

UK NATIONAL SURVEY REPORT

1. Setting the scene

The UK economy is characterised by increased outsourcing intended to reduce costs, creating a core and periphery workforce, with extensive areas of subcontracted work and the rise in agency labour (White et al., 2004). Overall cost has become a central driver of this change, which is most developed in the private sector and in particular in construction where a fragmented labour market has developed which involves large numbers of workers classified as self-employed, including migrant workers – many of whom remain undocumented (Harvey and Behling, 2008; Chan et al 2010). In the public sector, outsourcing has been less advanced and is arguably more uneven; although, it is clearly evident in the area of public transport, it has been more difficult to effect in central and local government and the National Health Service (NHS) where it has been managed through a 'procurement and commissioning' model which emphasises 'best value'.

As these changes have progressed, trade unions have seen a reduction not only in membership but also in their collective bargaining coverage, although they are still strong in the public sector (Achur, 2011). This means that, in the private sector, the maintenance or protection of employment rights in the subcontracting chain is mainly based on the legal enforcement of statutory provisions, although, apart from Acts such as the Gangmasters (Licensing) Act 2004, very few statutes are directly aimed at ensuring the protection of such workers. Overall discussion is on the enforcement of existing laws and regulations or their extension as much if not more than on their creation. Even though workers have limited access to support apart from this legal redress, notable exceptions are community based organisations such as Citizens Advice and the Living Wage campaigns which campaign and support precarious workers.

Given this situation, the following is divided into three main areas:

- Legal provisions to protect workers' rights in the subcontract chain;
- The limited social partner provision in place with an emphasis on the public sector and in private sector construction; and
- Examples of community based organisations and campaigns which have supported all workers including the most precarious, such as migrant workers.

1.1 An overview of applicable rules ensuring the protection of workers' rights in subcontracting

Legal Provisions

In the main, statutes and secondary legislation apply universally, not to particular sectors or parts of the chain. Therefore, protection of workers in the subcontract chain is indirect rather than direct. Employees are the most protected, followed by workers and then the self-employed. The greatest problem for a working person is to prove to an employment tribunal¹ that s/he is an employee or 'worker', and not self-employed, in order to claim the superior employment rights available to those two types of working person. In cases arising in the construction industry in particular, the principal contractor and subcontractors may argue that those on site are all self-employed, and not employees or workers. The following are the main legal provisions that protect workers' rights.

¹ An employment tribunal is a formally constituted court of law where a judge and two lay representatives hear employment law disputes.

Employment Agencies

There is legislation that applies to employment agencies in England, Scotland and Wales. These must comply with the Employment Agencies Act 1973 (as amended) and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (as amended)².

Wages

Wages are protected under s.13-23 Employment Rights Act 1996. This provides that, where a worker is not paid the full amount of wages including holiday pay, (s)he may apply to an employment tribunal for a declaration to that effect and an award of the missing amount. This Act also provides for guarantee payments in s.28. The National Minimum Wage Act 1998 ("NMWA") provides relevant workers with a right to receive a minimum basic hourly rate of pay. Statutory sick pay is provided to employees under the Social Security Contributions and Benefits Act 1992 (SSCBA 1992) and the Statutory Sick Pay (General) Regulations 1982, SI 1982/894. Whilst tax on wages is covered by the Income Tax (Earnings and Pensions) Act 2003 and the Income Tax (Pay As You Earn) Regulations 2003. There is also a tax deduction scheme for the construction industry in ss. 57-67 Finance Act 2004.

Social Fund Payments

National Insurance contributions are provided for by the SSCBA 1992.

Health and Safety

The main statutory protection comes from the Health and Safety at Work Act 1974. An employer also has certain duties to employees at common law. The Construction (Design and Management) Regulations 2007 (CDM) cover the management of health and safety for workers engaged in construction activities. More generally, provisions in both the Health and Safety at Work etc Act 1974 (HSWA), especially section 3; and the Management of Health and Safety at Work Regulations 1999 (MHSWR), particularly regulations 11 and 12, can be used to enforce cooperation and coordination between contracting parties to ensure the safety of those working for them.

Working Time

The Working Time Regulations 1998 ("WTR 1998") regulate working time and paid holidays.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) have been important in particular in public sector codes of practice which require contractors to ensure any newly employed staff are offered 'fair and reasonable terms and conditions' which are, overall, no less favourable than those of TUPE transferred public sector employees.

Insolvency Rules

Redundancy Payments are provided for in ss. 135-165 ERA 1996. If the employer is insolvent, the employee may apply to the Secretary of State to pay the equivalent of the redundancy payment. The appointment of a receiver may terminate the employment contracts of employees. Where there are 20 or more proposed redundancies, the consultation provisions at s.188 – 198 TULR(C)A 1992 apply.

² <http://www.bis.gov.uk/policies/employment-matters/eas> and
<http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1073793881&type=RESOURCES>

Gangmasters Licensing Authority (GLA)

The GLA was established following the Gangmasters (Licensing) Act, 2004 and the Gangmasters (Licensing Authority) Regulations 2005. These state that anyone supplying workers into agriculture, forestry, horticulture, shellfish gathering and food processing and packaging requires a licence³. The GLA has a wide interpretation of supply and this includes those who engage workers through both a contract of employment and contract for services.

Public Sector code of practice

The Statutory Guidance to Local Authorities on Contracting⁴ deals with employment and workforce matters and was issued to Scottish local authorities under section 52 of the Local Government in Scotland Act 2003.

Social partner provisions

Public sector

In the public sector the social partners have until recently universally adopted codes of practice designed to prevent the emergence of a two-tier workforce due to subcontracting. Subcontracting had grown as central government encouraged a “procurement and commissioning” model for many local and central services. However, in England the Coalition government has recently withdrawn the two most significant codes of practice and instead replaced them with Principles of Good Employment Practice detailed under section 2.3.3. In Scotland sub-national collective agreements are enforced through the Public Private Partnerships Staffing Protocol (PPP protocol) guidance and through the Statutory Guidance to Local Authorities on Contracting noted above. In Wales the Code of Practice for Workforce Matters in Public Sector Service Contracts⁵ still remains but there is no over-arching national agreement with regard to procurement. Finally, in Northern Ireland local councils are comparatively small and deliver a limited number of services, whilst health and social care services are delivered through an NHS trust model with a lobbying approach being used to protect against the creation of a two-tier workforce.

Private sector - construction

Trade union collective agreements are typically focused on a workplace or single employer and therefore difficult to audit, although, the construction sector has nine collective agreements in place covering the sector and the trades within it.⁶ These generally encompass wages, including holiday payments; social fund payments, including death benefits and pension schemes; and travelling and accommodation allowances. An important role in administering social fund payments such as pensions, death and accident benefits is played by the social partner-regulated Building and Civil Engineering Benefits Scheme (B&CE).

Interestingly, there are also more innovative agreements in place that have facilitated union organising of migrant workers and the protection of their and other workers’ employment rights. For example, for the delivery programme of the UK Olympic Games venues and infrastructure

³ See the following for further information http://gla.defra.gov.uk/embedded_object.asp?id=1013830

⁴ <http://www.unison-scotland.org.uk/briefings/protocolapp1.html> & <http://www.scotland.gov.uk/Resource/Doc/115506/0028632.pdf>

⁵ <http://www.unison.org.uk/acrobat/Wales%20Code%20on%20Workforce%20Matters.pdf>

⁶ (1) The Construction Industry Joint Council Working Rule Agreement (WRA); (2) The National Joint Council for the Engineering Construction Industry (NJC) National Agreement for the Engineering Construction Industry 2010-2012 (NAECI); (3) The Joint Industry Board for the Electrical Contracting Industry (JIB-ECI); (4) Joint Conciliation Committee of the Heating, Ventilating and Domestic Engineering Industry (HVACR); (5) The Joint Industry Board for Plumbing Mechanical Engineering Services in England and Wales (JIB-PMES) and Scotland & Northern Ireland (SNIJIB); (6) National Joint Council for Environmental Engineers and Allied Staffs (NJC-EEAS); (7) The National Federation of Demolition Contractors and Unite agreement (DICB); (8) The Thermal Insulation Contracting Industry National Agreement (TICI); (9) The Refractory Users agreement.

the social partners and client signed a Memorandum of Agreement⁷ which recognises the relevant collective agreements. More broadly, the Union of Construction, Allied Trades and Technicians (UCATT) has an annually reviewed 'partnership' agreement with a tax refund based business called Rift International to secure for construction workers tax rebates from HM Revenue and Customs. This in particular has provided a wider opportunity for some UCATT regions that have been able to access Central and Eastern European (CEE) migrant workers through Rift.

NGO provisions

Those workers unable to secure protection of employment rights, either legally because of ignorance of prevailing legal rights or because trade unions are not present to assist, have secured some protection through community based organisations such as Citizens Advice. Through their locations Citizens Advice Bureaux (CABx) provide free, independent, confidential and impartial advice to all on their rights and responsibilities, including legal and employment rights. The CABx have often worked in association with trade unions, either suggesting to workers that they consult a specific trade union official or in identifying and campaigning for equal employment rights⁸.

Aside from the CABx, there are also community based campaigns with workers who are least protected in the subcontract chain, the most prominent example being the London Living Wage campaign. Here the group London Citizens has become a London-wide coalition which has secured improvements in wages (main objective), holiday entitlements, sick pay and supported trade union recognition (Kloosterboer and Göbbels, 2005 and Wills, 2009). The campaign is not sector specific and has supported low paid workers in both the public (NHS and universities), and private sectors (banks, cultural industry and luxury hotels).

1.2 Historical background

Legal Provisions

Employment Agencies

The Employment Agencies Act 1973 was passed to regulate employment agencies and businesses. They provide the worker to a 'user' establishing a contract, but the contract remains between the agency/business and the worker i.e. no employment relationship is intended to develop between the 'user' and the worker.

Wages

One of the earliest pieces of legislation aimed at protection of the working man was the Truck Act 1831 which sought to ensure that wages were paid in full in the coin of the realm rather than in kind ("truck") and introduced regulations to cover disciplinary "fines" and deductions from pay⁹. The Wages Act 1986¹⁰ repealed the Truck Acts. All "workers" (manual and non-manual) were protected by it, but the controls on deductions were looser than previously was the case.¹¹

The question of wages - the amount, method, timing and deduction – had been primarily an issue for the contract of employment. Between 1979 and 1997 Government policies were largely anti-wage controls, whether in refusing to set minimum wage levels or to limit the maximum working hours per week. The only sector of employment which retained any controls was that of agriculture, in which basic hourly rates of pay are set by statutory bodies, the Agricultural Wages

⁷ <http://www.london2012.com/documents/oda-publications/memorandum-of-agreement-between-the-oda-and-trade-unions.pdf>

⁸ see http://www.citizensadvice.org.uk/rooting_out_the Rogues.htm

⁹ Truck Act 1896.

¹⁰ Now Part II, ERA 1996.

¹¹ In the case of retail workers more significant protection was given by ss.2-4 Wages Act 1986 (see now ss.17-22 ERA 1996).

Boards.¹² However, under the last Labour administration a change of approach was seen with the introduction of a National Minimum Wage from April 1999 and the implementation of the EC Working Time Directive¹³ by the WTR 1998.

Statutory Sick Pay

This was discussed in a 1980 Green Paper *Income During Initial Sickness: A New Strategy* (Cmnd 7864). It was enacted in the Social Security and Housing Benefits Act 1982.

Social Fund Payments

The National Insurance Act 1911 introduced a national insurance scheme, which was intended to provide for illness and unemployment and for retirement pensions.

Health and Safety

The duty of the employer to take care of the employee's health and safety at work is found in both the common law and in statute. The former states that the employer must take reasonable care to provide:

- Safe tools and equipment;
- Safe and competent co-employees;
- A safe system of work;
- A safe place of work.

In practice, although the basis for the duty is the implied contractual term, actions for breach will generally be brought in tort. In addition to the employer's common law duty there has been for almost two centuries legislative protection in respect of at least certain workplaces¹⁴. However, statutory coverage was at best piecemeal and fragmented. As a result of a review by the Robens Committee¹⁵, the whole approach to health and safety underwent a radical reform with the enactment of the Health and Safety at Work etc Act 1974, supported by regulations and approved codes of practice aimed at particular working environments. The 1974 Act was implemented to replace the piecemeal, prescriptive framework for health and safety legislation previously in place with a more goal-setting framework. Most recently the impetus for revision and up-dating has come from Europe as a result of the Community's Social Action Plan¹⁶. The two sets of regulations listed implement requirements of European Directives, including [CDM] most of the provisions of the Temporary and Mobile Construction Sites Directive (92/57/EC) and [MHSWR] provisions of the Framework Directive. None of the legislation has been made more strict since it was adopted.

Working Time

Until the WTR 1998 there was no automatic right to paid annual leave, this matter was a contractual one and depended on the express and implied terms of the contract. Even if there were a right to paid leave under the contract, there was no absolute right to be paid in lieu of untaken leave when the contract ended. Since the regulations were passed, there is now such entitlement. The regulations cannot be contracted out of regarding holiday entitlement, but enhanced rights may be agreed and some of the detail is still a matter for the parties. The WTR were passed to comply with the Working Time Directive 93/104, itself introduced as a health and

¹² Other sectors also had such protection via Wages Council machinery until the abolition of wages councils in 1993 by s.35 TURERA 1993.

¹³ Council Directive No.93/104/EC.

