense of the undocumented worker.

d. Usage
This approach is standard practice, for example, in Ireland, Slovenia, Austria, Denmark, Finland, Luxembourg, Portugal and Sweden, among others.

2. Protection with Consequences Approach

a. Outline of the Approach
States that advocate this approach provide for limited employment rights protection (including in some cases health and safety rights) for undocumented immigrants. Undocumented workers are entitled to enforce these protected rights before a court or employment tribunal (thus theoretically increasing the cost of such workers to employers). However, a claim to a court or employment tribunal will have the effect of revealing the identity and, consequently, the undocumented status of the worker to the authorities. This exposes the undocumented worker to detection by the authorities and subsequent detention and deportation.

b. Rationale for the Approach
The rationale behind this approach seems to be based on a need to address the injustices caused by the 'non-protection approach'. Therefore, under this approach undocumented workers are entitled to the protection of the law and employers should not be unjustly enriched at their expense. However, a second rationale is that, even though the 'non-protection approach' is unfair, cognisance must be given to the fact that these undocumented workers are illegally in the State and should not be immune from the consequences arising from that illegality.

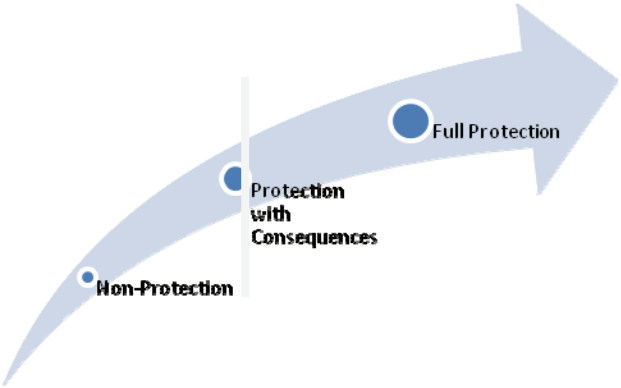
c. Critique of the Approach
The difficulties with this approach are twofold. First, even though employment rights are protected, most States only provide for the protection of rights to equal or comparable remuneration. Other employment rights, such as rights to

the protection of health and safety, are often not included in the protections afforded to undocumented workers. Secondly, the protection of rights is only theoretical as the enforcement of rights is not a serious option for undocumented workers due to the consequences that may flow from their engagement in the employment dispute resolution processes.

d. Usage of the Approach

Some examples of EU Member States that currently provide for the protection of remuneration rights and the provision of a complaints mechanism to enforce remuneration rights are France, Germany and Greece. Spain provides for the protection of all employment rights (including the right to health and safety) and for a complaints mechanism. Italy also provides for full entitlement to remuneration and social rights and a complaints mechanism.

The New EU Sanctions Directive: Where does it fit in?



The new EU Sanctions Directive[3] represents a policy shift from the criminalisation and deportation strategies of previous initiatives to the recognition of the importance of

the 'pull' factor and methods of addressing it. The Directive specifically notes the fact that '[a] key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status. Action against illegal immigration and illegal stay should therefore include measures to counter that pull force'. The Directive, therefore, appears to advocate a 'protection with consequences approach'. The criticisms that can be applied to this approach in other jurisdictions also apply in relation to this Directive. However, there are some other important provisions in the Directive that are worth reflecting on.

a. Rights

The Directive only protects the right to remuneration (Article 6). The Directive provides that undocumented workers can claim for back pay, taxes and social security contributions and any costs arising from making the claim. No other employment rights are protected.

b. Remedies

The Directive states that undocumented workers should have access to an effective remedy as a means of ensuring the full potential of the Directive (Article 13). This is a very important provision as it ensures that the provision of rights is not just theoretical but can be achieved in practice. The Directive allows States to choose the method in which these remedies can be enforced.

i. There is provision for undocumented workers to make a claim on their own behalf to the employment dispute resolution process. This can be facilitated by the Member State through the provision of assistance to undocumented workers in making their complaint and by making a residence permit (visa) of limited duration available to the undocumented worker to allow for legal residence in the State for the duration of the complaints process. (Article 13)
ii. The Directive makes provision for a third party to act 'on behalf of' or 'in support of' an undocumented worker.

There has been some debate surrounding the wording of this section. The words 'on behalf of' could be interpreted as potentially paving the way for States to develop a confidential complaints mechanism through which an undocumented worker could make a claim in confidence and ensure the protection of their identity. However, the Directive does not specifically mention this issue of confidentiality and unless States choose to interpret the Directive in this way, there is no mechanism for the protection of the identity of the undocumented worker.

c. 'Particularly Exploitative Working Conditions'

The Directive provides for the imposition of criminal sanctions in cases involving 'particularly exploitative working conditions' (Article 9). This term was included to address the growing number of incidences of undocumented worker exploitation across the EU. There are a number of important points to be raised in relation to the definition of 'particularly exploitative working conditions' (Article 2).

i. The Directive requires that in order to prove that working conditions are 'particularly exploitative' there must be a 'striking disproportion' compared with the terms of employment of legally employed workers. This concept of 'striking disproportion' remains undefined in the Directive and will be a matter for national courts to decide on a case-by-case basis. This could emerge as being decidedly unsatisfactory as Member States define 'disproportion' in a variety of different ways. What may seem disproportionate in one jurisdiction may not necessarily be so in another.
ii. The Directive provides that the conditions of employment might be 'particularly exploitative' in circumstances where the terms of employment are so 'strikingly disproportionate' that they affect the health and safety of workers or offend against human dignity This illustrates that the Directive takes the issue of health and

safety very seriously as it provides for criminal penalties in cases where breaches occur. However, the Directive does not grant undocumented workers in EU Member States the right to health and safety protections (which are reserved for those in legal employment) or the right to complain and be compensated. This is a striking omission from a Directive that specifically aims to address the issue of undocumented working and exploitation.

d. Application of the Directive

Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 20 July 2011. However, the Directive will not bind or apply to Denmark, Ireland or the United Kingdom (Recital (38) and (39)).

Developing a Full Protection Approach

The problems associated with the two approaches currently utilised in EU Member States and difficulties outlined with the Sanctions Directive illustrate the need for a more expansive approach to this issue. The development of a 'full protection approach' may be the most effective solution to 'pull' factor predicament.

a. Outline of the Approach

This approach would allow for the full protection of all employment rights (including the right to protection of health and safety) for undocumented workers. It would also include the right to a complaints mechanism that does not incur the same consequences that arise from traditional dispute resolution mechanisms (i.e. the possibility of detection, detention and deportation). This could be achieved by the establishment of a confidential complaints mechanism for undocumented workers which could be operated in the normal manner but which would allow a third party to act on behalf of an unidentified complainant. This would necessitate a number of changes to the traditional employment dispute resolution procedures and the introduction of suitable protections for employers

against vexatious claims (the expansion of these issues are unfortunately beyond the scope of this article). The development of such a system could contribute significantly to the reduction of the 'pull' factor enticing undocumented workers into the EU.

b. Rationale for the Approach

The rationale behind such an approach would be twofold: first, it is unjust to allow an employer to profit at the expense of an undocumented worker and this is contrary to public policy and, secondly, such an approach may reduce the "pull" of undocumented immigrants as it makes them a risky and expensive option for an employer.

Conclusion

This short article has emphasised the current shift in policy in legal approaches to undocumented immigration from the traditional policies of punishment and deterrence to the newer policy of addressing the 'pull' factors that entice undocumented immigrants to the EU. One of these 'pull' factors is the availability of employers willing to risk the penalties associated with employing undocumented workers for the sake of profit. One method of removing this factor is to allow undocumented workers to assert their employment rights, increasing the costs associated with such workers and reducing the incentive to employ such workers.

The article analyses the legal positions of EU Member States and their approach to this issue. Most EU Member States do not provide any protections for undocumented immigrants. This increases the incentive for employers to hire such workers. Other EU Member States adopt a protection with consequences approach that, theoretically, should reduce the 'pull' factor but, in fact, due to the consequences of detention, detention and deportation that arise from pursuing the employment rights, does little to diminish the 'pull' of willing employers. The new EU Sanctions Directive also advocates this 'protection with consequences' approach but seems to suffer from the same criticisms as a result.

The article suggests a new solution that addresses the criticisms of the other approaches and advocates a more open and transparent system of protection for undocumented workers. The 'full protection approach' has the benefit of increasing the cost of undocumented workers while at the same time reducing exploitative working conditions by allowing undocumented workers to complain about their conditions of employment without identification. While this new approach cannot legislate for those undocumented workers who do not want to engage with the system, it may, coupled with other more traditional policies, reduce the incentive that employers currently have to employ undocumented workers.

1. European Parliament Press Release, "Europe to penalise employers of illegal immigrants" *Immigration* (22-01-2009 - 09:06) available at http://www.europarl.europa.eu/news/expert/infopress_page/018-46697-019-01-04-902-20090120IPR46696-19-01-2009-2009-false/default_en.htm [last accessed 07/06/2010]
2. See Recital Paragraph (2) of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.
3. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

A capabilities or social approach to health and safety? - The British and Dutch construction sectors contrasted

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Introduction

There is an important debate on different approaches to disability, whether based on a functional limitations, capabilities or social model, which can be applied more widely to the whole field of health and safety and to different groups employed in the construction sector, including migrants. The 'capabilities' model, drawing on the work of Sen (1980), introduced a refreshing and illuminating

contrast to the traditional view of functional limitations seen as the result of a physical condition and implying that the individual had to change to fit society. The model instead conceptualises the disadvantage experienced by individuals in society and addresses the social, economic and environmental barriers to equality (Burchardt 2004). However, in Britain this approach has tended to ignore the sectoral level, unlike, for example, in the Netherlands where additional concerns have been with the extent to which disability is attributable to the workings or malfunctioning of the labour market.

In these concerns, the Dutch model reflects what is termed a 'social' model, which in its pure 'social relational' form, as argued by Finkelstein regards disability as 'the outcome of an oppressive relationship between people with impairments and the rest of society' (1980: 47). In other words, with a social model it is not an individual's functional limitations which disable but society itself. The implication is, as Mabbett (2005:228) argues that: 'different workers should be treated differently to the extent that this is necessary to ensure that they have equal access to employment rights'. In other words, disadvantage is relative to the labour market and that what is (dis)ability for one occupation may not necessarily be so for another.

This article assumes, as with the social model, that enabling and disabling factors are also occupation- and sector-specific and seeks to identify what these factors are in the British case, drawing on the example of constructing Heathrow Terminal 5. It shows how the approach in Britain to health and safety is based on the capabilities approach and how this contrasts with the Dutch approach that is closer to the social model.

