



European Institute for  
Construction Labour Research



**Improving best practices on the working and living conditions of posted workers**

Country report UK (Project VS/2009/0475)

Ian Fitzgerald - Sustainable Cities Research Institute (SCRI)  
October 2010

School of the Built and Natural Environment  
Northumbria University  
Wynne Jones Building  
2nd Floor, room 202  
Newcastle upon Tyne  
NE1 8ST

Direct line: 0044 (0) 191 227 4362  
Main number: 0044 (0) 191 227 3500  
Email: [ian.fitzgerald@northumbria.ac.uk](mailto:ian.fitzgerald@northumbria.ac.uk)

## **1. Posting of workers – background, facts and figures**

The recent background to the Posting of Workers Directive (PWD) in the UK is the EU accession in May 2004 of the eight central and eastern European countries (commonly termed the A8s). The UK was one of three EU countries that ‘fully’ opened up its labour markets to these workers. This has led to four significant impacts. Firstly, with numerical data the location and number of A8 workers has been difficult to identify. Only limited administrative and survey data are available, with A8 workers characterised as initially transient, although some authors believe the A8 migration to be the largest ever single in-migration (Salt and Millar, 2006). As with other EU countries information with regard to undocumented migrants and undeclared work is scarce (Gribling and Clarke 2006). Secondly, the administration data available from the Worker Registration Scheme (WRS) indicates that approximately forty percent of the near 950,000 registered A8 workers are employed by agencies (Border and Immigration Agency, 2009). Recruitment agencies, a number of Polish origin, have been identified as significant facilitators of the A8 migration both overall (Currie, 2006) and in some regional construction labour markets (Fitzgerald, 2007). Posted workers do not have to register to the WRS. Thirdly, it has recently been argued that in construction many A8 and Bulgarian and Rumanian workers are coming into the sector as bogus self-employed (Harvey and Behling, 2008). Lastly, a number of studies of migrant workers have indicated that working conditions can be very poor and often below industry norms (Fitzgerald, 2006; Carby-Hall, 2008). In agriculture poor working conditions and loss of life led to the Gangmasters (Licensing) Act 2004 which included the formation of the Gangmasters Licensing Authority (GLA - [www.gla.gov.uk/](http://www.gla.gov.uk/)). In contrast construction either has the social partners or prevailing regulatory bodies to deal with any issues. Significantly, it is believed that many of the worst agricultural labour providers have moved into construction, which strengthens the argument for the gangmasters regulations to be extended to the sector (see Blackman, 2007).

### ***1.1 National implementation – main characteristics***

The PWD was implemented with only minor changes to already existing legislation. The new acts were the Employment Relations Act 1999 and the Equal Opportunities Regulations 1999. The government identify a range of legislation that applies to posted workers<sup>1</sup>. Importantly there are currently no legislative provisions to apply the terms of mandatory or other collective agreements to posted workers. This means that the range of construction collective agreements (NECC, 2005), which are generally accepted by the construction social partners, do not necessarily apply to posted workers and in fact due to the ECJ judgements are potentially threatened. Most notably this includes the building and civil engineering Working Rule Agreement – WRA (CIJC, 2008) and the engineering construction National Agreement for the Engineering Construction Industry – NAECI (NJC, 2010). Posted workers are covered by the national minimum wage but this is below all construction collective agreements and the often higher local rates of pay.

### **1.2 Construction related features**

In 2008 there were approximately 202,407 private contractors in construction with 1,266,342 people working in the industry (ONS, 2009)<sup>ii</sup>. Over seventy percent of these firms had no more than three direct employees. In the engineering construction subsector, which was identified as having most posted workers, clients are mainly multinationals. Many subcontractors are SMEs (under 250 employees) and in 2008 there were approximately 55,000 workers of which 15,000 worked offshore. Two-thirds of these were in the NAECI craft trades with the remainder either management, professional or manual staff. Gibson notes that the workforce, as in construction as a whole, varies dramatically depending on projects and outward mobility (Gibson, 2009).

Overall in construction there are only a small number of main contractors who directly employ large numbers of people. The industry is based on flexibility and the use of contingent forms of labour-subcontractors, agency staff and self-employed workers (Forde et al., 2009). Employment is causal, insecure and fragmented (Clarke, 2006) and allied to this are workers who are undocumented (Gribling and Clarke, 2006) or bogus self-employed (Harvey and Behling, 2008). Harvey and Behling have estimated that there were approximately 400,000 bogus self-employed (large numbers from the A8 countries) which is in addition to a figure of 270,000–325,000 genuinely self-employed.