¹⁴ The first Factories Act arrived in 1802, the last bearing that name in 1961.

¹⁵ Report of the Robens Committee 1970-1972, Cmnd. 5034.

¹⁶ see Single European Act 1987.

safety measure. Initially the entitlement was to four weeks' paid holiday leave. This has been incrementally increased and from 1st April 2009 entitlement is to 5.6 weeks.

TUPE

The TUPE regulations 2006 revised the TUPE regulations 1981 and fulfilled the requirements of the European Community Acquired Rights Directive (77/187/EEC, as amended by Directive 98/50 EC and consolidated in 2001/23/EC). In 2001 the DTI issued a TUPE consultation document and in 2003 when the preliminary results of the consultation were released they included proposals to extend the public sector codes of practice designed to end the two-tier workforce.

Gangmasters Licensing Authority

The Gangmasters (Licensing) Act was introduced as a Private Member's Bill into the House of Commons by Mr Jim Sheridan M.P. on 25th February 2004 directly following a public outcry over the death of Chinese cockle pickers at Morecambe Bay. There had been a UK Temporary Labour Working Group campaign for registration of gangmasters¹⁷, although there was a mixed response from employers and the government who opposed further regulation (Carby-Hall, 2007). The latest (April 2009) version of the licensing standards supersedes the version issued in October 2006.

Public Sector code of practice

The Statutory Guidance to Local Authorities on Contracting was issued following a consultation with the Convention of Scottish Local Authorities, the Association for Public Service Excellence, the Scottish Trade Union Congress (STUC), the Confederation of British Industry (CBI), the Federation of Small Businesses and the wider public.

Social partner provisions

Public sector

As public sector authorities began to outsource services to the private sector, a two-tier workforce emerged. Trade unions campaigned and negotiated the introduction of codes of practice from 2001 onwards to reverse this trend. The two main codes were the Workforce Matters in Local Authority Service Contracts (2003) and the Workforce Matters in Public Sector Service Contracts (2005) which provide a backdrop for provisions in Scotland and Wales. The introduction of codes of practice was reaffirmed and extended by central government following the July 2004 Warwick Agreement between trade unions and the Labour Party. In Scotland the PPP protocol was agreed by the Scottish TUC and Scottish Government in 2002 and was followed in 2006 by the Statutory Guidance to Local Authorities on Contracting. In Wales the Code of Practice for Workforce Matters in Public Sector Service Contracts was developed and agreed by a Task and Finish group following a Ministerial Commission in 2005. Whilst the Code was agreed by the group and the relevant Minister, its wider circulation was delayed to allow harmonisation with the English version. Although, the English Codes have now been withdrawn, they still apply for some categories of workers, for example those employed on contracts negotiated prior to withdrawal and existing contracts which have been extended without re-tendering (unless the commissioning body and the contractor agree that the Code will no longer apply).

Private sector - construction

Construction collective agreements have been negotiated along skill/trades boundaries and on a

¹⁷ <http://www.ethicaltrade.org/in-action/projects/uk-temporary-labour-working-group>

subsector basis at differing periods of time. For example the WRA is a well-established agreement which was re-negotiated in 2008 and again in 2011. The other main agreement, NAECI, was originally negotiated in 1981 as a means to manage industrial unrest in the engineering construction subsector and was re-negotiated in 2010 following the Lindsey dispute. Whilst the B&CE was formed in 1942.

The Olympic Games Memorandum of Agreement was introduced in 2007, seeking to ensure direct employment and to guarantee minimum rates according to the collective agreement. This drew on the earlier example of the more stringent and regulated Major Projects Agreement applied in the building of Heathrow Terminal 5 (Clarke and Gribling 2008). The Rift/UCATT association began in 2001; although the first annually revised 'partnership' agreement was not signed until 2008. A key issue has been that Rift also provides a service to self-employed workers who are covered by the Construction Industry Scheme (CIS) and UCATT did not wish to be seen to encourage self-employment. The situation is now that the UCATT logo goes on all Rift advertising, apart from that which covers those who are self-employed.

NGO provisions

The CABx has a long history dating back to 1935, initially as an information service linked to the early social welfare service reforms. Their staff continues to be mainly volunteers and funding comes from a range of sources including government, charities, and the private sector¹⁸.

The London Living Wage campaign was launched in 2001 by the East London community organisation TELCO, now part of London Citizens which in turn is part of Citizens UK. London Citizens itself is a body of 160 member institutions, representing faith institutions, universities and schools, trade unions and community groups¹⁹, which was established to directly challenge the low wages emanating from increasing outsourcing and consequential subcontracting in London.

2. A detailed overview of the relevant national rules ensuring the protection of workers' rights in subcontracting

2.1 The rules – manner of regulation

Legal Provisions

Employment Agencies

The Employment Agencies Act 1973 (primary legislation) was adopted on 18 July 1973 and came into force on 1 July 1976.

Wages

The Employment Rights Act 1996 (primary legislation) was adopted on 22 May 1996 and came into force on 22 August 1996. The National Minimum Wage Act 1998 (primary legislation) was adopted on 31 July 1998 and came into force on 1 April 1999. The Statutory Sick Pay (General) Regulations 1982, SI 1982/894 came into effect on 6 April 1983.

Social Fund Payments

The Social Security Contributions and Benefits Act 1992 (primary legislation) was adopted on 13 February 1992. Most of its provisions came into force on 1 July 1992.

¹⁸ <http://www.citizensadvice.org.uk/index/aboutus.htm>

¹⁹ <http://www.citizensuk.org/about/london-citizens/>

Health and Safety

The Health and Safety at Work Act 1974 was adopted on 31 July 1974 (primary legislation) and most of its provisions came into force on various dates in 1975.

Working Time

The Working Time Regulations 1998 were adopted on 30 July 1998 and came into force on 1 October 1998.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 were made on 7 February 2006 and came into force on 6 April 2006.

Gangmasters Licensing Authority

The Gangmasters (Licensing) Act, 2004 received the Royal assent on the 8 July 2004 and the Gangmasters (Licensing Authority) Regulations 2005 (SI 2005 No 448) came into effect on 1 April 2005. With cross-border subcontracting, the GLA require a company representative to attend an interview in the UK and also check with non-UK authorities to confirm compliance.

Public Sector code of practice

The Statutory Guidance to Local Authorities on Contracting: The Treatment of Employment Issues when Exercising a Power to enter into a Contract (2006) was issued under section 52 of the Local Government in Scotland Act 2003 and dated August 2006.

Social partner provisions

Public sector

In England there was a commitment to monitor the Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts (2003) and the Code of Practice on Workforce Matters in Public Sector Service Contracts (2005). In Scotland regulation is through the Public Private Partnerships in Scotland - Protocol and Guidance Concerning Employment Issues (7th November 2002) [PPP Protocol]. In Wales regulation is through the Code of Practice for Workforce Matters in Public Sector Service Contracts (2005) re-issued in February 2008²⁰.

Private sector - construction

All collective agreements are voluntary in nature and are often supplemented by circulars and letters which inform employers of new amendments to existing agreements. The WRA was recently revised in March 2011 and is in force until the social partners decide otherwise. The NAEI is for the period 2010-2012 and is the most significant agreement with regard to posted workers as it now contains an appendix which specifically deals with non-UK contractors and labour on engineering construction sites, including the auditing of these contractors to make sure that they are following the agreement. This audit is undertaken by an independent auditor appointed by the client or managing contractor. The JIB-EI agreement is dated September 2007 and refers to wage and other rates up to and including 2010. It includes a section on subcontracting which prohibits the use of contractors who are not members of, or approved by, the JIB-EI and also seeks to limit the use of self-employed workers. The key national agreement for HVACR is laid down in letter 100 – Revised dated 22nd July 2010. The latest agreements in England and Wales from the JIB-Plum are for two years (2011-2012) and are contained in Promulgations No.163 (Rates of Pay and Allowances) and No.164 (Employee

²⁰ <http://www.unison.org.uk/acrobat/Wales%20Code%20on%20Workforce%20Matters.pdf>

Entitlements and Benefits), both dated 14th October 2010, whilst Scotland and Northern Ireland are contained in letter Reference: SNIJIB 2011/08 dated 20th May 2011. The NJC-EEAS agreement is laid out in Promulgation 1/11 dated 10th May 2011. The latest agreement through the DICB is dated 20th July 2010 – 19th July 2012. The TICI agreement is dated March 2011 and, although it has an appendix dealing with foreign workers, the key areas cover employment of local labour first and a skills test for those ‘outside the ranks of formally qualified personal’. The latest Refractory Users agreements are the RUF agreement March 2010, which will remain in force until further notice and the RUF Memorandum of agreement January 2011, which will not be reviewed until at least January 2012. The B&CE is a non-profit making employer and employee membership body and anyone working in construction can join the scheme.

The Memorandum of Agreement for the delivery programme of the UK Olympic Games venues and infrastructure (8th June 2007) is regulated by the client (Olympic Delivery Authority). They are detailed to undertake a monitoring coordinating role, whilst the partners to the agreement convene periodically as the ODA/TU Programme Review Group to review progress, identifying areas of concern and agree solutions. In particular it identifies the WRA, NAECI, JIB-ECI, JIB-PMES, and the HVACR collective agreements as applying to the Olympic construction programme. The Rift/UCATT association began in 2001 and what followed was limited engagement. Around 2004 the UCATT logo began to appear on certain Rift documentation in the north of England in particular. Then, following national discussions, the first ‘partnership’ agreement was signed in early 2008 and is ratified annually. The key cross-border measure here is the interpreters that Rift employ who work with UCATT when foreign groups of workers are encountered.

NGO provisions

Citizens Advice are a body of three registered charities in England and Wales (394 bureaux), Northern Ireland (31 main offices and 100 outlets) and Scotland (200 locations). All bureaux, locations, main offices and outlets are community based registered charities.

The London Living Wage campaign is a campaigning tool, used initially for single client engagement but now including the Greater London Authority’s Living Wage unit which issues annual reports with an exact formula for calculating the living wage²¹. A ‘living wage’ toolkit is available through Unison²², based on protecting all low-paid workers.

2.2 The objectives

Legal Provisions

Employment Agencies

The Employment Agencies Act 1973 was passed to regulate employment agencies and businesses.

Wages

The Employment Rights Act 1996 was adopted as a consolidating Act i.e. bringing under one Act, various rights already in other Acts and/or secondary legislation. The National Minimum Wage Act 1998 was adopted ‘*to make provision for and in connection with a national minimum wage; to provide for the amendment of certain enactments relating to the remuneration of persons employed in agriculture; and for connected purposes.*’

²¹ The latest report is Greater London Authority (2010) *A fairer London: The 2010 living wage in London*, Greater London Authority, <http://www.london.gov.uk/who-runs-london/mayor/publications/business-and-economy/2010-living-wage-london>

²² www.unison.org.uk/file/Living%20wage%20toolkit.doc

Social Fund Payments

The Social Security Contributions and Benefits Act 1992 was adopted to consolidate existing enactments and make amendments to give effect to recommendations of the Law Commission and the Scottish Law Commission.

Health and Safety

The Health and Safety at Work Act 1974 was passed, according to its preamble:

'to make further provision for securing the health, safety and welfare of persons at work, for protecting others against risks to health or safety in connection with the activities of persons at work, for controlling the keeping and use and preventing the unlawful acquisition, possession and use of dangerous substances, and for controlling certain emissions into the atmosphere; to make further provision with respect to the employment medical advisory service; to amend the law relating to building regulations, and the Building (Scotland) Act 1959; and for connected purposes'.²³

In other words, it is concerned with accident reduction and /or control of risk by the application of tried and tested principles.

Working Time

The Working Time Regulations 1998 were adopted to comply with EU Law.

TUPE

The objective of the TUPE regulations is to preserve continuity of employment and terms and conditions of workers transferred to a new employer.

Gangmasters Licensing Authority

The objective of the inspection process is to ensure that workers are not exploited and subjected to forced labour (GLA senior interviewee).

Public Sector code of practice

The Statutory Guidance to Local Authorities on Contracting is the Scottish government response to its dual commitment of ending a two-tier workforce and providing best value in the public sector.

Social partner provisions

Public sector

The public sector codes of practice were introduced to initially stall and then reverse the growth in a two-tier workforce. A key objective was to deter outsourcing and subcontracting by emphasising that any service competition should be focused on service quality rather than price.

Private sector - construction

The main objectives of construction collective agreements are to maintain differentials for the differing trades and to detail all other agreed payments. They often provide a minimum rate for jobs which can be exceeded at site level. Overall, they have been the first means to maintain labour standards in the industry and apply to all workers, including posted and migrant workers, with the NAECI agreement in particular recognising that foreign workers have been used to

²³ Preamble to Health and Safety at Work Act 1974.

undermine labour standards. The B&CE note their dual role as giving construction employees financial protection while in employment and in retirement and providing a range of employee benefits that allow construction employers to recruit and retain high quality, committed workers at low cost.

The Olympic Games Memorandum of Agreement has the key objective of involving trade unions in the Olympic construction programme and maintaining the agreements listed in the memorandum. The Rift/UCATT collaboration assists with a number of key criteria with regard to protecting workers' rights, but has in particular provided UCATT with the opportunity to gain CEE (Central and Eastern European) workers' membership. Previously this was difficult due to language or trust issues, and has now allowed Rift to expand its client base and to grow as a company (Fitzgerald, 2008).