The British construction sector: enabling and disabling factors

The UK construction sector is very diverse, employing 1.9m

and contribution to about 9% of GDP, with an important role played by the public client. There are approximately 170,000 firms, few of them large, 40% employing just one person and 11% with more than thirteen employees. 25% of the workforce is non-manual, 75% manual, covering a wide range of occupations, with a high level (36%) of often bogus self-employment, and many workers with little formal training and employed on a casual basis for long hours. Trade unions and employers associations are relatively weak and fragmented; c.17% of the workforce belongs to a trade union and collective agreements cover only 20%. Finally, working conditions are often poor and highly dangerous, with fatal and major injuries three times more than for other industries plus a number of identifiable 'safety critical' jobs.

The workforce too has its own particular diversity, including a very low proportion (2.8%) employed or in apprenticeships from Black and Asian ethnic minority (BAME) groups, though these represent 7% of the economically active population and considerably more (30%) in London and experience higher levels (12%) of unemployment than the white population; women are also virtually absent (0.3% of the workforce). The proportion of those in employment with disabilities is roughly the same as for the whole working population, though there are far higher numbers of labourers (10%) with a long term limiting illness than skilled manual (7%) or professionals such as architects (5%). In occupational health (OH) screening of 1,300 construction workers in the Midlands, 34% were found to have a disability; one in ten bricklayers are also invalided out of the industry (Clarke et al 2009). At the same time, the industry employs many migrants, an estimated 10% of the workforce, with higher proportions in lower positions (Chan et al 2010).

The low employment of women and those from BAME groups is indicative of the exclusive character of the industry, just as its hazardous working conditions are indicative of its

disabling nature (See table 1). The most common causes of injury are avoidable, including: being struck by a moving object; handling, lifting or carrying; and tripping, slipping, or falling from the same level or from a height. Other exclusive and disabling factors include the weakness of the VET system, in particular the difficulties in gaining access to work experience for those training in colleges. Going together with this, is the reliance for recruitment either on agencies or on informal and 'word-of-mouth' practices, making for a tendency to employ 'likes', 'people who fit in'. Poor employment conditions - especially excessively long hours, 'hire and fire' practices and insecurity – are also disabling and excluding, for instance for older workers, as are performance-based wage structures and heavy reliance on subcontracting. Finally, the 'macho culture', lack of employee participation and support to vulnerable groups, often overt discrimination, and rare application of equal opportunities policies only add to a picture of what in many ways continues to represent a craft system. In such a system, access to on-the-job training and experience depends on networking and mentoring, making for clear ethnic and gender obstacles to entry and means of exclusion from 'good jobs', including for migrants, and resulting in intense vertical segregation.

All is not gloom and doom though. The industry also has enabling and even inclusive features, including a great awareness of its inadequacies, of the need for higher skill levels, more training on site and formal methods of recruitment. There are now 'working well together days' and OH schemes on large sites, such as Terminal 5, the Olympics and firms such as Skanska, and careful screening of those in 'safety critical' areas such as steel erectors and slinger banksmen. At the same time, increasing mechanisation (e.g. mechanical lifting of kerbs and flags) and reduction in health risks (e.g. safety nets, replacement of ladders by stairs, provision of eye/foot/hand/head protection and clothing) have helped to improve conditions, as have the introduction of equal opportunity policies and initiatives for change, such

as the Constructing Better Health campaign and 'Respect for People'.

Table 1: Nature of disability of long term disabled in British construction sector

	Construction %	All Sectors %
Problems with arms or hands	7.7	6.0
Problems with legs or feet	13.6	10.7
Problems with back or neck	17.8	16.3
Chest or breathing problems, asthma, bronchitis	14.5	11.1
Heart, blood pressure, or blood circulation problems	15.7	11.7
Stomach, liver, kidney or digestive problems	5.0	5.1
Diabetes	7.5	5.7
Other health problems or difficulties	5.5	8.3
Total	**283,189**	**6,977,097**
Source: Meager and Hill 2006, derived from LFS 2005		

The case of Heathrow Terminal 5

These enabling and disabling factors were all to be observed in the construction of Heathrow Terminal 5, which was also, as now with the Olympic site, characterised by the employment of many migrants. This was a very large project, employing at its peak 8,000, with over a thousand OH assessments per month and about four hundred health and safety inductions per week. One major contractor employed over 2,500 at peak; another in the mechanical and electrical (M&E) area, 400 white collar and 600 blue collar; in 2006, 1,800 electricians, plumbers and heating and ventilating engineers were to be found on site. As with the industry at large, few women were in evidence and the employment of

those from BAME groups relatively low, though there was a concentration of Punjabi carpenters. Of the 7,000 screened in 'safety critical' occupations, 25% were found to have a medical problem, in particular hypertension, and 2,000 identified as having 'lifestyle-related' problems. Many of these problems were associated with an itinerant labour force, consisting of:

- a high number of those classed as 'travellers', that is over 75 kilometres from the site, both in M&E (c. 50%) and construction proper where about 70% were from as far afield as Wales, Scotland, the north and the Midlands
- migrants e.g. German, Polish, Portuguese, Czech and Croatian workers.

In terms of training, whilst efforts were made to establish a Skills Centre and to put in place on-site assessment, actual apprentice levels were extremely low except in M&E. Indeed, one major contractor had a ratio of apprentices to workers of 1:250! Those training in construction in nearby colleges, though representing relatively high proportions of women and those from BAME groups, had little if any chance of obtaining work experience on site, despite the local labour strategies in place which made little impact. Whilst wider skill profiles were sought on site, facilitating mobility and relocation, much of training provision was of a narrow nature and there was little if any in areas of greatest skill requirement such as groundworks or fitting out. Recruitment too relied in practice on 'word of mouth' and agency labour and there was no evidence of proactive implementation of equal opportunity policies. Employment conditions were contradictory, though exemplary in terms of the major projects agreement in place covering terms and conditions, the insistence on direct rather than self-employment, and high trade union involvement. Nevertheless, working hours were excessively long, with many working over 50 hours per week, and there was a lack of pay harmonisation, so that, for instance, those from Eastern Europe earned less. The great effort given to health

and safety, including the Incident and Injury Free programme and the OH scheme, did, however, make this a less 'disabling site', with few injuries and just one fatality (Clarke and Gribling 2008).

The Dutch approach in contrast

Whilst an exemplary site in many ways, Terminal 5 exhibited many of the problems evident for UK construction generally. Despite the forces of inclusion in place, the results, for instance in terms of levels of disability and training, were disappointing and disabling and exclusionary obstacles clearly in place, including long working hours, traditional recruitment methods, inappropriate training and lack of work experience. Many of the same characteristics are also to be found in the Dutch construction sector, but there are important differences, above all a higher qualification requirement and less occupational risk. The VET system is much more comprehensive and qualifications are a key means of entry into the sector. There are also greater social partner involvement, much lower working hours and regulated collective bargaining, including concerning disability risks.

In terms of approach too, the Dutch construction sector represents more of a social model, the result of state intervention and strong union pressure for regulation on working conditions and hours at sector level, including through the use of sector-specific policies and labour covenants. The numbers of those with disabilities excluded or included in the sector are carefully monitored and those who become disabled have to continue to be employed in the firm, albeit at a reduced level depending on the level of the disability incurred. This has meant far greater employer responsibility for health and safety and for employing those with disabilities, as well as an emphasis on the accommodating to the capabilities of workers, including those injured or disabled. In contrast the British approach places more responsibility on the individual than on the

employer, in line with the capabilities model. This is evident from the focus on identifying 'safety critical' areas and 'fitness to practise' and on eliminating risk, rather than on changing work organisation to enable those with disabilities to be integrated, except through 'reasonable adjustment'.

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Jeremy Bevan, HSE

Migrant worker health and safety: a regulatory perspective

The significant increase in Great Britain's migrant workforce experienced over the past few years (especially since further expansion of the EU in 2004) have focused the need for HSE to adapt how it works to ensure that health and safety protection for this particular group of workers gets the attention it both needs and deserves.

For HSE, a migrant worker is anyone who has come from abroad to work within the past five years and is working in Britain legally or otherwise. Five years is typically the time by which workers will have integrated to the point where their risk profile resembles fairly closely that of UK-born workers in the same employment sector. It says something about the rapid rise of migrant worker health and safety as a topic of concern that HSE did not formally define migrant workers as a category until 2006. In 2004, we not only lacked a definition, we also lacked a clear idea how many migrant workers were working in Great Britain, and in which employment sectors. Not that HSE was inactive on the topic: well before the EU's further expansion in 2004, inspectors were encountering migrant workers, and doing what they judged necessary in the individual circumstances that presented themselves, to ensure employers addressed health and safety problems affecting this group of workers. But HSE's approach at this time could be characterised as piecemeal, not particularly structured or coherent, and not tailored to the specific dynamics of the problem. Our approach was based by and large around the twin principles of inspection by topic (for example workplace transport, slips and trips, or manual handling) and advice/guidance for employers on these topics.

One of the things that has remained a constant in our developing approach has been the philosophy that migrant workers are entitled to exactly the same health and safety protection at work as anyone else. Given that, it is appropriate to ask why HSE, or employers for that matter, should do anything different to protect migrant workers' health and safety. They are, after all, doing the same jobs as established, UK-born workers, and the legal framework that protects them is the same. But, as an increasing volume of research reports including McKay *et al* (2006)[1] has shown, there can be important differences between vulnerable migrant workers and non-vulnerable workers where workplace health and safety is concerned.

Surveys conducted for HSE, and by others (including the Institution for Occupational Health and Safety [IOSH]) showed that roughly 20% of employers across all sectors thought that migrant workers they employed were at greater risk of accident or ill-health than UK workers doing the same job. Nine out of every 10 respondents said that the main reason for this greater exposure to risk was communication issues. That in itself, HSE concluded, was reasonable justification for employers to give careful and specific attention to the risks faced by a specific group such as migrant workers when it comes to assessing and managing risks – something that British health and safety legislation and guidance, notably the Approved Code of Practice (ACoP) to the Management of Health and Safety at Work Regulations 1999, specifically recommends. By then (2006), the HSE Board had discussed migrant workers' health and safety twice in two years, signalling the growing importance of the topic, and had supplied a strong mandate to develop the work further, as well as pursue the more tailored approach we were beginning to see was necessary. The policy team confirmed five strands of the work as being of importance: (i) inspection/investigation/enforcement; (ii) advice and guidance for employers; and (iii) a continuing research programme (in this case, focusing on refining answers to questions about migrant workers' relative risk and what should be done about it) represented a 'traditional' approach, a continuation of the ways of working HSE had traditionally adopted to ensure compliance across the range of risks faced by all workers. By contrast, (iv) a focus on what was at the time the relatively unfashionable approach of providing advice and guidance for workers and (v) collaborative work with others were both relatively new and largely unexplored.