### **1.3 Facts and figures, frequency and duration**

There are no direct administrative or other data on posted workers and so little is known on numbers, frequency or duration of stay. However, the recent preliminary findings on the number of E101 certificates issued in EU Member States and Iceland, Norway, Liechtenstein and Switzerland does provide a guide (EC, 2009). The data carries a number of caveats (ibid.: 2009, sc5). Although, it does show in the UK that the general situation in the years 2005–2007 remained stable, with initially a slight decrease of 2,000 posted workers in 2006 and a subsequent rise of 1,000 in 2007. In 2007 there were 37,905 posted workers (8<sup>th</sup> highest number in the EU) with the three most significant posting countries being France (18,955 – 50% of UK postings); Germany (8,284 – 21.9%); and Poland (3,340 – 8.8%). Unfortunately these countries did not provide a sectoral breakdown of posted workers, but in interviews only two sectors were identified as having posted workers, agriculture and construction. Construction had by far the most noted instances of posted workers who were mainly based in the subsector of engineering construction.

In agriculture an interviewee from the GLA reported that in 2008 a number of instances had been uncovered of Bulgarian ‘bogus posted workers’ (see Section 1.6); one of these involved 250 workers. Duration of posting was short given the seasonal nature of the sector and it was now believed that posted workers were not present.

UCATT reported that posting is still ‘quite rare’ in the building and civil engineering subsector. However, exceptions were noted involving the same main contractor Bouygues. Nationally it was reported that there were mainly French and Portuguese posted workers present on several Bouygues sites, the union were unable to

communicate with, or recruit, these workers but they were not considered a challenge to prevailing conditions of service. In the northern region Bouygues was the main contractor on the Tyne Tunnel project and subcontracted out work to PortScope (employing Portuguese workers) and Format-Lambda<sup>iii</sup> (employing Polish workers). It was estimated by a UCATT regional interviewee that in total both companies employed 100 posted workers.

In engineering construction posting is more prevalent and has been ongoing for a number of years. 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. RWE in turn sub-contracted to Austrian firm SFL. SFL supplied both Austrian and Hungarian posted workers, with the Hungarians coming through an SFL subsidiary SAB Ltd and there were approximately 120 poorly treated Hungarian workers (discussed further in Section 3.1). 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. This led to what is believed to be approximately 220 Polish posted workers at the site for between six and nine months (Unite, 2009). Also on this project the Polish company ZWE Katowice were 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. These companies 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. 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 posting 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 (Advisory, Conciliation and Arbitration Service – Acas – interviewee).

#### ***1.4 The impact on the total working population***

The E101 data and interviews indicate that posted workers are not having a significant statistical impact on the labour market. However, when the ramifications of the Lindsey Oil refinery dispute and ECJ rulings are considered, there is a significant perceived impact, which can be identified in both the UK and Europe, with a Health and Safety Executive (HSE) Policy Advisor commenting that it '*remains a topic of interest that MPs have raised with HSE in the past 12 months*'. Further the construction social partners noted that due to the ECJ rulings the PWD had the potential to be used to pose a significant challenge to the industrial relations framework.

### ***1.5 How is posting organised?***

In agriculture in the cases discussed above there was a direct relationship between the client (farmers) and labour contractors (Bulgarian companies), which allowed authorities to conduct a prosecution of the farmer (discussed in Section 2.3). However, in construction posting is organised through the fragmented construction supply chain. For example UCATT nationally commented that even if an EU foreign main contractor won a tender this did not mean posted workers, as the work was then likely to be subcontracted to local/British firms who would employ either UK or migrant workers. Further, even in the more structured engineering construction subsector a Unite national respondent stated that objective data on the terms, employment and conditions of posted workers ‘...was far from transparent’.

### ***1.6 Forms of posting, unintended effects***

An important misuse of the PWD was reported in agriculture where a number of instances of bogus posted workers were found in 2008. The background to this was that following the unprecedented migration of A8 workers into the UK labour market, the government restricted access to Bulgarian and Rumanian workers. Only a small number of exceptions were made which included posted and self-employed workers. These exceptions were perceived as an opportunity by some farmers and Bulgarian companies to ease access into the agricultural labour market. In one case in particular these workers were found to be living in squalid conditions (see Section 2.4). A broader unforeseen effect is the interpretation of the ECJ legal rulings that the minimum now applies; suggesting that in construction posted worker employers need now only pay the national minimum wage of £5.80 per hour.