NGO provisions

The central objective of the Citizens Advice service is to provide free, independent, confidential and impartial advice on workers' rights and responsibilities, as well as improve the policies and practices that affect workers lives.

The central objective of the London Living Wage campaign is to improve the poor pay and working conditions of all low paid workers in London.

2.3 The instruments and provisions

Legal Provisions

Employment Agencies

The Employment Agencies Act 1973 provides that the Minister may make regulations to ensure the proper running of employment agencies and businesses and to protect those using them. There is a restriction on charging employees for finding work for them (s.6). The Conduct of Employment Agencies and Employment Businesses Regulations 2003 contain the detailed provisions. The Agency Workers Regulations 2010, which apply to temporary workers, will come into effect on 1 October 2011.

Wages

Unlawful deductions from wages – The right is contained in section 13(1) ERA 1996, which provides: '*An employer shall not make a deduction from wages of a worker employed by him...*'²⁴ The term "employer" is used in the broad sense; s.230(3) defines a worker as someone who has entered into or works under:

*'(a) contract of employment [including one of apprenticeship], or
(b) ...any other contract...whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of client or customer of any profession or business undertaking carried on by the individual.'*²⁵

The emphasis here is on personal service. Recent case law has required analysis of the identical definition of "worker" in the WTR: **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 and **Bacica v Muir** [2006] IRLR 35, in which the EAT laid down some guidelines on identifying a "worker". If the person performing the work is not an employee or worker, but a fully self-employed subcontractor, then – should the expected contractual wages

²⁴ S.13(1) ERA 1996.

²⁵ S.230(3) ERA 1996.

not be paid - his/her claim would be under contract law, rather than the statute. The claim would then be brought in the courts rather than an employment tribunal.

National Minimum Wage

Workers in the UK are entitled to a minimum hourly rate of pay. The hourly rate is calculated with reference to what counts as pay for NMW purposes (e.g. accommodation, benefits in kind etc.) and to the amount of time spent working; it is updated regularly. The rates of pay for different ages of worker are set out in SI1999/584. The definition of worker is in s.1(2) NMWA 1998:

- (2) A person qualifies for the national minimum wage if s/he is an individual who—*
- (a) is a worker;*
 - (b) is working, or ordinarily works, in the United Kingdom under his contract; and*
 - (c) has ceased to be of compulsory school age.²⁶*

The definitions section is s.54: Meaning of “worker”, “employee” etc.:

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*
- (3) In this Act “worker” (except in the phrases “agency worker” and “home worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
- (a) a contract of employment; or*
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
- and any reference to a worker’s contract shall be construed accordingly.*
- (4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
- (5) In this Act “employment”—*
- (a) in relation to an employee, means employment under a contract of employment; and*
 - (b) in relation to a worker, means employment under his contract;*
- and “employed” shall be construed accordingly.²⁷*

Agricultural Workers are covered by the Agricultural Wages Act 1948 and the Agricultural Wages Board Order of December 2010.

Health and Safety

Under CDM, all contractors are covered, under the control of a principal contractor, by the provisions of the regulations (see in particular part 4 of the regulations – regulations 26 – 44). All workers are covered, including undeclared workers. Where workers are engaged under service contracts, either CDM or a combination of HSW Act s3/MHSWR (especially regulations 11, 12 & 15) can be used to secure effective control of their activities under a principal contractor. The rules apply to subcontractors established in other Member States and existing legislation on health and safety is viewed as sufficient to cover both EU Member State and third country nationals.

²⁶ S.1(2) NMWA 1998.

²⁷ S.54 NMWA 1998.

Working Time Regulations

Regulations 13-17 give the worker a right to annual holiday leave with pay. Again “worker” has the wider statutory meaning than “employee” (reg. 2(1)), with extension to some groups of self-employed, where there is a requirement of personal service. Although it covers employees within the definition, it does not include apprentices. See also **Byrne Bros. (Formwork) v Baird [2002] IRLR 96 EAT** on characteristics of “worker”.

Statutory Sick Pay

SSP is payable in respect of an employee as defined. The definition is significantly different from that found in ERA 1996. Under SSCBA 1996 s 163, for the purpose of that Act an employee is a person over 16 who is gainfully employed under a contract of service or in an office with general earnings. There is a single rate of SSP. The current rate of SSP applicable from 6 April 2011 is £81.60 per week.

TUPE

The TUPE regulations state that employment tribunals and the courts will decide the precise application of the regulations. The economic entity test would however generally mean that an identifiable set of resources (including employees) have been transferred (BIS, 2009). With service provision type changes, such as in the public sector, the regulations apply to an “organised grouping of employees” (which can mean just one employee) ‘...*having as its principal purpose the carrying out of the activities concerned on behalf of the client*’.

Gangmasters Licensing Authority

The Gangmasters (Licensing) Act, 2004 and GLA only regulate companies that provide temporary labour. The Act defines a gangmaster as anyone employing, supplying and or supervising a worker in the areas outlined. The client is required to exercise due diligence and ensure that they only use licensed labour providers to supply workers. The rules apply to all appropriate labour providers including those based outside the UK.

Public Sector code of practice

The Statutory Guidance to Local Authorities on Contracting applies to Scottish local authorities and Joint Fire and Rescue Boards and joint police boards. It covers any exercise which involves the consideration of a change of service provider or where the transfer of local authority staff is at issue.

Social partner provisions

Public sector

The codes of practice in England, Scotland and Wales required any supplier to ensure newly employed workers were offered fair and reasonable terms and conditions which were, overall, no less favourable than those of TUPE transferred employees. The codes of practice relate to public sector organisations’ contracted prime service providers, as well as any subsequent areas of a service that maybe subcontracted.

Private sector - construction

The WRA applies to all workers in construction apart from those working within engineering construction who are covered by the NAECI and those under the other relevant principle skill grades, such as electricians (JIB-ECI) and plumbers (JIB-PMES and SNIJIB) who are covered by the other seven agreements. The B&CE covers all employers and workers in construction.

As with the construction collective agreements, the Olympic Games Memorandum of Agreement applies to all subcontractors and their workers operating on the Olympic sites. It notes, in particular, that the following collective agreements shall apply: the WRA; the NAECI; the JIB-ECI; the JIB-PMES; and the HVACR. It also has an undertaking from the client to actively monitor and coordinate the 'fair application' of the memorandum principles to all contractors engaged to work on the programme. The Rift/UCATT collaboration covers all workers who pay tax in the UK, although those who are undocumented would not be able to use the company services. Rift gain access to workers either through UCATT or via main and other contractors on sites.

NGO provisions

The CABx place no restrictions on who they provide advice to and are available to all workers.

The London Living Wage campaign has supported all workers whatever their employment status and has campaigned against clients, for example the Greater London Authority²⁸, other public authorities and those in the private sector. Significantly, this has led to the Greater London Authority inserting living wage clauses into procurement contracts.

2.3.1 Preventive measures

Legal Provisions

In general, statute law does not require the client and principal contractor to check that the employees and workers of subcontractors enjoy all their labour rights e.g. are not underpaid by the subcontractor. The statute law places the responsibility on the employer of the labourer. Investigation is left up to the government departments or agencies, not the client or principal contractor. There are exceptions. For example, the Gangmasters Licensing Act 2004 includes an offence of using an unlicensed gangmaster. This obliges the party subcontracting the work to that gangmaster to check whether the gangmaster has a licence, or face the possible criminal charges.

Social partner provisions

Public sector

The codes of practice in England, Scotland and Wales place public sector organisations (the client) under a duty of responsibility to pay regard to them. This includes emphasising that service providers should consult with employees and trade unions from the earliest stages of contract procurement. This has to some extent limited the growth of the supply-chain and is why the English codes were recently withdrawn by the Coalition government.

Private sector - construction

As construction collective agreements are voluntary in nature, there are no legal obligations placed on the parties to the agreements, although four of these agreements have procedures in place that seek to resolve any individual worker disputes with the employer. The WRA has both a three stage grievance and appeals procedure with trade unions having the potential to be involved throughout the process. The TIC1 agreement has individual grievance and appeal procedures for member employers, which in some cases can proceed through to a mainly collective disputes procedure involving national trade union and employer association representatives. The JIB-ECI agreement has an alternative disputes resolution procedure covering member companies only. Here workers who feel they have not been paid correctly or

²⁸ http://www.london.gov.uk/mayor/economic_unit/docs/living-wage-2009.pdf

received agreed terms can take a complaint and independent JIB-ECI employer and trade union representatives hear the case whilst a Joint Industry Board senior adviser acts as secretary. This procedure does not preclude any future legal action that a worker may wish to take. Finally, the NAECI places a specific requirement for employer signatories to the agreement to consult with trade unions, although again any procedures are only applicable to these members. If individual disputes arise and these are not resolved informally, they move onto a site meeting involving senior employer and trade union officials, an ECIA employer representative can also be present. Disputes can in some cases proceed onto a number of the other consultative committees that operate on different sites depending on the size of the construction project. The agreement also places an obligation on the managing contractor to ensure that all foreign contractors are aware of the agreement (NJC, 2010, Part 3 Appendix G). On large projects, which are mainly covered by this agreement, there is also an audit procedure in operation that places an obligation on all subcontractors to provide contracts of employment and wage slips to prove that workers are obtaining the agreed NAECI terms and conditions.

The Olympic Games Memorandum of Agreement states that it is not legally binding and that any grievances or disputes will be resolved through the applicable collective agreement. The Rift/UCATT agreement is voluntary in nature and any support for workers would again be through the UCATT collective agreements.

NGO provisions

The Citizens Advice service and London Living Wage campaign can only advise and campaign for better rights for workers.

2.3.2 Sanctions

Legal Provisions

Employment Agencies

Breaches of the protective provisions may result in fines or imprisonment for those running agencies who do not comply with the law. They may also be ordered to make payments to workers from whom they have withheld pay.

Wages

Complaints can be made by workers to Her Majesty's Revenue and Customs (HMRC, which may issue an underpayment notice to the employer. This will state not only the arrears to be paid to the employees, but also a penalty of one half of the amount of the arrears, to be paid to HMRC. This will be recovered back to 1 April 2009. If workers make a successful complaint of underpayment to an employment tribunal, the tribunal will make a declaration that the employer has made unlawful deductions from the employee's wages and order that payment of the arrears be made. If the tribunal is satisfied that the employer or employee failed to follow a relevant Code issued by the Advisory, Conciliation and Arbitration Service (ACAS), the compensation sum may be increased or decreased by up to 25%,²⁹ but this is not an additional penalty for non-/underpayment of wages. There are however, no additional penalties for the non-payment of wages in a chain of subcontracting.

²⁹ See s.207A and Schedule A2 of TUL(C)RA 1992.

Health and Safety

The Health and Safety Executive's (HSE) complaints service is accessible to foreign workers, via an interpretation service if required. Local Authorities operate similar schemes.

Working Time

Workers may claim pay for untaken annual leave under the WTR. This will be dealt with by an employment tribunal. Compensation may be increased (as above) by up to 25% but this is not a penalty for failing to follow the WTR, as explained above. There are rights of complaint to an employment tribunal in cases of detriment or dismissal for asserting rights under the WTR, see ERA 1996. Some breaches of the WTR also carry criminal penalties of fines or imprisonment for the employer.³⁰

Statutory Sick Pay

If HMRC makes a decision in the employee's favour, but the employer does not pay, enforcement would be for the amount payable.

TUPE

If the TUPE regulations are breached, it is for the affected employee to bring a claim before an employment tribunal for unfair dismissal, unlawful deductions from wages etc as appropriate. If the claim is for breach of contract (e.g. less favourable contractual terms imposed) and the employment relationship is still subsisting, then the claim would be brought in the civil courts.

Gangmasters Licensing Authority

There are criminal penalties for breaching the Gangmasters Licensing Act 2004.³¹ These include up to ten years imprisonment plus a fine, for acting as a gangmaster without a licence. The maximum penalty for using an unlicensed gangmaster is six months imprisonment plus a fine.

Public Sector code of practice

Statutory Guidance to Local Authorities on Contracting (see below)

Social partner provisions

Public sector

In Scotland the Public Private Partnerships Staffing Protocol (PPP protocol) and the Statutory Guidance to Local Authorities on Contracting essentially detail that, if a local authority does not comply with the guidance, this could be regarded as a breach of the statutory Best Value duty under s2 of the Local Government in Scotland Act 2003 and therefore covered by the enforcement regime under that Act. Both codes are firm in their endorsement of a fair employment conditions with the PPP protocol stating that compliance with it should be a condition of service specification and any subsequent contracts. The Welsh Code of Practice for Workforce Matters in Public Sector Service Contracts details that a public sector organisation (the client) can enforce the terms of contract, incorporating the code. This happens if it finds after successive requests that a service provider is failing to implement the code of practice. It is also allowed to not consider the service provider when future work is tendered. If workers and trade unions believe that a public sector organisation has failed to meet these obligations, they can contact the Welsh Assembly Government.

³⁰ See reg. 29 WTR 1998.

³¹ See ss.12-14 Gangmasters Licensing Act 2004.