The new strands were relatively slow to gear up but by 2007 HSE had published some guidance for employers of migrant workers in the food and agriculture sectors ('Working in the UK from overseas' - http://www.hse.gov.uk/pubns/

indg414.pdf), with an accompanying pocket card for workers themselves (http://www.hse.gov.uk/pubns/indg410.pdf), which remains available in 10 languages. Perhaps surprisingly for a Government department, the pocket card opened with the statement 'UK health and safety law protects you whether you are working here legally or not', a point the HSE Board was persuaded was particularly important to the credibility of our role as investigator of complaints from exploited workers who may be part of (what is currently estimated to be) an undocumented British workforce of some 600 - 700 000. Perhaps not surprisingly, this is a stance, which continues to be discussed with the Border Agency, Great Britain's immigration enforcement body.

For reasons that were not immediately clear, and despite the anecdotal evidence to the contrary, the pocket card did not lead to the expected upsurge in complaints and queries from concerned migrant workers themselves, by then estimated to number (by our definition) in excess of 2 million. They had in any case moved on from food and agriculture into many other work sectors, which illustrates how difficult it can be for relatively slow-moving projects like Government publications to keep pace with fast-changing realities 'on the ground'. Nor was there much take-up of a telephone helpline, despite it having an interpreting service available in over 100 languages, or – from mid-2007 – interest in the detailed information about rights and entitlements on our migrant worker WebPages (http://www.hse.gov.uk/migrantworkers/index.htm), again available in a range of languages, currently numbering more than twenty.

Research carried out for HSE in 2008 on communicating with migrant workers[2] hinted at some of the problems faced, and confirmed the suspicion that migrant workers were reluctant to approach 'the authorities' for advice, preferring to get it from colleagues or friends. Evidence was also beginning to emerge from discussions with HSE's workplace health and safety inspectors, disclosing some of the attitudes migrant

workers had that were probably impeding our work with them even when we had made contact: it was, for example, of limited value to proclaim in our publications (or during visits to workplaces) 'we're here to help you' when workers' experience of the labour inspector in their own countries was of an individual with the power to blame and sack individuals after they had had a workplace accident. This is perhaps why a 2009 construction industry survey suggested that over half the migrant workers interviewed hadn't reported site accidents they'd had to *anyone*.

It's in large part due to these difficulties in 'drawing alongside' migrant workers - against a continuing backdrop of the HSE Board's concern about the possibility of them being at greater risk – that the policy team began to consider how to work more effectively with other Government agencies and stakeholders, concentrating on getting information out to workers through these intermediary bodies.

In the initial stages, this involved putting brief contact information in others' advisory literature, for example the Department for Business and Skills' 'Know before you go' booklets distributed in-country to migrant workers intending to come to the UK to work. This is something we've continued to do, most recently by providing HSE contact information in a joint Refugee Council/TUC publication on employment rights for refugees (2010).

But by 2008, we were exploring ways of working more collaboratively with other departments' programmes. Examples included the employment agency/employment business regulator the Employment Agency Standards (EAS) inspectorate, with whom we carry out joint accident investigations where the injured person is an agency worker, as migrant workers frequently are; and the Gangmasters Licensing Authority, on whose Board HSE is also represented, and whose workplace priorities we help to

set in drawing up with them the licensing standards for labour providers on health and safety.

Given previous remarks, it is perhaps more surprising that HSE also continues to work comparatively closely with the UK Border Agency (UKBA). A joint inspection/investigation pilot with UKBA and others that ended in 2008 indicated that there was scope for better sharing of information and coordinated inspection with other regulators, although restrictions on HSE inspectors' powers sometimes limited (and continue to limit) how much information we can gather on their behalf or share with them. Nevertheless, HSE and a number of other regulators agreed with the UKBA a Joint Working Protocol in 2008, setting out the circumstances in which we would consider acting as 'eyes and ears' for each other. This has had some success, and as far as sharing information with the UKBA is concerned, there are reputational issues for HSE that mean we need to proceed with caution in continuing to seek to make this partnership work effectively.

HSE has however been much more successfully involved in the Department for Business Innovation and Skills' Pay and Work Rights Helpline, which aims to encourage vulnerable (including migrant) workers to approach a range of enforcement agencies with complaints. As with our liaison with the Employment Agency Standards (EAS) inspectorate and the Greater London Authority (GLA), opportunities are being taken as part of this to investigate overlapping complaints where possible, for example on working time (HSE-enforced) and National Minimum Wage (HM Revenue and Customs-enforced). Part of the reason for the relatively high visibility of this Helpline among migrant workers was the use of a tailored, national advertising campaign developed by a specialist media agency.

The pinnacle so far of our collaborative work with other agencies has probably been the agreement of the

Department for Communities and Local Government (CLG) to fund a range of HSE projects to raise the profile of workplace health and safety entitlements and awareness of HSE among migrant workers. This has provided an opportunity both to engage further and more deeply with stakeholder groups representing migrant workers and to develop the necessary trust with the workers themselves. In many ways, it represents the logical conclusion both of our own work to reach migrant workers and our collaborative efforts with others.

A number of these projects have recruited outreach workers from migrant communities. Their knowledge of the target audience, its information needs and preferred ways of accessing it makes them ideally suited for the role. Other projects are focusing on the provision of targeted information through trusted intermediaries, such as community groups. In the North West of England, HSE (as regulator responsible for ensuring domestic gas safety) is working with the Fire Service to provide carbon monoxide detectors to houses in multiple occupation (HMOs), a type of accommodation frequently used by migrant workers.

The London Outreach project was a precursor to the current raft of nationwide outreach worker projects, and has been running since May 2009. Focused on London's construction sector, where migrant workers constitute some 40% of the workforce (compared to 6 – 8% across Great Britain)[3], the project has employed an outreach team consisting of a Pole, a Romanian and a British Asian (Hindi/Gujurati speaker). It is estimated that workers from Poland, Romania and India made up almost a third (32%) of London's construction workforce in 2009 (39% in 2008). The outreach team's brief is to provide information to workers from these communities, to help reduce the workplace vulnerabilities that arise from a complex of factors: poor command of English, possibly inadequate perceptions of risk, lack of knowledge of British health and safety standards, a 'sending country' culture that may tolerate poor health and safety

standards, lack of construction experience, uncertain employment experience (for example if workers are employed through an agency or are subcontracted), and a natural focus on other priorities, such as simply earning money or finding accommodation

The team also assists inspectors and Complaints Officers with investigations, and has been able to help extend the reach of HSE's existing Safety and Health Awareness Day (SHADs) programme into the target communities, as well as helping HSE more widely to learn valuable lessons in effective targeting of vulnerable groups. A full programme of activity over the past 12 months has seen the team distribute an estimated 150,000 wallet information cards, giving details of how to contact both HSE and the Government's Pay and Work Rights Helpline, and also containing a dedicated e-mail address for queries and complaints. The wallet card is now being adapted and expanded to cover additional language groups as further outreach worker projects nationwide gear up. The team has also distributed a large quantity of information through community groups (churches, temples, shops catering for particular communities, and UK embassies, where wallet cards were distributed to migrants queuing to vote in the 2009 Romanian presidential elections), and at events such as Indian community *melas*. A further feature of the team's work has been the extensive use made of migrant language media: London has many migrant language newspapers and there is an increasing number of UK-based websites for migrant communities working here. The team has secured considerable exposure, particularly on Asian community radio stations, and an hour-long discussion/phone-in format programme on Romanian television in December 2009, which drew an interested and appreciative audience of intending migrant workers.

What stage has HSE's work on ensuring that migrant worker health and safety is properly protected reached? It is maturing, but will go on doing so. We continue to engage in the 'traditional' strands of the work – inspection/

investigation/enforcement, advice/guidance for employers, and research. We have just updated our employer guidance with the Information Sheet 'Protecting migrant workers' which applies the lessons learned by employers over the past couple of years to four topics: confusion and unfamiliarity due to workers' inexperience; workers' lack of English skills, which can lead to poor communications and comprehension; competence: the right worker for the job, with authenticated certificates of training; and workplace health and safety cultural attitudes towards health and safety – on the part of both workers and managers. A conclusive answer as to whether migrant workers have more accidents than other workers remains to be found: the current regulatory climate means there is no prospect of enhancing the accident data available to HSE via the RIDDOR accident reporting system, which makes reporting of certain kinds of accident mandatory, but does not require the injured person's nationality or migration status to be disclosed. Our internal data collection systems are now better able to analyse the information that exists on *investigated* accidents, and is providing valuable insight into causal factors for accidents involving migrant workers.

While it is too early to be able to fully evaluate the impact of the London Construction Outreach project, it has clearly helped to 'open doors' to contact with groups that HSE would otherwise not know about or find difficult to gain access to; attendance at events also helps give visibility to HSE and facilitate the engagement process, suggesting that 'it's about more than just language': such an intensive approach can create real networks. It can also boost significantly the capacity of frontline inspectors to enforce effectively on behalf of workers in a way that was not previously possible, since outreach workers' language skills allow much greater on-site exploration of problems and concerns raised by workers, and reduce reliance on the employer's 'version of events'. There are of course challenges to ensuring that such projects leave an effective

legacy, and our hope is that both the London project and the current round of CLG-funded Migration Impacts Fund projects elsewhere in England will further cement relations at local levels with all sorts of (in many cases very energetic) stakeholders – churches, temples, community groups, Trades Unions at regional level. This could extend our 'reach', and make it easier for workers to approach us confidently, even in hard to reach subsectors like, for example, hand car washing in which we have recently carried out a focused and intensive regional inspection campaign.

Sharing of information with other regulators will in all likelihood continue to evolve, with the aim of making it harder for unscrupulous employers to get away with exploitation. Further (but as yet unspecified) close cooperation between workplace regulators is also likely, in view of future resource pressures on Great Britain's public sector.

This paper has suggested that HSE's policy on the protection of migrant workers is about growing, indeed evolving, the right mix of policies and tools to ensure migrant workers get the protection they're entitled to, alongside every other worker. Worldwide demographic shifts and globalisation mean that this approach is likely to remain fundamental to our regulatory approach for some considerable time to come: it is therefore entirely appropriate that HSE's recently-unveiled strategy recognises, this, calling as it does for the practice of health and safety to 'continually evolve to accommodate diversity within the population'.