## **2. National enforcement and control**

There is no direct enforcement or control measures with regard to the PWD; instead the Directive is enforced only as a consequence of the enforcement of other laws. In an interview the Policy Officer for posted workers (the sole UK government officer dealing with posting) noted that the key government agencies that might deal with any issues were the minimum wage inspectorate; a ‘robust’ health and safety enforcement system; and the GLA, which licences labour providers in the agricultural sector.

### ***2.1 Registration of posting***

As already noted there is no system of registration of posted workers.

### ***2.2 Control mechanisms and inspections on site***

If agriculture is at first considered there is an initially good account with regard to posted workers. The first labour user prosecution under the Gangmasters (Licensing) Act 2004 was of a farmer who used an unlicensed gangmaster who managed two Bulgarian labour agencies<sup>iv</sup>. A multi-agency team<sup>v</sup> initially investigated the poor conditions of these workers, then identified their employment status and finally scrutinised the businesses involved. GLA officers also reported a number of other incidents of the use of similar ‘bogus’ posted workers by Bulgarian GLA licensed recruitment agencies. No further prosecutions were initiated but in one case a GLA licence to supply labour in the sector was withdrawn<sup>vi</sup>. This on the surface demonstrates that a multi-agency partnership can work well. Carby-Hall (2010)

discusses this approach in more detail noting 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). He does, though, comment that it is estimated that twenty-five percent of the supply chain gangmasters operate without a license. Finally, it was reported by the GLA that Bulgarian workers were now being supplied as bogus self-employed rather than bogus posted workers, although employment status here, as in construction, is difficult to define.

In contrast construction has been identified as a sector in which it is very difficult to enforce regulations. Gribling and Clarke (2006) for one identify ‘...insufficient coordination between different authorities, combined with weak control and enforcement of ...existing regulations’. They highlight that small and medium size firms often do not know of regulations and see compliance as a low priority. So for example with a specific issue like health and safety this is compounded by the fact that due to government policy inspections of workplaces have been significantly reduced (Tombs and Whyte, 2010; CCA, 2009). In fact there are now only 134 construction inspectors throughout the UK, which means that there is only a small possibility of a site receiving an inspection visit (Fitzgerald and Howarth, 2009).

### **2.3 Enforcement, compliance and the role of courts**

Compliance and the role of the courts is based on the existing legal framework, for example a posted worker who is unfairly dismissed or paid below the minimum wage is able to bring a case to an industrial tribunal. This though may not only be difficult to do but also be difficult to prove given the nebulous nature of employment status in construction. However, Cremers (2007) does highlight an important case where Polish workers supplied by an agency were identified as being ‘employees’ of the agency rather than ‘workers’ who have more limited rights. The only other identified case of prosecution which indirectly related to the Directive was the GLA case in Section 2.2 above. In the Perth Sheriff Court in Scotland the farmer involved was fined £500 for not using a licensed labour provider; the UK Border Agency also made him bus workers back to Bulgaria at a cost of £19,000; and HM Inland Revenue have demanded payment of the workers tax and national insurance at a cost of £174,000 (Currie, 2010)

### **2.4 Cross border cooperation, information**

The social partners did not report any cross boarder cooperation. At a government level the Policy Officer coordinates administrative information through a Liaison Office, which is an administrative 'mailbox' and has only ever provided limited information relating to either UK companies posting workers or UK workers posted in other EU countries. The officer emphasised that she was also both a member of the commission’s high level expert group and a subgroup of that group, which in the autumn is reporting on administrative cooperation between Member States.

Of the other government agencies that are likely to be involved with the PWD only the GLA reported any cross boarder cooperation. This was based on the bogus posted workers discussed above. Cooperation 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 formal link meant initially that two GLA officials travelled 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 and the National Revenue Agency. The results of these investigations identified that there had been a number of Bulgarian labour violations and the GLA were also informed that these workers were not posted correctly under the Directive. The overall outcomes here are twofold, firstly the successful first ever prosecution under the Gangmasters (Licensing) Act 2004. Secondly, a joint memorandum is being drafted for future cooperation between authorities in the two countries.

## **2.5 Role of social partners**

There is no formal or noticeable framework in which the social partners have a role in the implementation of the PWD. Instead any engagement with the Directive is via the voluntary industrial relations framework. In interviews UCATT commented that they had one national officer who specifically dealt with the PWD. They also noted that on sites full time officials would deal with any incidents, if and when they occurred.