Private sector - construction

All construction collective agreements are voluntary in nature and so the threat of industrial action is the main sanction open to trade unions. Whilst the WRA procedures detail no sanctions - and indeed any dispute will be resolved by the employer in question only - it does acknowledge that some workers may not have English as their first language, detailing that they should be encouraged to seek help from either a work colleague or trade union representative. The TICl disputes procedure does allow resolution of any disputes to advance to a joint hearing of representatives from the national employers association and trade unions, but only if the employer and trade union in question agree. Any disputes that get to this stage are then resolved with a 'binding' decision. The JIB-ECI individual disputes procedure has been in operation for over forty years and allows almost immediate access to the alternative dispute resolution procedure detailed above. Workers can use the procedure to claim unpaid wages or other payments as laid down in the JIB-ECI collective agreement and fines can be imposed on contractors but these are rarely used (senior ECA interviewee). The NAECI disputes procedure can in some cases go to a national level, in which case it can become binding, whilst the audit has assisted some posted workers to secure back payments.

The Olympic Games Memorandum of Agreement and the Rift/UCATT partnership agreements contain no specific sanctions.

NGO provisions

The Citizens Advice service and CABs have entered a number of partnerships and campaigned with other organisations such as the TUC to limit the power of exploitative employers.

The London Living Wage campaign has used both traditional trade union representative (negotiation and strike action) and community and lobbying action to establish and maintain agreed increases.

2.3.3 *Soft law measures, such as codes of conduct*

The Coalition Government Cabinet Office released in December 2010 a set of voluntary Principles of Good Employment Practice to replace the English public sector codes of practice. These state that government will encourage public sector organisations (clients) and service providers to promote good workforce practices. Further, where new workers are introduced alongside former public sector workers, they should have fair and reasonable pay, terms and conditions and recognised trade unions should be consulted on these terms and conditions. Finally, all public sector service suppliers should pay attention to good industrial relations and dispute resolution. In the private sector, the GLA have a best practice guide that was developed by stakeholders from the food industry supply chain to support ethical practice and checks by the supply chain³².

2.4 The actors involved

Legal Provisions

Employment Agencies

The Employment Agency Standards Inspectorate is responsible for ensuring compliance with the EAS Regulations. It is part of the Department for Business, Innovation and Skills. Its goal is to work with agencies, employers and workers to ensure compliance with employment rights, particularly for vulnerable agency workers. It investigates complaints, works with the GLA and NMW officials and may issue warning letters, or seek to prosecute.

³² http://gla.defra.gov.uk/embedded_object.asp?id=1013823

Wages

The NMWA is enforced by officials from HMRC, a central government department.³³

Health and Safety

HSE is an independent public body responsible for monitoring work related health safety and illness, and enforcing the laws in that area.³⁴ However, it is primarily responsible for health and safety in building sites, factories, farms, government buildings, etc. In the case of restaurants, pubs and clubs, i.e. the catering industry, the local authority may have responsibility e.g. environmental health and food hygiene. The HSE also works through tripartite bodies such as the Construction Industry Advisory Committee (CONIAC) to promote compliance with the legislation.

Working Time

Rights to rest periods and rest breaks and to paid annual leave etc, are enforceable by individual complaint to employment tribunals. The provisions of the WTR, limiting the working week, and working time for night workers, record-keeping requirements etc, are matters for enforcement by the same agencies which enforce health and safety legislation under the Health and Safety at Work Act 1974 above.

Agriculture

The Agricultural Wages Board Order 2010 is enforced in England by the Department for Environment, Food and Rural Affairs and in Wales by the National Assembly for Wales Agriculture Department.

Statutory Sick Pay

An individual would have to make a complaint if s/he did not receive SSP. It is for an officer of HM Revenue and Customs to decide issues in connection with entitlement to SSP. Once HMRC has decided that the employee is entitled to SSP, the action to recover it would be through an employment tribunal.

TUPE

If there is a breach of the TUPE regulations, the individual employees' complaints would be made to an employment tribunal. Advice may be available from the CABx and ACAS and trade unions.

Gangmasters Licensing Authority

The GLA undertake inspection with other enforcement bodies, such as the UK Border Agency and national minimum wage inspectorate, who enforce legislation that specifically empowers their inspection activity. The government department responsible is DEFRA.

Public Sector code of practice

The Statutory Guidance to Local Authorities on Contracting is issued by the Scottish government as a duty on the appropriate local authorities.

³³ <http://www.hmrc.gov.uk/>

³⁴ www.hse.gov.uk/

Social partner provisions

Public sector

The public sector codes of practice generally involve: on the employer side, the relevant public sector organisation and, on the union side in local government, the GMB, Unite and Unison; in central government, the Public and Commercial Services Union (PCS) and Unison; and, in the NHS, the GMB, the Royal College of Nurses (RCN), Unite and Unison. The Welsh Workforce Code of Practice Task and Finish group also had representatives from the Welsh Local Government Association, Wales TUC, Confederation of British Industry, NHS and Assembly officials. The codes overall generally operate at a local level through the appropriate public sector management and trade union representatives or committee. This procedure is often through either a consultative committee or via individual representations from trade union representatives to managers. In some cases, such as in Scotland, trade union representatives are involved in the very early stages of the procurement process.

Private sector - construction

The construction collective agreements have the following parties involved in their negotiation:

(1) **WRA**: Trade union representatives – UCATT, Unite and the GMB. Employer representatives - National Federation of Builders (NFB), Painting and Decorating Association (PDA), Home Builders Federation (HBF), Civil Engineering Contractors Association (CECA), Scottish Building Federation (SBF), National Federation of Roofing Contractors (NFRC), National Access and Scaffolding Confederation (NASC), National Association of Shopfitters (NAS), UK Contractors Group (UKCG); (2) **NAECI**: Trade union representatives - Unite and GMB. Employer representatives - the Engineering Construction Industry Association (ECIA), the Thermal Insulation Contractors' Association (TICA) and the Electrical Contractors' Association of Scotland (SELECT); (3) **JIB-ECI**: Trade union representative – Unite. Employer representatives - Electrical Contractors Association (ECA) and the Electrical Contractors' Association of Scotland (SELECT); (4) **HVACR**: Trade union representative - Unite. Employer representative - Heating and Ventilating Contractors Association (HVCA); (5) **JIB-PMES and SNIJIB**: Trade union representative - Unite. Employer representatives - Association of Plumbing and Heating Contractors (APHC) and the National Federations of Builders (NFB) and the Scottish and Northern Ireland Plumbing Employers' Federation (SNIPEF); (6) **NJC-EEAS**: Trade union representative – Unite (Electrical and Engineering Staff Association section). Employer representatives - Electrical Contractors Association (ECA) and the Heating and Ventilating Contractors Association (HVCA); (7) **DICB**: Trade union representative – Unite and the National Federation of Demolition Contractors; (8) **TICI**: Trade union representatives – Unite and the GMB. Employer representative - Thermal Insulation Contractors Association; (9) **The Refractory Users agreement**: Trade union representatives – UCATT, Unite and the GMB. Employer representative - Refractory Users Federation (RUF).

With these agreements, the employer federations involved in the agreement recommend that all member companies follow the agreed terms and conditions, whilst the trade unions enforce this at a site level through either trade union representatives or full-time officials making individual representations to the employer representative. In some instances a shortened version of the WRA is pinned up on site canteen walls for workers to view. With the NAECI agreement, local site representatives are also involved in Project Joint Councils and Local Forums; and with Major New Construction Projects via Supplementary Project Agreements (SPA). With non-UK contractors also detailed is that there should be meaningful consultation with trade unions and site representatives (stewards) to explain the agreement and its operation. Finally, here the social partners support site stewards to attend a National Stewards' Forum, which meets three times per year for two days. Here activities include invited speakers on important topics to the sector and discussion on any issues that are arising on sites and with main or subcontractors.

The **B&CE** trade union representatives are – UCATT, Unite and the GMB. Whilst the employer representatives are – Federation of master Builders; CECA; UKCG; National Specialist Contractors Council; and SBF.

The main signatories to the Olympic Games Memorandum of Agreement are the client the Olympic Delivery Authority; for the employers CLM Delivery Partner Ltd which is a joint consortium of CH2M HILL, Laing O'Rourke and Mace; and for the trade unions Unite, GMB and UCATT who have agreed to meet regularly via the ODA/TU Programme Review Group. The UCATT and Rift International partnership typically operates at regional and site level with employees of Rift working jointly with the appropriate local and full time officials. A typical situation would involve a Rift employee who speaks a CEE language engaging with a newly arrived group of migrant workers. In assisting these workers with their tax and other needs, they would also contact the UCATT who would come to meet with these workers.

NGO provisions

The central actors involved in the London living wage are London Citizens who use a campaigning approach, Unison who support this approach whilst also using more traditional trade union approaches, and the Greater London Authority which provides a dual role as an influential supporting local government agency and as a client pressuring its subcontractors to support the living wage.

UK NATIONAL CORE REPORT

3. The interpretation, implementation and enforcement of the relevant national laws

Before discussing how laws, social partner agreements and NGO initiatives have protected or failed to protect workers in cross-border subcontracting, it is necessary to briefly consider how foreign workers have been introduced into the UK labour market. With regard to EU workers this has happened in two ways: first, through an open door policy of free entry under Article 39 EC (now 45 TFEU); and secondly via the more structured means of the Posting of Workers Directive and Article 49 EC (now 56 TFEU) (Barnard, 2009). Given this, as noted by the Commission, the UK is one of the most open Member States for the provision of services cross-border. However, what this means is that there is a lack of regulation and registration and, therefore, accurate data on movement. Third country workers have either entered undocumented or via a more restrictive regime of work permits, and now via a points based system. Overall though, what it is clear is that the extent of cross-border subcontracting, and with it labour activity, increased following the accession of the Central and Eastern European countries (A8) in May 2004. Salt and Millar (2006) identify the migration that followed the accession and in particular the introduction of Polish workers, as the largest ever single migration to the UK.

In more detail, large numbers of A8 workers came to the UK with or without a guarantee of employment, some came to see what opportunities existed whilst others were more focused on advertisements/employment fairs in their countries of origin (Fitzgerald, 2007). Thus many were not employed, and did not enter the subcontracting chain, until they arrived in the UK, with means of entry to the UK varying from low cost flights and coaches through to using their own cars (Stenning et al., 2006). The overall situation was fluid, with new migrants being introduced into sectors and communities where they had not been before. The entry of A8 workers has now of necessity become more structured, although still fluid and with only estimates of numbers and periods of stay. Prior to the May 2004 migration it was highlighted that recruitment agencies were an important facilitator of A8 migration (Ward et al., 2005). Further, Currie (2006) was early in noting the significance of recruitment agencies with regard to the unfolding migration and Fitzgerald (2007) reports that they were the predominant mode of entry into the construction and food processing sectors in the north of England for Polish workers. Thus a mixed/evolving

situation existed with regard to cross-border subcontracting, with some workers being employed in their place of origin whilst others came to the UK and then took up employment.

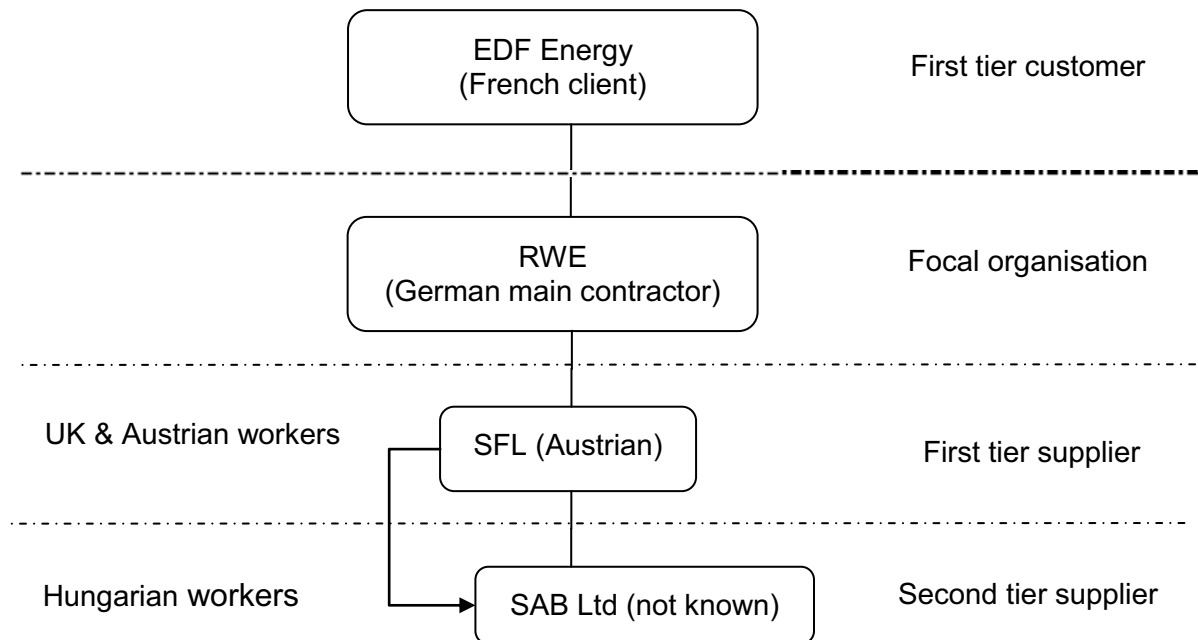
Regardless of where the employment contract was entered into, the UK did attempt to introduce one form of regulation for all those who were employed. The Worker Registration Scheme (WRS) was for newly arrived A8 workers who were meant to register whether employed in Poland or the UK. This did not include the self-employed or posted workers. However, it is reported that many did not register and indeed were not even aware of the scheme (McKay and Winklemann-Gleed, 2005; Currie, 2006; Fitzgerald, 2006). This static administrative data does nevertheless indicate that, of the 950,000 workers that had registered by early 2009, approximately forty per cent were employed by recruitment agencies (Border and Immigration Agency, 2009). Also significant was that a number of studies of A8 workers have indicated that their working conditions were very poor and often below industry norms (Fitzgerald, 2006; Carby-Hall, 2008). Again this applied to workers regardless of where they entered into a contract. Trade unions have, though, had some success in recruiting and organising these workers and securing improvements in their conditions of employment (Fitzgerald and Hardy, 2010; Fitzgerald, 2007).