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1. McKay, Sonia, Craw, M. and Chopra, D. (2006) *Migrant workers in England and Wales: an assessment of migrant worker health and safety risk* (HSE).
2. Although the research was not published in HSE's Research Reports series, the conclusions are summarised at http://www.hse.gov.uk/aboutus/meetings/iacs/coniac/260309/report-vulnerable-workers.pdf (para. 26).
3. Based on a survey on behalf of HSE by the British Market Research Bureau, and regional employment data from the Office for National Statistics (ONS)

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The growth in migrant worker injuries in the UK workplace: A solicitor's story

We know that on the 1st May 2004 the European Union (EU) witnessed its most challenging enlargement, with the accession of eight central and eastern European member states, commonly known as the A8 countries. What is also known is that many of these workers suffered poor conditions of employment with some faced by racial harassment at the workplace and in the community after they came to the Western part of Europe (TUC 2004; Carby-Hall, 2007; Fitzgerald 2007). What is less well known is that these poor conditions have involved injuries at the workplace, sometimes fatal, often as a result of employer neglect. With regard to this CLR News 4 (2009) carried an important review of the recent Centre for Corporate Accountability (http://www.corporateaccountability.org/) investigation (CAA 2009), funded by Irwin Mitchell, into migrant workplace deaths in Britain. This investigation is, as readers may be aware, a harrowing read, discussing many fatal deaths in construction over the recent period. Given the above it was essential that a senior figure from Irwin Mitchell was present at the Northumbria University School of the Built Environment ESRC seminar in April on Health and Safety (H&S) in construction. A partner of the firm, Roger Maddocks, agreed to do this and presented a thought-provoking piece on migrant worker workplace deaths in Britain.

What was clear from the presentation was that the labour market position of many A8 workers, many of course self-employed in construction (Harvey and Behling 2008), can mean that they are more open to H&S abuses than indigenous workers. Roger Maddocks finished by noting that it was not until April 2008 that the UK Health and Safety Executive (HSE) began to collect information on the nationality of workers who have had fatal accidents at work. More significantly, this is still not done with regard to

those workers injured at work.
Irwin Mitchell itself is the fourth largest law firm in the UK dealing mainly with personal injury claims. Its national network of offices includes Newcastle and it was here that my loose association with the firm began. At the time, around 2006, my work was ongoing with the construction trade union UCATT and Polish community links had been established (see Fitzgerald, 2006 and 2007 for a fuller discussion of this work). Through this loose association what has become clearer is, as some of the Irwin Mitchell partners often say, that the best approach to dealing with H&S issues at workplace level is via union membership. Irwin Mitchell approached me and asked for collaboration to strengthen their already developing Polish community links. What was clear from our early associations was the commitment of those few at the firm working with migrant and immigrant communities, not just for business reasons but also for wider 'sword of justice' issues when migrants have little protection. Their migrant worker casework has risen since the accession and one main group has come to the fore. According to the CCA investigation (CCA 2009), 50% or more of the fatalities in the UK construction happen to workers coming from Central and Eastern Europe (mostly Poles). The investigation reports poor introduction and instruction on site, problems with languages skills and overall neglect. Polish construction worker fatalities account for approximately forty-four per cent (8) of migrant construction deaths since May 2004. Given an increasing number of Polish enquires around personal injury claims, the firm employed a Polish speaking dedicated lawyer and set-up a Polish language information telephone line, as well as having some of its website in Polish. However, as a partner pointed out, just because migrants have poor working environments this does not mean that they will report incidents, often fearing for their jobs. Significantly, over ninety per cent of the firm's casework consists of minor injuries such as fractured arms or minor permanent injuries with an average settlement of below £10,000. Also significant is that the vast majority of cases do not go to

court, which means of course that bad employers can continue to be bad employers!

On a personal note, one of the more horrendous cases that the firm has assisted with came to my attention when a UCATT full-time official phoned to ask me to contact the firm. Why? He was called to a building site and found that a Polish migrant worker had been fatally injured. If this was not bad enough, the employer had relinquished his responsibilities by phoning the worker's family in Poland, breaking the news and telling the family to come to re-claim the body. This of course does not seem possible in our 21st century of global communications and movement of services (or does it fit into neo-liberalism?), but I can assure the reader that it took place. Irwin Mitchell and UCATT of course followed this through and did obtain some form of compensation for the family.

What is chilling about this story is that the union and a solicitor had found out about the case and been able to help; however, what we might ask is the reality for the increasing numbers of bogus self-employed and undocumented workers on our UK construction sites? Why again, we might ask, has the UK gangmasters licensing authority not yet been extended to construction? Is there no shame?

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Discussion

A case study of labour relations in the North East of England

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Abstract
Historically, labour relations have been a concern in the North East (NE) of England. This short paper reports on a case study of an oil and gas company based in Aberdeen, with worldwide operations, which was commissioning the construction of part of its offshore platform to companies based in the NE of England. Prior to commissioning its work, the company's aim was to understand labour relation issues in the region which would then provide a basis for informing its decision when selecting contractors for its project. Most importantly the company aimed to establish the extent to which labour lockouts pose a risk to the project. The research is based on a literature review and official statistics. It was found that the risk of labour lockouts in the NE of England construction industry appears less likely when compared to other industries. Nonetheless, the risk of poor labour relations should be managed effectively given the time constraint of the project because any disruption, as a result of any form of industrial action, is deemed unacceptable by the company. Moreover, the company needs to formulate an appropriate approach for effective management of labour relation issues.

Introduction

The renowned Miners' Lockout and General Strike of 1926 have marked the history of labour relations in the North East (NE) of England, with its defeat helping to reshape labour relations in the region in the direction of more accommodative practices.[1] As a reflection of the region's "troubled" labour relations history, to the extent that it was labelled a "problem region", it comes as no surprise that the NE has the second highest level of union membership in the UK (after Northern Ireland) with approximately 40% of

workers belonging to a trade union in the NE, as opposed to approximately 20% in the South East[1,2,3]

Such a high level of union membership makes the region more prone to the risk of industrial disputes and potential work stoppages. This is evident in the recent 'Labour Disputes' statistics[4] which show that the NE of England reported the highest levels of work stoppages[5] as a result of industrial disputes. However, looking at the breakdown of stoppages by sector, it appears these are highly concentrated in the public administration and defence sectors with '51 days lost per 1000 workers' as opposed to 'nil or negligible' numbers of days lost (as a result of stoppages) in the construction industry (*See appendix)*. Statistics therefore suggest that the risk of work stoppage in the construction industry in the NE of England is not high.

Whilst work stoppage is an extreme form of industrial action, other forms of industrial action (that would not necessarily result in work stoppage) could potentially impinge on the progress of construction projects, such as work-to-rules and go-slows. Such actions emanate from workers de-motivation and lack of job satisfaction. Thus, the onus is on the client to identify labour relations issues early-on in the project and to put provisions in place from the outset of a project to minimise the risk of any form of industrial action (which is crucial if a project is working to a very tight timescale). Such issues will be briefly highlighted followed by a brief discussion of the approaches that could be adopted by a company for addressing them. Whilst these issues were succinctly presented as a set of practical recommendations to the Aberdeen-based (oil and gas) company, any company could consider them as a good starting point if it is attempting to address labour relation issues.

Labour relations issues

- **Pay agreement** is paramount given that work stoppages are primarily caused by pay-disputes. Decreasing the likelihood of pay-disputes could be

achieved by:

- **A collective agreement**[6], negotiated to agree a level of pay from the outset of a project. Such agreement could form a part of the contractual arrangements which should be underpinned by the philosophy that systems and procedures should bring the objectives of all parties in-line with the project objectives.

- **A pay and productivity bonus scheme** could be introduced similar to the Teesside Industrial Bonus productivity scheme (TIBS) which covered mechanical labour during the construction of a Biochemical plant in Teeside. Most recently on major construction projects, such as Heathrow's T5, bonus schemes have proved successful and resulted in productivity gains, improved industrial relations and collaborative team working. Indeed if workers are well-incentivised then they will do their best for the benefit of the project.

- **Good working conditions** are important to consider because these could be a potential source of motivating workers and thereby enhancing performance. The Hawthorne studies have indicated that improved working conditions may indeed enhance workers' productivity performance. On the other hand, poor working conditions could be detrimental to workers morale and may create a culture of 'Them' and 'Us' in organisations. This notion would not be in the company's best interest let along the negative publicity created (see Talking Union, 2009)[7] which could be detrimental to its image and may affect future operations, i.e. winning less contracts.

- **Health and Safety** (H&S) is crucial in the NE of England construction industry. Recent research from UCATT indicated that there was an increase in construction deaths in the region.[8] Recently, the Health and Safety Executive (HSE) has encouraged workers to report any

health and safety violations in the workplace.[9] Having a third party to enforce H&S standards is not an optimal solution. Not only may this expose the company's poor H&S practices (which could be to the detriment of its reputation), but it may also trigger potential conflict between the company and its workers. As such, it is important that adequate H&S practices are implemented and maintained throughout the project. After all, if workers feel safer they will have a better chance of performing to their full potential.

- **Duration and patterns of working hours** should not be at the expense of the well-being of workers. This becomes particularly crucial when considering working hours in the UK as generally more than in the rest of Europe[10] and not necessarily as productive.

  - ✔ It is important to discount the notion that longer and unfriendly working hours will lead to a better productivity performance. In fact, research suggests that extended working hours result in lower productivity levels on construction projects.[11]

  - ✔ From a different perspective, extended working hours could be at the expense of workers' well-being and family life and it comes no surprise that the construction industry has one of the highest divorce rates when compared to other industries.

- **Staffing and work allocation** should be reflected in the duration and patterns of working hours. So, if the project is understaffed (whether because of skills shortages or with the intention of saving money), then it is more likely that workers will work extended hours. This approach is too risky for a project that is working towards a tight deadline. Thus, it is important to ensure that adequate levels of staffing has been well-planned in advance and work allocation decided accordingly which

could be achieved through a formal Human Resource Planning (HRP) exercise.

- **Fringe benefits and team bonding** are essential so that workers can establish a sense of belonging to the project. For example, a gala could be staged in order to produce some cohesiveness within the total work-force and a sense of identity with the project. This becomes particularly important when considering the temporary setting of the project.

How to address labour relations issues?

The Aberdeen-based (oil and gas) company has incorporated the aforementioned labour relations issues in its tender documents to establish to what extent short-listed contractors have provisions in-place for addressing these issues. This has informed the company's selection process for sub-contractors. It has to be noted here that the company was proactive in its attempts to address labour relations issues. They approached trade union representatives directly, GMB, in an attempt to gain guidance. The union representatives were impressed as this seemed too good to be true. A big oil and gas company approaches and consults with trade unions to address their concerns from the outset of a project! The company had to make the choice of being forward looking (which should be applauded) as it cannot afford any delays on its project. What the company did could be regarded as an informal approach, not legally-binding unless the issues are incorporated as part of the contractual agreement. This raises questions of whether other approaches could be adopted to effectively deal with trade unions in order to address labour relations issues.