With regard to the Posting of Workers Directive this was transposed with only minor changes to legislation and importantly the UK has no system of registration and little is known with regard to numbers of posted workers (Fitzgerald, 2010). The main area where posting has come to prominence is engineering construction where posted workers have been an on-going 'issue' since 1999. Indeed the audit procedure operated under the National Agreement for the Engineering Construction Industry (NAECI) was challenged and subsequently improved to protect posted workers, and in turn the NAECI, against the worst forms of subcontracting which amounted to social dumping (Unite national officer interview). Legally whether an EU member state worker enters the UK under Article 45 TFEU freedom of movement for workers or via the more structured means of the Posting of Workers Directive and Article 56 TFEU, the *modus operandi* for government and its enforcement agencies is that UK employment law applies equally.

Lastly, it is important to briefly discuss how a supply chain might typically operate in an area such as construction. The industry itself is one of the largest in the UK and in 2008 it was estimated that it had 270,000 active enterprises with 186,000 construction contracting companies, of which over ninety per cent had fewer than 10 employees, with 72,000 being one-man operations (House of Commons, 2008). Within this are contingent forms of labour such as bogus self-employment which makes for a fragmented industry (Gribling and Clarke, 2006; House of Commons, 2008) Not surprisingly, there is limited primary data on the actual operation of a supply chain, from client engagement of a main contractor, through its procurement of a number of work packages to the number of tiers involved in this process, although on larger sites, which tend to be secure and with formal site induction programmes, work has been done. For example Hughes et al. (2006) discuss two construction case studies, providing supply chain maps with one client and focal organisations (main contractor). The main contractor procures a number of vertical work packages, undertaken by first tier suppliers/subcontractors. Horizontally these first tier suppliers in turn tender parts of their work packages to second tier suppliers and these in turn subcontract part of their work package to a third tier supplier, although the authors note that the third tier suppliers are mostly material and product manufacturers/suppliers (ibid: 75). The authors also note that there are a large number of companies in tier two. If it is also considered that large projects and therefore sites are not now common, with work taking place on smaller less secure sites, it can be assumed that it is difficult to evaluate where a company is in the chain and at what point it enters and exits sites. The framework is though worth examining with an example from engineering construction, where sites are secure, which involved construction of a fluegas desulphurisation (FGD) plant at Cottam Power Station in Nottinghamshire. Here posted workers were introduced at two points in the tier structure (Figure

1), though only part of one of the procured work packages is identified as this posed a serious challenge to the NAECI to be discussed later.

Figure 1: Cottam Power Station FGD plant construction



3.1 Legal Provisions

UK law, and the regulatory and enforcement bodies that underpin it, consider the protection of workers in the subcontract chain as indirect rather than direct. Levels of protection are only evident at an employment tribunal between employee and ‘worker’ and the self-employed. Barnard (2009) has, however, cast doubt on this broad application of UK employment law in reporting that the UK government defended a pre-infraction letter from the Commission due to the recent ECJ rulings. Examples are discussed of how UK law does not sit well with these rulings, in particular Luxembourg (C-319/06), but her conclusion is that it may for political and publicity reasons be difficult for the Commission to challenge the UK in court.

One of the most common problems in the UK for the European citizen is that his/her employment status in UK law may not be determined unless and until a claim is made to an employment tribunal. Cases such as **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 EAT, **James v Redcats** [2007] IRLR 296 and **Autoclenz Limited v Belcher** [2011] UKSC 41 show how groups of workers may believe that they are employees or workers of a contractor, only to find that when they make a claim for deductions of wages or holiday pay, the contractor is arguing that they are self-employed. In some cases the position is further complicated, for example, if the contractor has been paying the group via one of its members, because the others do not have bank accounts, and alleges that the payee is the gangmaster of the other men. Or, the contractor pays the group via a payroll company, to which group members send their timesheets, introducing a further party into the working relationship and distancing the contractor from the group of workers and any pay problems. The Union of Construction and Allied Technical Trades (UCATT) is campaigning against payroll companies which it argues is leading to increased numbers of self-employed workers³⁵.

Overall, legal provisions should be seen against the background of a move away from regulation

³⁵ <https://www.ucatt.org.uk/content/view/993/30/>

and a change in how enforcement operates with the establishment of an employer based model which leans towards risk management. This is evident from the Labour administration's Hampton review (2005) and with it the Better Regulation Commission through to in March 2011, UK Department for Business, Innovation and Skills (BIS) opening up an opportunity to review 21,000 statutory instruments, to try to remove what government see as 'unnecessary red tape'³⁶. Significantly, there is now a Red Tape Challenge website where for example people can comment on the 151 regulations that apply to UK employment law. Under compliance and enforcement the six questions asked give an indication of the challenges that are likely to be faced in this area in the future. For Dickens (2009: 2), prior to recent developments, what this implies is that, even though the Labour government introduced '*...a more comprehensive role for legislation in setting minimum standards (for employment rights this) was not accompanied, however, by any strategic overview and consideration of the mechanisms, institutions and processes for rights enforcement*'. She argues that the five main UK employment inspectorates (Gangmasters Licensing Authority [GLA], National Minimum Wage [NMW], Agricultural Minimum Wage, Employment Agency Standards Inspectorate [EAS] and Health and Safety Executive [HSE]) provided an 'incomplete patchwork' for enforcement with a lack of coordination and information sharing and varying amounts of resource allocation, inspection rates etc. Interestingly a recent Citizens Advice (2011) analysis shows that the taxpayer spends the following on the key enforcement agencies: £19 per worker on the GLA; £4.25 per worker on the National Minimum Wage; and only 85 pence per agency worker on the EAS. There was in late 2009 the introduction of a Pay and Work Rights Helpline which provided a single telephone gateway to these enforcement bodies allowing multi-issue cases to be referred to two or more inspectorates, though Pollert and Smith (2009: 123) note underfunding and staff cuts for these enforcement agencies as public sector austerity ensued. Thus again there is the possibility of disconnect between case identification and then referral to an under resourced inspectorate.

The following discusses the way that law, regulation and enforcement have operated in three of these five inspectorates, the NMW HSE and the GLA. Both have had to deal extensively with the challenges of cross-border migration and workers rights, the HSE mainly with groups of free moving migrant workers from Eastern Europe and the GLA a broader range of migrants and some 'bogus' posted workers.

National Minimum Wage (NMW)

The latest evidence from the government to the Low Pay Commission on the NMW states that in 2009-2010 there were over 2,800 complaints made and following investigation over £4.4 million in arrears was obtained for over 19,000 workers (BIS, 2010a). Enforcement is undertaken through an HM Revenue and Customs (HMRC) Central Information Unit and via 16 regional compliance teams (BIS, 2009: 21) with 125 NMW compliance officers. HMRC also stated that they work collaboratively with other enforcement agencies to share best practice and maximise impact. This includes information sharing where legal gateways exist and joint or sequential visits. The Employment Act 2008, which came into effect on 6 April 2009, created an information sharing gateway between HMRC and the Employment Agency Standards inspectorate (EAS) and with the introduction of the Pay and Work Rights helpline in 2009, which has language line translation, they noted '*...a steady increase in the number of joint enquiries*' (interview BIS officer). It was noted that approximately 60 per cent of complaints come direct from workers; the remainder come from targeted enforcement and awareness-raising campaigns.

With regard to migrant workers in October 2009 the agency received £180,000 from the Migration Impacts Fund to establish a new Dynamic Response Team (DRT) as a proactive, and geographically flexible, team to be used to target NMW 'hot spots' where employers are using migrant labour to undercut legitimate employers by offering wages below the NMW. The DRT has worked with local authorities and migrant communities and reported establishing useful links

³⁶ <http://www.bis.gov.uk/news/topstories/2011/Apr/red-tape-challenge>

and receiving valuable information. Although, due to the current government public expenditure policy it was stated that funding was withdrawn from the project in October 2010 (BIS, 2010a: 31). However, it was reported that this year DRT officers worked alongside the UK Borders Agency (UKBA), HMRC's Hidden Economy Group (HEG), the Department for Work and Pensions, the Health and Safety Executive and the police during a major operation in Leicester city centre focussing on migrant workers employed in the textile manufacturing businesses. The operation was based on intelligence provided by the DRT to the UKBA and it involved over 100 officers (interview BIS officer).

This case does raise one of the key issues with joint enforcement collaboration, here at Leicester the operation involved around 80 third country workers and 12 businesses. All these workers were checked for their immigration status and 33 were found to have no legal right to be in the UK. These are/were deported. A recent report for Oxfam highlighted in some depth that undocumented migrants were not able to often report abuse to the inspectorate because they feared the consequences of deportation due to their immigration status (Wilkinson et al., 2009). Unite in interview agreed with this with regard to many third country workers and this is discussed later. Overall the NMW inspectorate as with the GLA has generally operated successfully and uses the same proactive approach with investigation and importantly will take punitive action if needed.

Health and Safety Executive (HSE)

Health and Safety legislation places certain obligations on principal contractors and subcontractors for the protection of workers' health and safety. CDM 22(2) places a number of obligations on the principal contractor and this was highlighted in particular by a HSE Policy Officer in interview. The Regulation states that

'The principal contractor shall take all reasonable steps to ensure that every worker carrying out the construction work is provided with —

(a) a suitable site induction;

(b) the information and training referred to in regulation 13(4) by a contractor on whom a duty is placed by that regulation; and

(c) any further information and training which he needs for the particular work to be carried out without undue risk to health or safety'.

As part of CDM 22(1) the contractor should also monitor the effectiveness of its systems for assessing subcontractor performance on health and safety (HSE interview). Employers also have certain obligations under MHSWR regulation 15 with regard to temporary workers:

'Employers shall, before employment commences, ensure that persons on fixed-term contracts of employment or supplied by an employment agency are informed of any special qualifications or skills required of that employee to work safely and any health surveillance to be provided to that employee by law. Employers shall ensure that employment agencies supplying employees to work in the undertaking are informed of any special qualifications or skills required of those employees to work safely and any features of the work likely to affect their H&S (the employment agency has the duty of informing those employees)'.

The HSE in interview noted that evaluation of *'...previous versions of CDM suggests the regulations to have been effective in improving coordination and reducing accident figures in the construction industry from the mid-1990s onward'*. Howarth and Watson (2009) support this, highlighting a steady decline in the issue of improvement notices, prohibition notices, the number

of informations laid, and the number of prosecutions. Employers are also legally obliged to consult their workforces with regard to health and safety. For those without recognised trade unions, this is under Health and Safety (Consultation with Employees) Regulations 1996 and for those with trade union recognition, under Safety Representatives and Safety Committees Regulations 1977. Trade unions can appoint workplace health and safety representatives who have rights under both these regulations. A key issue though is, of course, not just that these rights exist but who is there to implement them. That responsibility has been increasingly moved onto employers with a lack of trade union voice and fewer HSE construction inspectors.

The key issue is what this actually means for workers' rights in subcontracting chains. The evidence is not good. McKay et al. (2005) initially identified that, even though there was not yet statistical evidence of increased risk due to an individual being a migrant worker, there was considerable need for concern. The authors argued that migrant workers were more likely to be working in sectors such as construction with a heightened health and safety risk. This was followed by a Centre for Corporate Accountability report (CCA, 2009) which provided statistical evidence that almost a fifth of construction fatalities in 2007-08 were migrant workers. Overall the report highlighted a fourfold rise in migrant worker construction fatalities since the accession of the A8 countries. The CCA had previously noted (CCA, 2008) in a report for the trade union Unite a reduction in HSE presence at the construction workplace with only 14 per cent of major, and two per cent of 'three-day', injuries investigated.

Importantly, in a recent government inquiry into the underlying causes of fatal deaths in the construction industry, Donaghy (2009) stated that there were insufficient resources in London to carry out the existing workload (ibid: 16). Overall what this means is that '*...there is only a small possibility of a site receiving an inspection visit*' (Fitzgerald and Howarth, 2009). Currently, with the planned reductions in public expenditure the HSE will have a 35 per cent reduction in its budget. The announcement of this followed Lord Young's (2010) *Common Sense Common Safety*, an initial review for the Coalition government of health and safety laws and the growth of the compensation culture. Whilst this accepted that construction, as well as a number of other heavy industries, still needed certain regulations, it was critical of many health and safety regulations currently in place. Central in the report was the following quote:

The aim is to free businesses from unnecessary bureaucratic burdens and the fear of having to pay out unjustified damages claims and legal fees. Above all it means applying common sense not just to compensation but to everyday decisions once again.

The recommendations of this report are now being implemented through a review of health and safety legislation by Löfstedt which is due to report back in October 2011. Lastly, HSE will now only undertake targeted inspections of high risk/high hazard sectors and companies with poor records. This will mean overall 11,000 less inspections in offices, shops, schools and SMEs (Unite, 2011).