In the light of the literature[12], there are four approaches to managing labour or employee relations, namely: *Adversarial* - the organization decides what it wants to do, and employees are expected to fit in. Employees only exercise power by refusing to cooperate; *Traditional* - a good day-to-day working relationship, but management proposes and the

workforce reacts through its elected representatives; *Partnership* - the organization involves employees in the drawing up and execution of organizational policies, but retains the right to manage; and *Power sharing* - employees are involved in both day-to-day and strategic decision making.

The case of the Aberdeen-based (oil and gas) company fits more under the category of an informal partnership agreement. However, such a partnership agreement could be formalised under the National Agreement for Engineering Construction Industry (NAECI). The NAECI is a comprehensive framework for managing labour relationships to ensure completions to time and budget, which is already in-place for major project in the NE of England, such as 'Ensus Bio-ethanol, Teeside'. The NACEI is administered by the National Joint Council for the Engineering Construction Industry[13] (NJC) and is a legally-binding agreement which has proved successful on a number of projects. In order to implement the NACEI, a company should become a member of the Engineering Construction Industry Association[14] (ECIA) who could then act on behalf of the company in brokering an agreement with the trade unions (Unite and GMB). However, this may involve an additional cost (on-top of ECIA membership fee), for instance an independent auditor and levy fee. The Aberdeen-based (oil and gas) company did not opt for the NACEI as it only had a one-off project in the NE of England.
The benefit of a formalised approach is that it can provide a framework for guidance. This becomes particularly important given the uncertainty as to the best approach to adopt for dealing with unions when considering the multiple number of trade union bodies available and the complexity of the issues involved. At the same time, using an intermediary as opposed to dealing directly with the union might signal that there is mistrust when dealing directly with the union.

Conclusion

Whilst the risk of labour lockouts in the NE of England construction industry appears less likely than for other industries, the risk of poor labour relations should be managed effectively given the time constraint of the project commissioned by the Aberdeen-based company. In summary**,** experience suggests that workmen have four significant needs – but these needs should be confirmed with workers prior to the project:[15] 1) Fair payment: not less than similar crafts on other sites or other crafts on the same site; 2) Some control over how much time they spend at work and when they spend it; 3) Proven and visible respect for craft pride and competence; and 4) Opportunities for friendship with other workers.

Poor labour relations can potentially put a project in peril. As such, labour relation issues should be addressed from the outset of a project. Indeed if workers are happy, well-motivated and feel safe in their workplace they will be more productive which will be to the benefit of a project and the company. Finally, a company has to make a choice as to what would be the most appropriate approach to adopt for effective management of labour relations. Regardless of the situation a company should always opt for a more engaging approach towards trade unions, namely partnership or power sharing, as opposed to adversarial or traditional approaches. After all, are people not the most important asset for an organisation?

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5. The statistics cover stoppages of work in progress in the UK during a calendar year caused by labour disputes between employers and workers, or between workers and other workers, connected with terms

and conditions of employment. These include 'lock-outs' by employers whereby organisations close their sites and will not allow workers to participate in their normal working day, and 'unlawful' or 'unofficial' strikes.

6. Section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 defines a collective agreement as "any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations." It is very unusual for the terms of a collective agreement to be legally binding, but they can be enforced if they are "incorporated" into the contract of an individual worker. This is known as the "normative effect" of a collective agreement.
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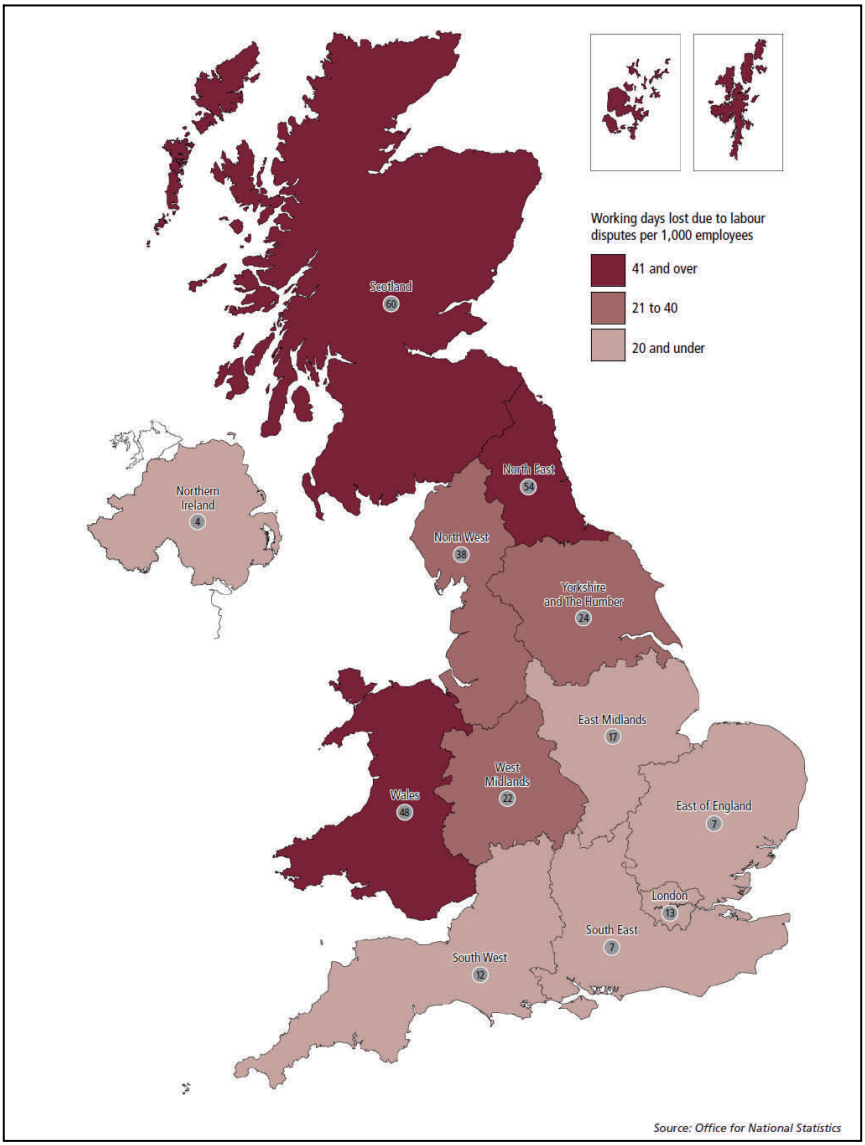
Appendix: A map of 'Working days lost per 1,000 employees,all industries and services, 2008



Reports

Summary report - Paul W Chan

The economic crisis: a disaster for trade unions or an opportunity for revitalisation?

Elewijt Centre, Brussels, 4 and 5 May 2010

Day 1: Focus on diagnosing the crisis

Sam Hägglund welcomed delegates and introduced the workshop, reiterating the origins of the financial crisis and the adverse consequences on bi-partite and tri-partite arrangements across the globe. Sam stated that the purpose of the workshop is to debate on the future of trade union organisation in adapting to developments arising from the economic crisis. Linda Clarke went on to explain the format of the workshop. She argued that the root of the crisis is the inequality of society and the inability to distribute the social product, and this is very evident in the construction industry. Linda stated that the two-day workshop is split into two main parts. On the first day, the focus is on diagnosing the problem, particular the changing nature of the employer, the dissolution of traditional employment relations that serves only to disrupt the organisation of production, and the loss of control over entry into the sector. On the second day, the focus shifts towards discussing strategy, especially in terms of how the root problem of inequality can be addressed. Of particular interest at the workshop is the role of the state in controlling entry into employment, occupations and wage grades, the future shaping of employment relations and labour representation.

From crisis to catastrophe: trade unions in a free-fall economy - Charles Woolfson

Charles Woolfson started his presentation by tracing the transformation of the Baltic States from communism to free market ideology and showing how countries like Lithuania and Latvia have moved from a position of "economic miracle" to position of "hard landing." Charles argued that the bubble burst of the Baltic States was inevitable,

regardless of whether there was a global financial crisis. The growth in personal consumption following the boom was considered by Charles to be unsustainable, financed largely by Swedish banks. The sharp economic decline (in excess of -17% growth rates in GDP in 2009) has totally destroyed the housing and property market. The decline has also brought about a severe rise in unemployment (especially youth unemployment) and falling wage rates (up to 30% cuts in public-sector wages). At the same time, it can be observed that there emerges a growth in part-time employment in the Baltic States, which implies a shift away from traditional forms of the employment relationship. Furthermore, projections by the IMF suggest that the Baltic States will struggle very slowly to recover from the economic recession. Charles argued that citizens in the Baltic States have two options: an increase in public voice and/or a new wave of emigration. He noted that the crisis has certainly created high levels of public dissatisfaction and increased the propensity to protest, whilst encouraging the destitute to move into the black and grey economies in countries with a more optimistic relative position. So what are the opportunities for trade unions? Charles noted the sharp decline in trade union density in the Baltic States (around 5-8% in Estonia and Lithuania, and around 15% in Latvia). However, about 25% of the workforce remain unclear as to whether joining a trade union would be beneficial or not, simply because many (nearly half) do not understand the role of trade unionism in contemporary society; notwithstanding a vast majority (around 80%) felt that trade unions were still needed at the workplace. Therefore, Charles argued that this represents immense opportunities for trade unions to assert and renew their role in maintaining social cohesion and re-establish social dialogue (especially at enterprise level) in today's society.

Discussion: Jan Cremers sought to clarify whether political systems and ideologies have a role to play in emerging trends in the Baltic States. Charles responded by saying that there

were clearly policy developments (e.g. changes in labour law to encourage flexibility) and deterioration of social dialogue that did not help in the situation. Rolf Gehring agreed with the contents of the presentation but wondered what tools and devices can be practically deployed by trade unions, especially given differences in cultural and political contexts. Jean Luc Plumelet commented that in France, union membership is on the rise and becoming increasingly radical. Jean Luc also argued that in order for trade unions to effectively engage in discussions about a strategy to adapt to the crisis, they must understand how things work today including discussing openly about developments under global capitalism. Dan Cristescu was interested to find out whether there were any peculiarities in the operations of trade unions in the Baltic States.