Gangmasters Licensing Authority (GLA)

The GLA inspectorate maintains compliance with GLA licensing standards through a proactive approach which involves information exchange with other government departments and inspection of companies, interviews with workers and the client (GLA Director of Strategy). Information to undertake this approach is received from NGOs, trade unions, exploited workers and the general public. Significantly, the GLA Chief Executive has stated that just nine per cent of the gangmasters that the GLA deals with employ only British workers, whilst around eighty-two per cent employ either some or all Polish workers (Livsey, 2009). Currently, the GLA has 1,154 licence holders and has revoked 172 licences since 2006, 22 of which are being challenged (GLA Head of Licensing interview). Carby-Hall, (2010) identifies the general pattern of GLA working as being through a variety of partnerships methods. Partners are stated as including: Her Majesty's Revenue and Customs (HMRC), United Kingdom Border Agency

(UKBA), Serious Organised Crime Agency (SOCA), all UK Police Forces and the Employment Agency Standards Inspectorate (EAS) (GLA, 2011). Examples of this GLA approach are through specific operations on which the authority works with and supports other organisations, as in Operation Ruby (see Box 1)³⁷ where A8 and Rumanian workers were trafficked to and within the UK.

Operations are also initiated through combining specific actions as in the case of Operation Ajax³⁸ in 2008, which involved a number of unannounced raids over an eighteen month period. The twin objectives of Ajax were to reflect the GLA's new strategic focus of enforcement and raise its media profile (Balch et al., 2009). The GLA partnership here combined other government agencies such as the Border Agency and the Police with social partners such as the TUC and the supermarket chain Sainsbury. Two examples of the Ajax operation were in Kent³⁹ where Indian, Pakistani, Polish and Nepalese workers were assisted. Enforcement was implemented through 26 unannounced inspections of 20 businesses, which included 10 gangmasters. Enforcement notices were issued to four clients who used an unlicensed gangmaster and one unlicensed gangmaster. Secondly, in Lincolnshire 12 GLA officers were deployed for four days on a two-part operation. Initially 11 unannounced inspections revealed that the gangmasters reviewed were meeting GLA requirements. However, in the second phase, involving four visits in the county to fields which had mainly Indian, Polish and Lithuanian workers picking and packaging produce, the GLA reports that its investigations were mixed⁴⁰.

Box 1: Operation Ruby

Agencies involved: Northamptonshire Police and the UK Border Agency (UKBA) and supported by the UK Human Trafficking Centre (UKHTC), the Serious Organised Crime Agency (SOCA) and the Gangmasters' Licensing Authority (GLA);

Nationality of workers: Sixty workers from Slovakia, Poland, Romania, the Czech Republic and Hungary;

Operation details: Trafficked workers were recruited through advertisements and agencies in Eastern Europe on the promise of work in the UK. Documents were taken from workers when they arrived and deductions were made from wages to pay for accommodation and travel;

Nature of prosecution: Thirteen people of mixed nationality were charged with human trafficking and the laundering of money (£10million) through a number of companies.

This partnership working has invariably uncovered instances of cross-border exploitation of migrant workers from other EU and third countries⁴¹. An important series of cross-border cases have involved the GLA working with authorities in Bulgaria (interview GLA senior field officer). Here a number of instances of Bulgarian 'bogus posted workers' were found who were employed by licensed and unlicensed Bulgarian recruitment agencies. One case involved a Bulgarian national who 'managed' two recruitment agencies employing 250 workers and who supplied these workers to a client farmer in Scotland. Here the client David Leslie became the first labour-user prosecution under the Gangmasters (Licensing) Act 2004. He was fined £500 for not using a licensed labour provider; the UK Border Agency also made him pay for workers to travel back to Bulgaria at a cost of £19,000; and HM Inland Revenue has demanded payment of

³⁷ <http://news.bbc.co.uk/1/hi/england/northamptonshire/7735623.stm>

³⁸ <http://gla.defra.gov.uk/index.asp?id=1013370>

³⁹ http://gla.defra.gov.uk/embedded_object.asp?id=1013433

⁴⁰ http://gla.defra.gov.uk/embedded_object.asp?id=1013448

⁴¹ For press releases on this go to <http://gla.defra.gov.uk/index.asp?id=1012780>

the workers' tax and national insurance at a cost of £174,000 (Lowson, 2010). The agencies involved in the investigation were the Border Agency, the UK Human Trafficking Centre, Health and Safety Executive, Tayside Police, Tayside Fire and Rescue Service and Perth and Kinross Council. Collaboration between cross-border authorities began informally via the Bulgarian Honorary Consul for Scotland. The Consul provided interpretation and cultural assistance when Bulgarian workers were initially encountered in Scotland, with more formal contact established in 2008 through the British Embassy in Bulgaria. This then led to two GLA officials travelling to Bulgaria to present evidence of the poor conditions of Bulgarian workers. The Bulgarian companies involved were then investigated by the Bulgarian General Labour Inspectorate which led to the UK prosecution. In 2009 an agreement was signed by the Executive Director of the Bulgarian Chief Labour Inspectorate and GLA Director of Strategy to exchange information under Directive 96/71/EC on working conditions for posted workers. The GLA is currently discussing other equivalent collaborative agreements with Poland and other new member states but reports that there is '*still some work to do here*' before these are signed (interviews with senior and field GLA officers).

The GLA framework of partnership working has generally been regarded as a success (Wilkinson et al., 2009). Carby-Hall (2010) in fact notes that the GLA has used '*...an innovative approach by targeting the supply chain to bring about disruption rather than relying on routine inspections*' (ibid: 10). Gaus et al. (2009) see the introduction of the Gangmasters (Licensing) Act in 2004 as the UK taking '*...a first step towards a more comprehensive policy framework in order to protect vulnerable workers from exploitation*' (ibid: 92). However, Carby-Hall (2010) sounds a note of caution with the estimate that twenty-five percent of supply-chain gangmasters operating in the relevant sector still do so without a licence.

3.2 Social partner provisions

3.2.1 Public sector

Even though in England the public sector codes of practice have been withdrawn, their mixed success is worth briefly reviewing. For example in Scotland, the PPP Protocol was considered to be successful (Unison, 2008), whilst in England the Unison local government branch of Newcastle City council reported that following early industrial and campaign action most services had been kept in-house. The codes, or what has been termed TUPE-Plus arrangements, formed an important part of the Council Corporate Procurement Strategy and 'scared off many contractors' (Unison Branch Secretary). However, Unison (2008) identified a number of key challenges, one of the most significant being the lack of evaluations or research on code application apart from its own through union branch structures and through a Freedom of Information request to local authorities (Unison, 2008; and Unison, 2009). This research identified that a number of local authorities were either not consulting trade unions when contracts were outsourced or were just not applying the codes and that some contractors were simply refusing to apply the codes (Unison, 2008). This has important implications for cross-border discussion and the introduction of migrant workers to the public sector. In the NHS the codes were again not always applied to NHS Soft Facilities Management contractors and did not cover certain areas such as social care (where spot purchasing was increasingly used) and local further education colleges. Finally, the Codes were self-limiting so that there had to be a TUPE transferred member of staff introduced into the private contractor's workforce, causing problems if this member left or retired (Unison, 2008). A major challenge has been that, whilst transferred staff were protected, this was more difficult with existing private contractor staff who could sometimes feel 'forgotten' (interview officer Migrant Worker Unit - MWU).

To add to the challenges that public sector unions faced, there has been a substantial increase in agency staff working for public sector bodies and contractors. In 2007-2008 it was estimated that local councils spent £1.4 billion on agency staff (Unison, 2009), a figure which would rise substantially if those from the NHS were added.

Cross-border situations

A growing issue for Unison has been the introduction of migrant workers through outsourced contracts and the number of workers introduced as agency labour. The actual proportion of migrant workers in the public sector was estimated at 13 per cent of all staff in 2010 and in the social care area at nearly a fifth of all workers; migrants are identified as being concentrated in privatised services (BIS, 2010). The codes were not reported to have been used or assisted the union in its work with migrant workers (interview officer MWU). Instead, the union since 2004 has undertaken targeted campaigns, for example supporting Filipino nurses in their community (discussed later under the NGO section) by sponsoring a basketball team and a London based newsletter. In 2005 a Migrant Workers National Working Party was established to coordinate policy, sharing best-practice though the union tended to be 'reactive' with activity based on individual projects (BIS, 2010). The senior officer for the MWU also noted that migrants were not active in the union and a strategy was established to address this and the better coordination of union migrant activity in order to increase Unison's migrant membership. . The MWU was established and this included seconding an OPZZ organiser from Poland. The union further secured funding for a migrant workers' participation project with four key elements: producing promulgation materials to encourage migrant engagement; outreach through migrant community networks, which was particularly successful for Filipino care workers; talent spotting which included not only identifying potential migrant activists but also encouraging branches to support these workers; and, finally, a two-day Pathways into UNISON course offered to new migrant activists (BIS, 2010). An evaluation of the project identified it as a success with 70 new migrant worker activists recruited. It also led to more informal types of activism due to third county migrant concerns about immigration status with the potential for deportation. A number of services for migrants were established, including English as a second language training, an immigration advice helpline and an employer agreement in the Midlands to provide citizenship training (Moore and Watson, 2009).

Two other examples were given of the work that the MWU has undertaken. The first was Basildon Hospital which was described as a typical example of migrant worker union activity. Here a private contractor secured a cleaning contract which involved the transfer of NHS workers who were covered under TUPE and the workforce codes but also Slovakian staff being brought in on the minimum wage. The trade union approach was to get these workers onto free English language classes as well as to recruit Slovakian shop stewards, even though these were not allowed time-off to attend to any workplace issues. So the current challenge is negotiating a recognition agreement with the employer. The second example of care homes in Lincolnshire has had mixed success. At Heritage where 20 percent of workers are Polish the union succeeded in establishing workplace organisation with eight shop stewards (three Polish), with the senior steward being Polish. But at UPU many of the workers are Filipino and described as being 'very exploited' (interview officer migrant worker unit). Although, the workforce codes and procurement statutes have not been successful in supporting migrant workers, Unison has a Migrant Workers webpage and through its Vulnerable Workers Unit (labelled Hidden Workforce) is dealing with all outsourced workers providing public services. Many of these workers are migrant workers and they have established trade union organisation in contract companies as well as gained membership.

3.2.2 Private sector - construction

This section will in particular look at the two main agreements in the industry (the Working Rule Agreement or WRA and NAECI) as well as briefly discussing the craft Joint Industry Board Electrical Contracting Industry (JIB ECI) agreement.

Working Rule Agreement

As identified earlier the civil side of the construction sector is fragmented with the increasing use

of contingent forms of labour, which means that enforcement of the WRA is also fragmented. National officials deal with broad policy issues, such as health and safety and bogus self-employment, whilst regional full time officials negotiate with the main employers for site agreements (see Box 2) or pressure them if site issues arise with subcontractors. These officials spend a lot of time visiting sites and dealing directly with site agents (often the only representative of a main contractor on site), site union representatives and groups of workers. With less resources - and therefore time - for full time officials, it has been increasingly important that site union representatives are present to enforce and report on attempts to undermine agreements. However, the key challenge here is that trade union membership stands at fourteen and half per cent, with the proportion of workers who have a trade union present in their workplace standing at only twenty-seven per cent (Achur, 2011). Significantly, it is also increasingly difficult to recruit site union representatives, so not surprisingly agreements are often difficult to enforce. What this means is that a lot often depends on the market, and for a number of years a good market has meant good rates - often higher than the rates in the agreements which have provided a minimum. However, with the current economic situation this is changing.

With regard to site agreements a West Midlands UCATT full time official reported that it had been possible to negotiate a number of site agreements, in particular two with Skanska. The Skanska parent company had signed an international agreement on workers' rights in 2001 which applied to all its subsidiaries; these in turn have to inform all their subcontractors⁴². The sites in question were hospital projects (Walsall [Box 2] and a £500m Mansfield project) in the Midlands. The agreements stated that all should be directly employed, benefit from provisions in the WRA, and be covered by the pension and holiday benefits via the B&CE Benefits Scheme. However, with implementation there were problems of a cross-border nature with the first agreement signed in Mansfield and discussed later.

Box 2: Summary of Skanska Walsall industrial relations code of practice

Parties to agreement: Skanska local management and UCATT on the 29th January 2008;

Framing of agreement: Procedural code of practice together with Skanska Code of Conduct and IFBWW agreement;

Trade union information rights: The agreement notes that Skanska must inform trade unions when a trade contractor is appointed who in turn must supply information on its industrial relations 'philosophy'. Trade contractors must supply personal information on all operatives, including name, address, national insurance details and qualifications;

Health and safety: Skanska are responsible for co-ordinating safety meeting for a management representative of the trade contractor and the workforce. H&S representatives must be afforded all i legal rights. Skanska is also responsible for ensuring that trade contractors provide PPE as required. They will also provide the facility of a full-time safety representative;

Welfare: A fully equipped canteen, first aid, male and female toilets and an occupational nurse will be provided.