In response, Charles noted that the emerging troubles are a result of an increasingly atomised society. Social protest movements have historically intensified at the beginning of an economic upturn, when people realise there are problems with distribution as a result of the inadequacy of the political leadership. Therefore, there is a vital role for trade unions to be involved, and the French are typically exemplary in terms of organising protest movements. Ernst-Ludwig Laux asked if there should be more transnational cooperation in the trade union movement to help countries with weaker trade unions to strengthen their role in organising the social movement. John Grahl asked about the role of the European Union and how the Baltic States are dealing with emerging ethnic tensions. Linda Clarke queried the 'immiseration thesis' put forward by Charles, suggesting that the statistics tended to disguise disparities in wage and employment relations, such as the decline in old relations and the emergence of new. Surely one needs to focus more attention on identifying disparities and more closely scrutinise new forms of wage relations? Bernd Eisenbach wanted to clarify the nature of class structure in the Baltic States and how relevant this is in the context of the developing economic crisis. Charles closed the discussion by suggesting that the crisis has provided a

dangerous recipe for the rise of the right-wing, neo-fascist movement because of a breakdown of solidarity and a move towards individualism and a decline in social accountability.

Discussion in working groups

The mutation of the employer - Jörn Janssen

Introduction: Jőrn argued that one should not focus on the consequences of the financial crisis, but on the reasons that led to its onset. There is a marked shift away from trade unions being proactive in calling for regulation of the labour market to an era where employers appear to be on the offence and trade unions taking a more reactive stance. Jőrn asserted that distinctions between capitalist and socialist models of production represent false dichotomies, since the shift towards neo-liberalism (epitomised by the breaking down of the 'wall') means that it is very difficult to return to such categories of the past. The value of financial assets is four times the global annual product (i.e. the bubble), and there are a number of worrying trends, including enormous disparities in wage levels across the world, a decline in regulated rates of pay, the reconfiguration of the production process resulting in the relative anonymity of the owner, the casualisation and ambiguity of the employment contract, and disproportionately high levels of property values. Jőrn put forward a number of points for reflection, including the role of shareholders in the employment contract, the clarity of what constitutes the employer, the employees' share of the social product (collective bargaining versus concessionary bargaining), and the responsibility for vocational education and training (VET) given the breakdown in stability of traditional notions of the employer.

Discussion: Key issues discussed included:

Focussing solely on the employer-employee (profits-wages) relationship is inadequate without deeper analysis of the role of capital.

This crisis has brought the distinction between financial product(ion) and traditional production to the fore, where

the former (i.e. economy driven by financial markets) bears no relation to the latter (i.e. the real economy).
The mutation of the employer is inevitable because of changes in societal institutions; there is a paradigm shift away from the classical individual entrepreneur who employs to one that is driven by a more autonomous, dynamic capitalist. So, whereas the former places more value on traditional forms of the employment relationship, the latter focuses more on serving the interests of financial markets rather than taking a long-term view on investments. One plausible explanation for this is the shift away from a production economy to a consumption economy, which serves to disrupt traditional notions of organising production.
Traditional categories of the employment relationship are inadequate to capture the complexities associated with the construction industry, given the variety of types of companies operating in the sector (e.g. SMEs, family businesses, MNCs) and the increasingly global nature of firm ownership.
There is certainly a decline in private responsibility over working conditions such as unemployment and pensions to the public sector, which in turn would be borne by the individual taxpayer. Therefore, this represents a clear shift away from the collective to the individual.
These changes demand new ways of thinking about labour organisation (e.g. transnational cooperation, integration of migrant workers, compulsory membership etc.). So, the trade union movement must seek to transform worker representation beyond simple discussions about membership.

Impacts on employment conditions (How is the financial crisis related to employment conditions?) - Halvor Langseth
Introduction: Halvor reiterated that the crisis has resulted in the deterioration in employment conditions. Even the Norwegian *Akkord* system has been hit by the crisis. However, there are disparities, especially in terms of the distinctions in pay and working conditions between

indigenous and migrant workers. Furthermore, to exacerbate the matter, there are distinctions between those within permanent employment arrangements and those who are self-employed or agency employment. This is especially critical given different terms and conditions when it comes to negotiating conditions. Consequently, migrant workers tend to suffer most because of often less favourable terms and conditions attached to their employment. Many have returned with no compensation. The lowest pay did not increase in the crisis. Halvor stated that there is a compelling relationship between poor pay and poor working conditions. He posed a few points for reflection. To what extent can future strategies help safeguard against social dumping? And how can pay and working conditions generally be improved? What can be done about the rise of the black and informal economy?
Discussion: Key issues discussed included:
Country reports were intended to identify critical trends for discussion. For instance, the rise of precarious work across European countries is a worrying trend. The impact of the financial crisis on migrant employment was also recognised, as well as the downward pressure on wage levels.
Interesting developments in Italy in terms of regulating entry into the industry by means of a licensing scheme were described.

Impacts on trade union's organisation (How is the financial crisis related to labour organisation?) - Gunde Odgaard
Introduction: Gunde Odgaard noted that the decline in trade union density has been a perennial problem, whether there is a financial crisis or not. He argued that the critical challenges for trade unions are two-fold: how can they succeed in recruiting new members and how do they retain them? However, there is a tension that needs to be resolved. Trade union membership has often been characterised by the core of the workforce, yet the core workforce has been shrinking over time. In times of crisis, there are a number of critical

points that are worthy of reflection. Gunde explained that these include: preventing people leaving the construction industry in times of rising unemployment in the construction industry; and securing the future for the younger generation (e.g. through apprenticeships, training, and youth employment in the construction industry). Young people cannot find apprenticeships and this will result in a lack of qualified labour. He argued that the nature of trade unions needs to be transformed and suggested that a good starting point would be for trade union officials to be more hands-on and proactive at the workplace and to go into the colleges/ schools.

Discussion: Key issues discussed included:

The financial crisis was a wake-up call, but that the alarm clock was on snooze, i.e. trade unions were still suffering from declining union membership. Trade unions are finding new ways of engaging with youth, self-employed, migrants etc. There is a need for trade unions to create space for these non-traditional members to express their trade union activism, beyond that provided by current structures. There also needs to be tangible benefits for members to participate.

Trade unions need to take a pragmatic approach to get members together to solve problems.

Cross-border activities need to be intensified. There are certainly opportunities for cross-border learning and learning from how other trade unions can better organise.

There is a need for trade unions to adapt to the new world order, and questions need to be raised regarding the relevance of old categories of how trade unions organise (e.g. by trade or political affiliations etc.).

Day 2: Formulating strategies

Plenary discussion

Jean-Claude Le Douaron started the second day with an introduction to a new web-resource that can provide researchers and trade unionists with information on worker

participation issues in Europe. This web resource will enable interested parties to compare industrial relations issues across Europe (http://fr.worker-participation.eu/). Sam Hägglund reiterated the purpose of the second day, which is to take the discussions on diagnosis further to explore what can be done by the trade union movement.

Introduction to the workshops

Entry into employment, occupations and wage grades - Linda Clarke

Introduction: Linda Clarke noted that it is increasingly difficult for young people to gain access to employment and training in the construction industry, and that ethnic minorities tend to suffer acutely in this respect. She argued for a need to have clearer transition routes, clearly defined occupations at European level, greater control over the recruitment and development of skilled and qualified labour, maintenance of a social wage and removal of the status of unemployment, and the introduction of more transparent means of entry into the construction industry.

Discussion: Key issues discussed included:

The cost to society of an unskilled person is approximately €700,000 per person over a lifetime. This cost is based on the differentiation between skilled and unskilled people in the Danish context, including the pressure on tax, social welfare and benefits. This conservative estimate does not consider the costs associated with increased propensity to illness and criminal activity. Furthermore, increased skills levels remove the supervision burden.

However, the problem is not about lack of training participation. The challenge is to get the trained persons into employment. Nonetheless, there are benefits associated with retaining young people in the education system if they do not have employment. Furthermore, it has been well acknowledged that an increase in the proportion of the skilled workforce greatly improves productivity.

Questions were raised regarding the quality of the training and education, and the issue of image attached to

apprenticeships, particularly in relation to the construction industry. There are opportunities for trade unions to engage with youth in schools/colleges to encourage trade union membership and to dispel the myths about the construction industry.
Trade unions can get involved in learning good practices from other countries (e.g. large training centres in the US, bilateral bodies and job banks, having a register in terms of what skilled people do, a licensing scheme that clarifies the skills requirements associated with the occupation etc.). There are opportunities for creating legal requirements to establish skills requirements attached to occupations, perhaps (or not) at a pan-European level. In any case, the fundamental message for trade unions is that there is a pressing need to take control of the labour market. One critical opportunity is how trade unions can effectively engage with the EU2020 plan (with a focus on climate change and sustainability) and how the construction industry can be brought to the fore to benefit from this agenda. An issue on CLR News with a theme on "Green Skills" would be a useful start.
In terms of wage levels and collective agreement of wage grades, a discussion developed around the extent to which wages are related to qualifications levels and skills across Europe. Interesting comparisons were made across occupations (e.g. differentials between carpenters and concretors etc.), and across countries (e.g. the *Akkord* piece rate system in Denmark and time-based system in Germany).

Partners in a democratic process of employment relations - John Grahl
Introduction: John Grahl stressed that the premise of the workshop is the continued / intensified destabilisation of the employment relationship (i.e. shifts towards more atypical employment relationships). However, he noted that the challenge is to discuss what can be done regarding the consequences of such destabilisation. He noted that the destabilisation of agency is evident on both sides - the

employee and the employer. John also argued against comparative work in Europe because there is a tendency to search for exceptions to solve general problems. He maintained that what is needed is a better framing of general solutions to general problems. Solutions such as corporatism or coordinated market economies are no longer adequate categories given the evolution of markets and the effects of destabilisation.

Discussion: Key issues discussed included:

There is a need to return to basics and to consider reinstating a simple contract of employment that safeguards working conditions when they move from one job to another and from one country to another.

Concerns were raised regarding trends in the distribution of wealth, and the discussion concluded with calls for greater control and supervision over more equality in redistribution. There is certainly a need for more effective social dialogue and to ensure that all parties take a full part in the negotiations themselves, given the multiplicity of employment relationships and ever closer ties between production, capital and ownership.

However, it was recognised that major hindrances to effective social dialogue are the political complexities found in different countries. Nonetheless, redistribution can be done effectively (or not) through the tax system and so trade unions need to engage more (and more effectively) at the political level as far as possible. One useful lever would be to use public sector projects to secure a fairer and more equitable set of working conditions.

There is a shift towards increasing neo-liberalism at both political and social levels. Taxation on labour has increased far quicker than taxation on capital, and so this needs to be redressed. Precarious working is on the rise, and so there needs to focus on eradicating this, with more emphasis placed on lifelong learning that helps eradicate the status of unemployment.