With other site agreements, the key issues have been around holidays. Importantly, on one large Derby site which only had three subcontracting tiers the agreement generally was successful. Overall it was highlighted that these sites represented large projects, which are now becoming scarcer. On other smaller projects contractors have been more reluctant to enter into

⁴² <http://www.bwint.org/default.asp?index=43>

agreements. As noted in the survey report, construction trade unions have also negotiated memoranda of agreement. Again, these are generally on large publicly funded projects such as the Olympic Park and Village sites, which drew their example from the earlier Heathrow Terminal 5 (Clarke and Holborough 2011; Clarke and Gribling 2008). In each case, the role of the client is critical in promoting, implementing and policing such agreements. In an interview a senior national UCATT official stated that the Olympic Memorandum of Agreement had been on the whole successful on the Olympic Park where it was established that the majority of workers should be directly employed (PAYE- Pay-as-you-earn). Regular client (Olympic Delivery Authority - ODA) audits have proved a good preventative tool, whilst, if issues have arisen on the sites, these have been generally resolved by officials rather than going through the more formal procedures of the memorandum. However, it was reported that the Olympic Village site has not been as successful, one reason given being that it was basically 'a big housing estate' making it difficult to regulate. In contrast, the Olympic Park site contains the larger more complicated stadium construction. Overall, direct employment and a clear knowledge of wages has made the Park a better regulated site, with the accident rate of the Village site twice that of the Olympic Park site (Clarke and Holborough 2011).

Cross-border situations

With regard to cross-border situations, construction trade unions on the civil engineering side have been involved in regular sporadic incidents of cross-border engagement since the accession, involving contracts of employment with migrant workers entered into in both the UK and in their home countries (see Fitzgerald, 2006 and 2007 for example on case studies in northern construction). A senior UCATT research officer reported, however, that, if a foreign contractor secures a UK contract, this is often subcontracted down to a local UK firm who may then either employ British or migrant workers. Overall it was stated that:

'What all our regions deal with quite extensively is the issue of foreign/migrant labour. In civil engineering the workers tend to come to the UK on their own initiative, or are brought over in small groups (from Poland etc) by agencies/gangmasters. UCATT officials spend considerable time and effort in recruiting and supporting these workers, as well as at the same time trying to protect the terms, pay and conditions of the indigenous workforce.'

With the Skanska Mansfield agreement, abuse of these migrant workers occurred in 2007 when a Lithuanian worker approached the convenor on site, complaining of being hungry. He was employed by a Lithuanian company, who was a fourth or fifth tier subcontractor, and was ostensibly paid £200 per week. However, out of this sum deductions were taken for lighting, tools and a number of other items so that he ended up with £8.80 for a 39 hour week. Others were found to be on £13 per week, so action was taken and the company was removed from the site. Interestingly, a few months later the Dorset police contacted the West Midlands official and the Skanska HR manager as the company owner was prevented from leaving the country because he had too much money with him (£130,000).

The West Midlands UCATT official has also undertaken an amount of work in the Polish local community to support and recruit migrant workers, including in the church (see Fitzgerald, 2009 for more information). UCATT Northern Region also emphasised how that the agreement with Rift International has assisted them in gaining membership of A8 workers, though Rift was not a key means of engagement in the West Midlands.

With regard to the direct posting of workers, UCATT nationally has reported that posting is still 'quite rare' in building and civil engineering. However, exceptions were noted involving the same main contractor Bouygues. In some cases these were mainly French and Portuguese workers and, although the union were unable to communicate or recruit them, they were not considered to be exploited or a challenge to prevailing conditions of service. However, there was an exception in the northern region where Bouygues was the main contractor on the Tyne Tunnel

project, subcontracting to PortScope (Portuguese company employing Portuguese workers) and Format-Lambda⁴³ (Polish company employing Polish workers). A UCATT regional interviewee estimated that in total both companies employed 100 posted workers. Foreign workers initially spoke to local workers and the union subsequently obtained a contract of employment for them. From this and information provided, it was discovered that posted workers were working to WRA steelwork rate 1 (£9.82 plus contract bonus) but were being paid only £5.50 per hour, a rate which was also illegal as the national minimum wage was then £5.73. Employers disputed this finding, with one arguing that as these were posted workers it was not necessary to pay the negotiated WRA steelwork skill rate 1 - a claim which was detailed in a solicitor's letter sent to the union. The key point was that the letter inferred that these posted workers were not covered by anything other than UK law. A series of meetings were held with the client and the main contractor, and Members of Parliament were informed by the union that this might turn into a significant issue in their constituencies. The issue was not resolved, with the union reporting that it was difficult to engage with workers even though leaflets had been printed in Portuguese and Polish. In short, no one joined the union and the companies moved off site. Also of note was that this was a publicly funded project with a procurement clause stating that local labour was the preferred route of employment.

Joint Industry Board Electrical Contracting Industry

The JIB-ECI is an agreement covering skilled electrical workers and was set-up in 1968 by its constituent parties the Electrical Contractors' Association (ECA) and the EETPU (now Unite). As noted in the survey report, it has sophisticated dispute resolution procedures. Further subcontracting to companies who are not parties to the agreement is difficult, as there are clear procedures and rules that must be adhered to before an external company can be used or indeed before self-employed workers can be hired (JIB-ECI: sec17). However, cost pressures have meant in recent years that the low-cost opportunities offered by Eastern Europe have begun to challenge the agreement (ECA employer interviewee). Alongside this are changes in technology, extensive subcontracting and use of agency workers, and contractors' Taylorist practices have rendered some areas of electrical contracting vulnerable to the use of semi-skilled labour rather than being only the domain of qualified electricians with their far broader skill profiles. Recent regulation of the agreement has therefore begun to turn from key procedures and methods laid down in the agreement to employer withdrawal from the agreement and consequential industrial action⁴⁴. Indeed eight large employers have recently given notice that they will withdraw from the agreement in March 2012 and the trade unions have responded with strike action. Cross-border engagement here is limited or has not happened, but this is likely to change as a consequence.

National Agreement Engineering Construction Industry

Before discussing directly how the NAECI protects workers' rights in the subcontract, it is important to provide some brief background on the engineering construction industry. The industry has some of the largest companies by far in construction with a smaller much more self-contained number of employers. Clients are invariably foreign energy multinationals and many of the large employers are also foreign. Many projects are undertaken on large energy based sites which often have high security and controlled entry. Some teams of workers are on site for long periods of time, for example on nuclear installations; others are there for short periods working on specific projects as in the case of new energy plant construction. The workforce itself is mainly highly skilled and many of those on site are classed as 'travelling men' in the sense that their home is at a distance away so that commuting is not possible and they receive a travelling and lodging allowance (Gibson, 2009). It is not uncommon for issues to arise between British workers over who is to be regarded as 'local' especially in the light of policy initiatives to

⁴³ <http://www.format-lambda.pl/eng/about.html>

⁴⁴ <http://www.constructionenquirer.com/2011/08/18/opinion-me-giants-seize-chance-for-change/>

encourage the employment and training of 'local' workers rather than their foreign counterparts, including through the use of Section 106 clauses drawn up by local authorities as a condition of planning permission (Clarke and Gribling 2008). As migrant workers may be classified as 'local' as opposed to 'travelling' in the terms of the NAECI agreement, such policies are difficult to apply.

The engineering construction workforce is well organised and has many informal means of communication outside of union and other official structures (Gall, 2010). Historically the NAECI has been central to containing conflict which has been channelled through agreed and centralised procedures. Thus it has been well supported by both employers and official trade unions. However, Gibson (2009) identifies that since 2006 'unprocedural action' has risen and in 2008, prior to the dispute at Lindsey power station there were '*...approximately 15,500 days (lost), 1% of approximately 1.5 million days that were worked in that year (ECIA data). Almost 30,000 days were also lost in the first seven months of 2009, despite a decrease in the industry workload*' (Gibson, 2009: 12). Within these first seven months the union state that the Lindsey dispute witnessed an estimated 13,000 workers 'walking-out' on 19 sites across the UK (Unite, 2009: 4).

The undercurrent to the move to open conflict is undoubtedly cost pressures and a global energy market. Apart from the Nuclear Decommissioning Agency there is little scope for public procurement. The NAECI agreement signed following Lindsey is very much about trying to contain this price competition. For the trade union side it offers very firm procedures and clear guidelines with regard to the use of foreign labour, which it is argued provides a cheaper alternative to British workers. For the employers, there is the promise of change, ostensibly on the grounds of productivity improvements which are underlined in the recent government Gibson (2009) review. The key here is that, when industrial relations break down, projects overrun with consequential cost repercussions. Finally, allied to pressures to change working practices is an evident and growing skills shortage aggravated by inadequate vocational education and training (Chan et al 2010).

Thus regulation is enforced: first, through the threat of unprocedural action by workers on sites, if, for instance, main contractors or subcontractors do not follow or more importantly agree to abide by the NAECI agreement. The NAECI agreement specifically supports site stewards who are central to workforce action which is often unofficial. One means to try to bridge the gap between unofficial and official trade unionism is the National Stewards' Forum, which meets three times per year for two days and involves both GMB and Unite members. This is organised by national full-time officials and stewards attending do not lose any normal earnings (NJC, Part 3 Appendix C 5) and travel is funded by the trade unions. Activities include invited speakers on important topics to the sector and discussion on any issues that are arising on sites and with main or subcontractors.

Alongside this, second means of enforcement are the sophisticated arrangements in place to contain conflict. Thus consultation, discussion and negotiation of key issues must go through procedures laid down in the agreement including, for example, prior notifications of significant projects in the industry (NJC, 2010, sc20.1). These procedures inform trade unions of planned new projects and, when a project begins, there are Project Joint Councils and Local Forums where any issues arising can be discussed. With Major New Construction Projects there are Supplementary Project Agreements (SPA), stipulating, for instance, the appointment of an independent auditor. There are clear instructions on the use of this an auditor on large projects and what the role involves, including auditing pay levels (NJC, 2010, Annex D). The audit is central to supporting workers rights' in the subcontract chain on large projects (Category 1 sites) and maintenance on existing sites (Category 2 sites)⁴⁵. Initially, the auditor interviews all contractors prior to starting work on site to ensure that employers are aware of the NAECI

⁴⁵ Category 1 is for major new construction projects and Category 2 is for long term repair and maintenance projects.

conditions and are members of or a NAECI signatory organisation and that their sickness and accident insurance cover is appropriate. When work begins, relevant data is then compiled, with any discrepancies reported back to the Project Joint Council (see Box 3).

Apart from the broad challenges identified the main successes, challenges and agreement in practice are best understood in cross-border situations.

Box 3: Summary of NAECI auditor Baker Mallett's role when a project begins

Background: Baker Mallett is a quantity surveying/project management company, which is one of only three undertaking the NAECI auditor role. It began this work in the mid-1970s and only undertakes work on Category 1 sites;

Funding: Its role is paid for by either the engineer procurer construct contractor (main contractor) or the client;

Operational projects role: It collects a range of personal information for each worker, including wage slips and compares this to agreed terms and conditions on a weekly/monthly basis, depending on the payroll scheme. Apart from the direct employer, the auditor is the only one who views this information and the Project Joint Council which includes the trade unions is only involved if there is a discrepancy;

Period and purpose of audit: The audit is undertaken while mechanical engineering works are underway and ends when there are only a few workers left on site. The interviewee noted that *'This process aids industrial harmony and we believe it is successful'*.

Cross-border situations

The NAECI agreement itself has an Appendix on *Non-UK Contractors and Non-UK Labour on Engineering Construction Sites* (NJC, 2010, Part 3 Appendix G). Here a number of key actions are laid out for the management contractor and foreign contractors which include: early action to ensure that foreign contractors are fully aware of the NAECI agreement; meaningful consultation with trade unions and site stewards; equality of opportunity for UK workers (including informing local Job Centres of employment opportunities but not EURES); and that the managing contractor confirms that a foreign contractor has a workforce that is competent to perform the tasks required. The employer body ECIA (Electrical Contracting Industry Association) also provides foreign contractor guidance for its members (ECIA, no date). Prior to the current agreement, unofficial action, which was often informally supported by national trade union officials, was significant in cross-border situations.

For example in 2005 at Cottam power station a German utility company, RWE, was sub-contracted to build a flue gas de-sulphurisation (FGD) plant (see Diagram 1). RWE in turn sub-contracted to Austrian firm SFL which supplied both Austrian and Hungarian posted workers. The Hungarian workers came through an SFL subsidiary, SAB Ltd, and approximately 120 were found to be poorly treated, receiving between £816 - £1,020 per month, which was below the NAECI rates and national minimum wage. A posted worker reported that the equivalent Hungarian wage was £326 per month. The union took industrial action in support of the workers and against the introduction of cheap labour. Following a six week strike, the outcome was that the existing audit system was refined to include monitoring payslips and the SFL transference of wages from an offshore bank account into workers own Hungarian accounts. Initially the audit report showed that the workers were receiving the correct payments. However, a posted worker reported that a 'managing' fee of £2,380-£2,584 per month was being taken from their personal Hungarian bank accounts following the final wage payment. The union again resorted to industrial action and temporary local UK bank accounts were set-up for Hungarian workers. Prior

to this action, the unions were also already campaigning against the introduction of cheap foreign labour. An example of this approach is a joint union publication of 2004 which had in its title '*...social dumping: a crisis in the UK engineering construction industry*' (NECC, 2004). More recently, following the spate of incidents which included Lindsey, Unite also produced a publication entitled '*The case for fair access to employment in the UK engineering construction industry*' (Unite, 2009). As part of this approach there are leaflet, poster and sticker 'resources' available on the Unite website⁴⁶ and a website dedicated to the revision of the Directive following the recent ECJ judgements⁴⁷.

Following Cottom in 2008 there were a number of reported issues with posted workers in the sector. For example during the construction of a new gas-fired Grain CHP (combined heat and power) station in Kent, Alstom awarded the Polish company REMAK the boiler element of this project, resulting in an estimated number of 220 Polish posted workers at the site for between six and nine months (Unite, 2009). Also on this project the Polish company ZWE Katowice was awarded the '*alignment contract on the site which provided similar employment opportunities*'. Following this, at a new combined cycle gas power station at Staythorpe (Nottinghamshire) Alstom awarded sub-contracts to a number of companies, including two Spanish companies Monpressa and FMM which posted 105 and 100 Spanish workers respectively. In all four cases unions spoke to the companies concerned and were informed that no local or UK labour would be employed. Again sporadic industrial action was taken to maintain the agreement, with national officials negotiating and discussing issues with clients and main contractors.

These incidents preceded the now infamous Lindsey Oil refinery disputes. Here the French client Total initially awarded the contract for a new desulphurisation facility at the site to an American multinational Jacobs Engineering Group. The mechanical piping work was in turn subcontracted to the Shaw Group; certain areas of the project were then subcontracted to the Italian company IREM which posted its own workforce of Italian and Portuguese workers. It is believed by Unite that these Portuguese workers were sourced through Portuguese recruitment agencies. It is estimated that around 200 full-time equivalent posted workers were involved (Acas – interviewee). Again the unions argued that cheap labour was being introduced onto sites which undermined the NAECI. IREM was unable to produce any form of evidence to disprove this assertion. However, Gibson (2009) reported finding no evidence to support the union claims and instead noted early audit discrepancies which were rectified. Also significant, and this has been the case with the other disputes above, the unions believed that IREM posted workers were not able to take rest breaks during their shifts, though management disputed this by arguing that these were added to their midday lunch break. Just as significantly, IREM workers were changing into their protective clothing and preparing for a shift prior to the shift starting though local practice was that this was undertaken at the beginning of each shift. IREM did not dispute this and Acas noted that IREM was being paid on a lump sum basis of a fixed number of hours in which to complete the job.

Significant here are the last areas noted, in particular rest breaks and differing ways of working, particularly with regard to foreign workers being more flexible in their working practices. This is central to new discussions on productivity and integrated team working, a way of working which potentially challenges current demarcations on UK sites. Overall the enforcement of the agreement has been good and much conflict is channelled through its procedures. Workers rights have been protected, although this perhaps relates more to British than foreign workers as unions have recently found it difficult to engage with posted workers. As has been noted, much of the recent action and indeed a number of the procedures in the agreement relate to 'local' workers which is often used as an acronym for British workers.

⁴⁶ http://www.unitetheunion.org/campaigns/uk_workers_want_fair_access_to.aspx

⁴⁷ <http://www.amicustheunion.org/lavalvikingruffert/default.aspx>

NGO provisions

The Citizens Advice Bureaux (CABx) undertake their support work with 21,500 volunteers and 7,000 paid workers (Citizens Advice, 2010a: 3). Citizens Advice nationally also campaigns and both local and national organisations work in collaboration with a number of trade unions and other bodies. In the period from 2009 to 2010 the CABx assisted 286,600 people with over 586,000 employment issues, a six per cent rise on the previous period. Interestingly the leading six categories of advice were in the areas of pay and entitlements, dismissal, redundancy, terms and conditions of employment and dispute resolution (Citizens Advice, 2010b: 3): 1). Importantly though Tailby et al. (2011: 279) state that in 2006 only a third of CABx had a specialist trained to give employment advice, which means that it is mostly provided by generalists. They researched 124 CABx with employment advisers and also found that around two-thirds had just volunteers. Given this the challenges for the Service are clear. Although, they state that '*public service, altruistic, moral ethic*' is what drives voluntary sector workers there is a note caution in that their research gives '*voice to the strains and frustrations of operating in a threadbare resource environment. Advisers cope, but at the cost of compromises they are forced to make because of inadequate funding and funding rule changes*' (ibid: 287).

The CABx has done extensive work in support of migrants workers, uncovering some of the worst abuses of workers' rights⁴⁸. For example Carby-Hall (2007: 278) identifies several cases of CABx assisting migrant workers, noting that these were introduced into the UK under circumstances resembling modern slavery. A typical case was reported in 2005 where a number of Filipino nurses were bought into the country to work at a local NHS trust (employer details not known). They were escorted from the airport on a bus where a trust representative instructed groups to sign tenancy agreements that offered accommodation at three to four times the market rate. Nurses were told that if they complained they would be sent back to the Philippines. The case was uncovered when one of the nurses approached a local CABx which passed on details to Unison which in turn resolved the matter. Cases are also passed on by the local employment service or other NGOs which are not able to assist. One of the issues is that the burden of proof is placed on the worker as the CABx is not in a position to inspect workplaces. As evidence of what this can mean, Pollert and Charlwood (2009) in a study of low paid non-union members found that, though those whose rights had been violated were more likely to seek advice, they would on the whole seek out managers, family and work colleagues rather than external organisations, although the CABx featured prominently when they did.

The London Living Wage campaign has been essentially a community based approach which has moved conflict and discussion away from the workplace into the public sphere. The campaign has three interlinked components⁴⁹ which have been introduced at the same or differing stages since the campaign was introduced in 2001. The first is research and academic support which began in 2001 with Unison commissioning work on identifying what a living wage was in London. Discussion and conferences followed with research underpinned by Professor Jane Wills securing two ESRC funded projects to work with the campaign and groups involved in it⁵⁰.

Secondly, and most significantly there were public meetings, rallies and marches, with some meetings having up to 1,000 people. As part of this direct action was taken against clients and contractors. For example, the London Oxford Street branch of HSBC was occupied and its AGM was attended and the meeting was disrupted with demands for discussion of a living wage. Thus as much public pressure was put on both private and public sector clients to secure discussion

⁴⁸ Citizens Advice (2004) *Nowhere to turn- CAB evidence on the exploitation of migrant workers*, Citizens Advice, March 2004; (2004) *Somewhere to turn: the case for a Fair Employment Commission*, Citizens Advice, October 2004; (2005) *Supporting migrant workers in rural areas: A guide to CABx initiatives*, Citizens Advice, September 2005; (2005) *Home from home? Experiences of migrant workers in rural parts of the UK, and the impact on local service providers*, Citizens Advice, December 2005; (2007) *Rooting out the rogues*, Citizens Advice, December 2007.

⁴⁹ A full chronology can be found at <http://www.geog.qmul.ac.uk/livingwage/chronology.html>

⁵⁰ Economic and Social Research Council grant numbers RES-000-23-0694 and RES-148-25-0046.

around the issue. There was also union support here and in some cases industrial action was taken so that community based campaigning was brought into the workplace which facilitated organisation and activity there (Wills, 2009: 454).

Lastly, following a large meeting of support for striking NHS contract workers a new element to the campaign was added. Here a strategy was begun of improved contractor ethical standards. In late 2003 a *Socially Responsible Contracting* document was launched with major banks and cleaning companies and MPs present. This area was then developed with the London Olympic Committee signing a compact with London Citizens that the 2012 Olympics would be ethical. This included paying a living wage to Olympic contractors and those actually working when events began.

The workers it has supported are mainly migrant workers from third countries who though employed by some large multinationals and working in the some of the most prestigious banks in the world were undocumented. This clearly made them vulnerable to employer intimidation and threat of the immigration authorities. London Citizens began a campaign called Strangers into Citizens to support undocumented working being documented⁵¹. A central part of the campaign is its community base and these workers faith organisations which have worked with them to secure a living wage (Wills et al., 2009).

Wills (2009) identifies that the key challenge with the campaign has been moving the focus to the real employer (client) rather than the subcontractor. In discussing this she notes that one of the success of the campaign, Homerton Hospital, had a number of challenges including labour turnover due to working practices and isolated work patterns; the campaign also had little impact on issues at work; and the trade union had real issues with retaining members. Unison also reported that at Islington college they have worked with the living wage campaign to secure this for contract staff. Although, it was noted that catering and security contract workers have joined the union and are participating but it has much harder with cleaning staff who are only working two hours a day (interview NWU officer).

Overall, one of the main strengths of the campaign is that it has secured a living wage for many of those who have little if any voice. It has been calculated that by 12th November 2010 a staggering £62,681,059 has been accumulated in increased wages for 4,861 full-time and 4,004. Part-time workers⁵². However, this necessary focus on wages is to some extent a weaknesses as employment is still contingent and day-to-day working still difficult. One of the central factors here is that even though there has been significant support from the trade unions they have seemingly not fully committed to this approach (Wills, 2009; interview Unison official).

4. Concluding remarks

When protecting workers rights' in the subcontract chain is considered in a UK context, the situation is challenging whether for UK or cross-border workers. If the legal provisions detailed in the survey report are considered first, then these would seem to provide a level of protection. However, underpinning this law is the status of a "worker" which needs to be clarified from the outset of the contract if deductions from wages under the UK's s.13 ERA 1996 or holiday pay under the WTR 1998 (a simpler procedure in the employment tribunal than claiming as a self-employed contractor in the civil courts) are to be claimed. Workers need to know from the start, how the contractor regards their status and to be aware how this affects their right to claim deductions from wages etc. UK law already provides under s.1 ERA 1996 that within eight weeks of the start of the contract, an employee must be given a written statement of terms and conditions of employment. The provisions in s.1-11 ERA 1996 could be extended, so that all persons contracting to do any work, must be given a statement by the hirer/employer, indicating whether the relationship between them is as an employee, worker, or self-employed person.

⁵¹ <http://www.strangersintocitizens.org.uk/>

⁵² <http://www.geog.qmul.ac.uk/livingwage/numbersandmoney.html>

Prescribed information in the statement could also state which types of rights are available to each type of worker. While there could be practical problems for new employees who wished to challenge the status, it would arguably be better that they knew where they stood from the start. Also, relatively simple deduction claims could be dealt with in tribunals without so many becoming bogged down on the question of status.

This is not the only issue with UK laws and regulations. If these are viewed from below and the case of enforcement is considered, there is serious cause for concern. As Wilkinson et al. (2009) state:

'...The UK enforcement framework has failed temporary workers in general and migrant workers in particular.... There have, however, in recent years been two exceptions to that rule – National Minimum Wage Inspectorate and the GLA...'

It should also be considered that much of UK enforcement now relies on worker information and this is shared by all, including the Border Agency. This means that, when migrants rights are violated, third country workers are conscious of the danger of deportation. There is an overwhelming need for a single labour inspectorate that is separate, has a clear enforcement role and puts workers rights at the heart of its work. There remain, however, some best practices in legal provision which are worth highlighting:

a. The GLA Inspectorate:

GLA good practice relates to its overall working practice and its engagement with other European Union agencies. The GLA was set-up following the death of 23 Chinese migrant workers and trade unions were central to the campaign and process that led to the authority being created. Carby-Hall (2010) also argues that the GLA has operated in a partnership manner in its work. Given this outward looking approach, it is perhaps not surprising that when confronted with poorly treated Bulgarian workers it worked with Bulgarian authorities to identify bogus posted workers. This good practice is now part of a more formal agreement between Bulgarian and UK authorities.

In terms of social partner provision, it is difficult to identify best practice. Even though Unison and all UK trade unions have undertaken exemplary work with migrant workers, much of this is temporary and relies on funding that may soon disappear. For example a central part of the Union migrant worker project was funded by government and this will not recur. With the economic crisis it is difficult to see how unions can seed fund new work. More importantly there is some question as to whether trade unions are prepared to support migrant and cross-border workers outside of the workplaces where they do not have a presence. However, it is worth highlighting two best practice examples from an industry which still has a good trade union presence:

b. National Stewards' Forum:

Given the fragmented nature of construction the voluntary system of national agreements can be difficult to enforce. With engineering construction this can be a significant challenge with posted workers. One key group of trade union representatives who have sought to enforce this are the workplace stewards. Their network and the NAECI supported National Stewards' Forum provide a discussion, information and training forum where workplace issues and potential employer challenges to the NAECI agreement can be identified. The network itself is also informal and contact is made outside of meetings and information quickly passed from project to project. Currently this forum provides a space where stewards can 'air their views' and discuss/challenge national union officials with regard to agreements or current negotiations.

c. NAECI Audit:

One of the most important areas that gives rise to unrest and industrial disputes in the engineering sector is the fear of 'social dumping' through posted workers. The recently negotiated NAECI audit of posted workers wages and conditions provides a fact based transparent process where unions, stewards and indigenous workers can be sure that agreed rates of pay and conditions of service are being followed.

With NGO provisions both CABx and the London Living Wage Campaign should be lauded for the way they have protected workers rights. In particular the Living Wage Campaign has

d. London Living Wage Campaign:

The campaign has provided an organic and inclusive structure, capable of changing and moving as the economic and social environment dictates. From the beginning the organisers recognised that there can be no boundaries when supporting workers' rights, working with trade unions and not criticising them when they have failed to fully support the campaign. They have demonstrated and argued strongly against some of the foremost bankers in the country, but still discussed with them how best to secure what is equitable. The work done has been with those migrant workers who are in some of the poorest paid jobs. The central objective of the campaign has been to work with those who are on the minimum or less and not to undermine existing collective agreements. As such the campaign has had a wide impact including being used for the Olympics Park and those who will work on events when they begin. The London living wage is now extensively applied, dependent on and at the same time improving on the legal minimum wage.

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