Labour representation for changing employment relationships - Ian Fitzgerald

Introduction: Ian Fitzgerald reiterated the worrying trend of an increasing representation gap, and asserted that this gap became problematic long before the onset of the financial crisis. He suggested that strategic options potentially include placing more emphasis on the core principles of organising (e.g. a union for the self-employed, more efforts in organising migrant workers) and greater collaboration across sectors and countries to deal with critical issues such as posted workers.

Discussion: Key issues discussed included:

A discussion revolved round the attitudes of workers in today's workplace. There was a feeling that the contemporary workforce is more knowledgeable.

Questions were raised regarding who ought to be involved in negotiations, especially given the mutation in the notion of the employer.

Organisations like EFBWW have opportunities to be more proactive in influencing policy development, although one should avoid reinventing the wheel.

There was recognition of distinctions across European countries regarding representation strategies. Suggestions included taking a large construction site and analysing the nature of employment relationships and setting up committees between the multitude of trade unions and companies operating on the site to secure favourable employment relations. Another suggestion referred to the creation of informal forums for social partners to discuss issues concerning the politics of representation.

One possibility is to move towards the internationalisation agenda of the trade union movement. Perhaps there is scope for a transnational trade union that cuts across trade boundaries and political affiliations.

General discussion on strategies

Coen Van der Veer chaired the general discussion on labour strategies and questioned whether transformation in the

employment relationship is necessarily a consequence of the financial crisis or whether trade unions have to adapt anyhow to what is a general trajectory that is regardless of the financial crisis. However, Jan Cremers felt that, despite the general trajectory, the critical dimension is who is paying (and suffering) from the financial crisis. So, whilst the shifts in employment relations are predicted to continue, there is a need to safeguard the welfare and social conditions of those on atypical contracts (e.g. agency workers, temporary workers) since they tend to suffer the consequences of being the buffer group. Furthermore, there are long-term issues of recruitment to be considered. Franco Turri also agreed that crises like the current financial crisis tend to exacerbate working conditions significantly, certainly in the Italian context. At the core, companies have tended to respond to crises by retaining their skilled employees and get rid of their unskilled workers, usually through outsourcing strategies; reliance on part-time and temporary workers means that skills development strategies are often being sacrificed. Moreover, Franco suggested that the current crisis, which is a structural crisis, has intensified the long-standing problems that trade unions have been trying grapple with since before the crisis. Halvor Langseth asserted that trade unions must never lose sight of the purpose of trade unions, and that is to safeguard the welfare for all and not just for a select group (e.g. all workers working in Norway, rather than just the Norwegian workers). Halvor suggested that more needs to be done to reach out especially to hard-to-reach groups, i.e. those who are being exploited and abused. The question of pan-European working was discussed and opportunities were mentioned in terms of embedding transnational trade union cooperation in a series of bridge/tunnel projects across a number of European countries, including Austria, Denmark, France, Germany, Italy and Spain (these projects do not just cross geographic boundaries, but companies operating in these projects are transnational as well). There are already instruments that help in transnational frameworks and agreements, although there still remains a barrier in terms of

some countries (notably the UK) having difficulties with transnational trade union cooperation. There is certainly scope for more strategic discussion in this area. To summarise, it would be worthwhile for delegates to frame some action points that can be taken forward at the European Federation level.

Discussion on interface with the academic world

Rolf Gehring started the discussion by suggesting there are benefits of engaging in a dialogue with academic partners to see what research needs to be done to seek solutions for the problems diagnosed thus far. He recalled positive gains in the past with engaging with academic researchers, e.g. through ETUC research that resulted in a policy response on the regulation of financial markets and financial transactions and collaborative research with FIEC on social dialogue at European level. There are clearly opportunities, which include:

Given the increasing absence of coalitions with employers, the need for evidence on a whole range of working conditions (e.g. VET, working hours and stress, wages), and the challenges associated with worker representation.

Gunde Odgaard also suggested that there are opportunities surrounding the EU 2020 Green Agenda and how one can help mobilise capital in this area to the benefit of job creation in the construction industry.

Ernst-Ludwig Laux noted the possibility of learning from developments in Greece to see how the European Union can move forward with shaping trade union strategies.

Jean Luc Plumelet suggested that, regardless of whether a political system is socialist or liberal, there is a need to challenge the system and to seek an evidence base to confront the employers.

Jan Cremers wanted to create a more interactive forum for trade unions across Europe to share good practices with one another (CLR can certainly serve as a useful platform for dissemination as well).

Linda Clarke was keen to look at other marginalised groups,

e.g. women, black and ethnic minorities and the unemployed. She suggested that it might be useful to capture lessons learnt from Olympic cities and see how the crisis and employment relations develop in these different locations (e.g. Barcelona, Sydney, Greece, Beijing, London).
Paul Chan suggested the need to investigate the issue of how the destabilisation of the employment contract (where the proportion of atypical employment is now becoming a typical group) will influence trade union strategy both in terms of representation and increase in union membership.
Jean-Claude Le Douaron stressed that trade unions must also develop an evidence base on how capital operates (e.g. in the area of investment of pension funds), in part to establish how money is being spent within the trade unions.

Discussion on the role of the EFBWW in further activities

Rolf Gehring reiterated EFBWW's role in terms of taking the discussions forward, which includes facilitation of further dialogue and effective campaigning efforts (e.g. on illicit working and on dangers of asbestos). However, Rolf noted that EFBWW needs to balance the demands for moving the strategy forward with limited resources. Therefore, any intervention needs to be pragmatically taken. Jőrn Janssen was concerned that the discussions ensued were not strategic enough, although Rolf Gehring noted that it was probably not feasible to exhaust all discussions on strategy over two days. However, Rolf noted that interested parties can take the work further in future forums such as CLR seminars and CLR news, and EFBWW events to work on some of the ideas originating from this workshop. Jan Cremers also reported that a CLR News Edition dedicated to the crisis and the country reports will likely to be published around September 2010.

Reviews

Hans Baumann

SOLIDAR-Studies: **Building Decent Jobs by Better Industrial Relations**

Within the SOLIDAR-project "Decent Work for All: A Key to Effective Industrial Relations", case studies were elaborated on Romania, Estonia, Italy and Lithuania. Two of these studies concern precarious employment conditions in the construction industry and in particular the situation of migrants and posted workers.
SOLIDAR is a European network of 53 NGOs. For this project, SOLIDAR was assisted by an advisory group led by Jan Cremers (CLR & AIAS).

Different features of labour relations in Europe can prevent or undermine decent work: Atypical contracts include part time, temporary work, "mini-jobs", low pay, fixed-term contracts, posted work, on-call contracts, irregular working time, "dead end jobs", discrimination of wage or working place, lack of collective protection and workers representation, inadequate entitlements to social protection and vocational training, bogus self-employment, sub-contracting and outsourcing, undeclared and informal work etc.
Short-term migrant workers in the construction industry are particularly concerned by unfair working conditions.

In **Romania**, the number of migrant workers from non-EU-countries has increased rapidly since joining the EU, many of them working in the construction industry. In 2008, 40% of the foreign workers came from non-EU-countries, among others from China. Only in 2009 and 2010, under the pressure of the economic crisis, was this migration restricted.
In Romania, migrants from non-EU-countries work often under precarious working conditions, because they do not have the same legal protection as Romanian employees or posted workers from the EU. Posted workers from third countries can be employed at around 30% lower labour costs because employers do not have to pay contributions to

insurance, health and unemployment funds. In addition, there are numerous abusive practices by private recruitment agencies against these workers, such as modifying the initial verbal agreement or written contract in order to lower wages or extend working time. Together with other discriminatory practices, this has a negative impact on the wage level in the construction industry, which is 17% below the average for the whole economy.
The case study gives numerous recommendations on how to improve the situation. With regard to labour law, migrants from third countries should benefit from the same treatment as EU-citizens. Private agencies, recruiting workers in their home countries, should be better controlled. This requires new instruments for labour inspection, including the possibility of sanctions. The report also recommends that Romania ratify ILO Convention 181 on Private Recruitment Agencies and Convention 97 on Migration for Employment Purposes in order to guarantee the same working conditions as nationals for workers from third countries.

In **Italy** migrant workers play an important role in the construction industry as well. The number of migrant workers has increased sevenfold since 2001, making up about 17% of the workforce. Although migrant workers enjoy equal treatment according to labour law and their share in union membership is growing, they are still exposed to discrimination. Employers prefer new migrant workers not because of their qualifications but because they are easier to exploit. Foreign workers are frequently hired into a lower job category than appropriate for their experience and qualifications. There is little vertical mobility: Migrant workers tend to be kept in lower job categories for many years. It is difficult for foreign workers to attend vocational training courses and safety training. This has a significant impact on accident rates, which are higher than those for nationals. Even more discriminated against are foreign workers with an irregular status or a short-term permit.
Italian trade unions implement many policies and activities to

integrate and support migrant workers. The national collective agreement also provides specific measures to support migrant workers, such as vocational training, including literacy courses, recognition of titles and qualifications, specific welfare funds etc.
The recommendations of the study to improve the situation of migrant workers are addressed in particular to the social partners: They should take initiative to strengthen legal measures to sanction employers in case of discrimination against foreign workers. Principles of equal treatment for migrant workers and possibilities to combat discrimination should be included in collective agreements. The ILO Convention 97 on Migration for Employment, ratified by Italy, should be fully respected as well as the UN Convention on the Protection of the Rights of all Migrant Workers and their Families, which Italy has not yet ratified.

The case studies are available on the CLR-website and can be downloaded from *http://www.solidar.org/Page_Generale.asp?DocID=21774&la=1&langue=EN*

Jörn Janssen, London, 24 June 2010.

Jan Lucassen, Leo Lucassen and Patrick Manning (eds.), **Migration History in World History – Multidisciplinary Approaches.**
'Studies in Global Social History', Brill, Amsterdam 2009, 289 pp., € 99.-, ISBN 9789004180314.

In the 3/2008 issue of CLR-News, dedicated to 'Cross-Border Work', we reviewed - among other literature on migration - Jan Lucassen's (ed) "Migration, Migration History, History", published as early as 1997. The International Institute of Social History in Amsterdam has become the centre of an international project on "Global Migration History", initiated in 2005, and will be holding its third international conference in Taiwan on 26-28 August 2010. The present book represents a step in the work in progress of this project. It is

an outstanding and unconventional effort to understand "the current situation … as resulting from unique political upheavals (the fall of the Iron Curtain, the wars in Iraq and Sudan, etc.)" (p. 3). It transcends traditional disciplinary boundaries such as those of history, biology, linguistics, archaeology, and anthropology as a means to grasp the complexity of the movement of humans across the globe. I shall not seek to summarise all the eight contributions but just highlight a few points that happened to catch my particular interest as a researcher in labour history and activist in construction labour politics.

In their introduction the editors – historians – trace the recent history of migration historiography and its aims, in particular its determination to overcome the traditional Eurocentric bias coupled with a restricted time horizon and disciplinary blinkers. 'Global Migration History' is closely related to the 'Global Labour History' project (CLR-News 1/2009, pp. 51-57). Peter de Knijff's genealogical verdict may be surprising and is at the same time convincing: "… the transition by modern humans during the last 10,000 years from a mobile hunter gatherer life-style towards predominantly stationary farming-based societies should be seen as the exception rather than the rule." (p. 39) The linguistic approaches by Andrew Pawley, Christopher Ehret and Patrick McCowell are fascinating in that they trace how migrants interacted with 'indigenes' when they imposed or adapted their languages and ways of living. Archeological evidence, condensed by Jon M. Erlandson, displays the great panorama of migration across all continents originating in East Africa 50,000 years ago and leading to the recent so-called 'globalisation' sparked off by the Vikings from Northern Europe. The final contribution by Jon Kok focuses on the family with a microscopic picture of how family conditions are conducive to special kinds of migration.

Reading this book is rewarding in many ways. It raises the awareness that migration is an intrinsic feature of human

existence, indicative of as well as instrumental to development. The confrontation with 200,000 years' development of the 'homo sapiens' puts the present perception of 'globalisation' into a perspective, which opens up a considerably wider scope for the future. The confrontation of the diverse approaches not only widens our horizon but serves, at the same time, as an antidote against prejudices based on incidental single aspects.

One might expect more reference between the diverse essays, more regard for overlaps and gaps. Shomara Keita, for instance, presents the geochemical methodology with its own examples unrelated to case studies of other essays. Such relative disparity is testimony to an early stage of coordination under the auspices of migration between formerly isolated disciplines.

Migration is related to building and shipbuilding from time immemorial. Ships were the most important means of transport for long-distance migration and first thing travellers need, when arriving at a new place, is shelter. The present continuing process of urban concentration is first and foremost a building process. This explains why typically migrants are so numerous among construction workers. In order to maintain humane working conditions, they deserve particular provisions, not just containers. For the construction industry there is a lot to learn from migration history.

Thomas Klikauer, Industrial Relations Group at The University of Western Sydney

Humphrey McQueen, 2009, ***Framework of Flesh - Builders' Labourers Battle for Health & Safety***, Ginninderra Press, ISBN: 978 1 74027 545 3, 1042 footnotes, index, 337 pages, $30

Despite a rather unexpected title, McQueen's book – *Framework of Flesh - Builders' Labourers Battle for Health & Safety* – isn't so much about one trade union's fight for better working conditions, nor is it about Occupational Health and Safety (OHS) in general. It is about the role OHS,

industrial accidents, deaths, and injuries play in capitalist economies driven by management, its ideology of Managerialism, profit-maximising imperative, and the real bottom line. In this context, the book outlines why next to no industrial accident is really an accident al all. Almost all injuries, diseases, illnesses, and deaths that occur while working are preventable. Furthermore, in many countries death at work outnumbers death in road traffic accidents even though corporate mass media has successfully generated the perception that is exactly the reverse. McQueen's book tells how employers, management, states, and trade unions deal with OHS.

Even though OHS is the single most regulated subject in the world of work in almost all countries today, the long and bloody history of OHS is plastered with the death of workers. The book starts with the 19th century, outlining working conditions of labourers on construction sites that included *'death traps*' in a largely unregulated industry. This began to change when trade unions started to run educational campaigns teaching OHS issues such as scaffolding and the use of hazardous materials and substances. As an outcome of this, builders' labourer federations demanded state inspections and the introduction of legal regulations safeguarding the industry. During the second half of the 20th century, the construction industry experienced a sharp increase in building constructions as part of the post World War II reconstruction efforts. In the wake of that, buildings grew taller while scaffolding remained a central concern as trade unions initiated a "*Clean Up the Building Industry*" campaign banning free-fall hoists (p. 80).

According to McQueen "unions regained their militancy throughout the 1960s". This activism institutionalised OHS during struggles to establish safety committees, determining membership and power. During that time, some spectacular building collapses and industrial accidents did, however, nothing to create a sort of self-criticism of employers. The

managerial prerogative – the right to manage – remained a strong feature on construction sites. The unwillingness of employers to provide a safe working environment forced the builders' labourers union to demand workers control at construction sites. *The Frontier of Control* (Goodrich, Pluto Press, 1920) became the central issue of conflicts between employers and trade unions. Meanwhile, trade unions also influenced politics and states to introduce stronger OHS legislation protecting workers and resulting in several OHS laws. During the 21st century, this became a contentious issue for trade unions because increased state regulation in conjunction with state inspections sought to replace trade unions' own inspections at building sites by moving such responsibilities onto state bureaucracies.

Chapter 4 – *The Twenty-First Century: Framework of Fear* – describes how a regaining of managerial power under the neo-liberal attack during the late 20th and early 21st century occurred. It allowed management to return to *Macho-Management*, a phrase invented by British Leyland's *Michael Edwardes (1983) describing an extreme version of an anti-democratic* authoritarian management style where management takes a tough approach directed against labour unions. Under the heading of a neo-liberal ideology of *'market-forces'*, this gave management the *free-hand* it always wanted. The outcome of neo-liberalism was that any industrial relations (IR) and OHS laws were *'reformed'*, a term used to cover up factual rollbacks shifting an already asymmetrical power relationship between employers and trade unions even further toward management and employers. They sought to use market forces to reduce injury levels, which in fact remained two-to-three times greater in the construction industry than in the rest of the workforce.

The final section of the book interprets such new re-regulated anti-labour and anti-OHS laws by answering three questions. Could these be giving a freer hand to management account of '*killing no murder*', i.e. the killing of

a worker that is not a crime? None of those in authority took the appropriation of surplus value through the disciplining of labour-time as the pivot for analysis. Instead, the pressure on lawyers to display a mastery of case law enmeshes radicals in an ideology that they set out to unravel. Nevertheless, some disparaging attempts were made to locate legal processes within the dynamics of capital expansion as 'economic determinism'.

The second question flows from the answer to the first: *will OHS laws ever consider killing, when done for profit, as murder?* Well, it is conceivable that working-class pressure on a reform-minded legal profession – over a further 200 years of capitalism – could extend rules about unintended consequences of a felony to treat some OHS violations as real crimes. What will forever be impossible under capitalism is to consider the appropriation of surplus value as an offence comparable to the non-payment of wages. Although injured labourers receive all their prescribed entitlements, this does not prevent workplaces in which other workers may still be harmed. Also industrial deaths and injuries are not regarded as a criminal offences committed by employers. Forging such a connection would require a legal system to curtail capital instead of steering its expansion.

The third question begs for an answer to why it is that progressive lawyers have difficulty in promoting so temperate a shift in class relations. Lawyers become agents of capital whenever they cannot think beyond the limitations that capitalists don't go beyond in profit-taking. The failure among the establishment to reason out how *'killing for profit'* might be treated as murder is to be expected. That this bias has overtaken many in its radical wing is partly the result of the triumph of neo-liberalism since the 1970s, anchoring the *Servants of Power* (Baritz 1960, Wesleyan Uni-Press) inside today's business and law schools teaching how to aid capitalism.

A Marxist critique recognises that the creation of a post-capitalist society requires driving beyond the seizure of capitalist production methods and its state apparatus. It must be fundamentally altered by trade unions and working people's emancipating themselves. McQueen concludes (p. 269) with *"progressive lawyers have aimed to rewrite the content of OHS laws. While they have allowed space for worker control over safety, they showed less enthusiasm for workers' remaking the law as both content and form, on and off sites".* There was a "*reluctance of radicals to break through the web of legal reasoning in order to consider OHS violations as real crimes".* It was an *expression of "a politics which dared not contemplate destroying"* an oppressive system.

In sum, despite more than 1,000 references, McQueen's book is written by a journalist with a highly enjoyable non-academic writing style. It has been written by a critical trade unionist for trade unionists that dare to think beyond the confinements of the current legal structure of OHS. By linking industrial deaths and injuries to the way capitalism operates McQueen's exquisite work highlights the role OHS plays in a capitalist economy, discussing the core question of *'why industrial deaths is not considered murder'* under a socio-political and legal system that is operated by the *Servants of Power* (Baritz 1960).

Illicit work campaign

Jan Cremers, AIAS

The European Federation of Building and Woodworkers recently started a campaign against the use of 'illicit work'. The EFBWW has come up with a document 'Concrete Proposals on the Prevention, Detection and Sanctioning of Illicit Employment in the Construction Industry' that you soon can find on the EFBWW website (www.efbww.org) or on the CLR website.
In the document it is stated that:

Undeclared labour leads to serious social, economic and political distortions:

1. *Within the overall EU, billions of euro of social and fiscal revenues are evaded by illicit activities This either leads to an increase of taxes and social contributions (in order to keep the system sustainable) or a decrease of the necessary public services;*
2. *The rise of undeclared work gradually undermines the stable system of industrial relations, collective agreements and the role of the social partners to manage their sectors;*
3. *Undeclared labour is a product of "egoism" and the ability of individuals to do things as they like/please. This individual approach of doing things as "I like" undermines every common sense of political consciousness.*

The EFBWW, therefore, proposes a series of measures for the industry that focus on compliance and enforcement of existing legislation in a transnational context, in order to (1) prevent and (2) improve the detection of illicit employment and (3) to impose sanctions on the use of illicit employment.
The measures include specific rules to tackle illicit labour providers (gang masters) and labour users and special attention is paid to so-called "letter box companies". The EFBWW also formulates a plea for the introduction of a Social Identity Card, issued by the National Authorities of Social Security of the country of origin. All main contractors

should be obliged to keep a daily staff register on the work place, which includes at least names of the business, identification of the card owner and working hours of the persons on their building sites.
One of the crucial pieces of regulation, in order to face the reality of "social fraud" in the chain of sub-contracting and the responsibility of the main contractors, is the introduction of a regulatory system of joint and several liability of general or principal undertakings for all subcontractors and outsourced activities.

Finally, effective and adequate, announced and unannounced, inspections have to be carried out to control illicit employment, combined with a solid and effective system through which complaints can be lodged against legal and national persons in direct contact with illicit employment, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when foreseen by national legislation.
The proposal conclude with the suggestion that cross-border coordination between the Member States needs to be coordinated at EU level via a permanent coordination Agency which deals with the cross-border 'fight against criminal entrepreneurship within the field of labour, social security and income' and that ensures a proper system of data sharing and matching between all competent national authorities.

Read the proposals and have a look at the leaflets (in 8 languages) on www.clr-news.org under News.

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