In engineering construction Unite had in place and supported three main initiatives which dealt with enforcement and compliance. The first is via a campaigning approach (see Novitz, 2010a), which although seemingly distant to the ongoing issue with the Directive on sites has proved a successful strategy when used in agriculture. 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 Lindsey dispute Unite 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 website<sup>vii</sup> and a website dedicated to the revision of the Directive following the recent ECJ judgements<sup>viii</sup>.

Secondly, a key issue with any construction site is maintaining accurate information on who is actually, or is likely to be, working on site. To this end there is the National Joint Council for the Engineering Construction Industry (NJC)<sup>ix</sup>. This is the industry body that facilitates opportunities for consultation, discussion and negotiation of key issues, including the PWD, relevant to the overall subsector and individual projects. The framework for these opportunities is laid out in its NAECI national collective agreement (NJC, 2010). Significantly there are specific requirements for employer signatories to the agreement to consult with trade unions. For example this can be done through such practical means as a prior notification of significant projects in the industry (NJC, 2010, sc20.1); through Project Joint Councils/Local Forums; and with Major New Construction Projects via Supplementary Project Agreements (SPA). With a SPA it is expected that an independent auditor is appointed for projects and there are clear instructions on the use of an auditor on large projects and what their role involves, including auditing pay levels (NJC, 2010, Annex D). Further in addition to this the NAECI agreement 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 managing 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 also provides foreign contractor guidance for their members (ECIA, no date).

Lastly, one of the most significant groups involved in compliance and enforcement are the trade union stewards on engineering construction sites. The NAECI agreement specifically supports site stewards in a number of ways. One important example is the National Stewards' Forum, which meets three times per year for two days and involves both GMB and Unite members. 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.

### **3. Working conditions**

The context for working conditions is currently the recent ECJ rulings which now make it legally possible to post workers to the UK on the national minimum wage undermining construction collective agreements. An employer interviewee expressed a worry that the minimum wage could now be used as a device by some EU employers to undermine the '*level playing field*' that currently exists in construction (Electrical Contractors Association interviewee). Currently in construction no such action has been taken. Although, Novitz (2010b) has reported that the Viking and Laval judgements were used as a 'threat' by British Airways to stop trade union industrial action in a potentially cross-broader 'social dumping' dispute. Whilst Kilpatrick (2009) uses the recent Total (Lindsey oil refinery) and Alstom (Staythorpe power station) disputes to discuss a number of ECJ ruling scenarios that could be damaging for construction trade unions.

#### **3.1 Wages and other remuneration related conditions**

A significant factor in all construction collective agreements are skill and craft grades with both the WRA and NAECI increasingly recognising these skills through two competence based schemes (the CSCS card and the ACE card<sup>x</sup>). Brockmann et al. (2009), though, have explored the idea of competency, which has become a common term in vocational education and training and is central to the European Qualification Framework. They highlight that in a European context competency is linguistically and conceptually different. However, differing continental definitions are often based on the notion of occupational capacity rather than a narrower English task based 'single-skilled' focus. The English focus leads to restrictive occupational capacity making it difficult for employers to recruit skilled staff. In essence migrant and posted workers maybe preferred because they are 'multi-skilled' and more able to transfer to other tasks.



The WRA covers major building and infrastructure sites and allied trades to the industry and is agreed at the Construction Industry Joint Council<sup>xi</sup>. It covers a wide range of skill and craft rate occupations based on 22 sub categories of construction work. This provides an industry minimum which local rates often exceeded and the current national rates are still based on a June 2008 agreement (see Table 1).

**Table 1: The Construction Industry Joint Council Working Rule Agreement**

Occupational classification	Hourly rate	Weekly rate
General Operative	£7.75	£302.25
Skill Rate 4	£8.35	£325.65
3	£8.85	£345.15
2	£9.46	£368.94
1	£9.82	£382.98
Craft rate	£10.30	£401.70

With the WRA the example of the Tyne Tunnel project (client Tyne Tunnel 2) is interesting. Here a main contractor Bouygues subcontracted part of the contract to Polish and Portuguese contractors. UCATT identified that posted workers were working to WRA steelwork skill rate 1 (£9.82 plus contract bonus) but were only being paid £5.50 per hour which was illegal as the national minimum wage was £5.73. Employers disputed that the national minimum wage was not being paid and one argued that as these were posted workers they did not have to pay the negotiated WRA steelwork skill rate 1. A series of meetings were held with the client and main contractor and Members of Parliament were informed by the union that this may turn into a significant issue in their constituencies. Subsequently the Portuguese company PortScope produced what the union believed to be a fictitious pay slip. This showed that a worker was being paid above the minimum wage but a combined payment for holiday pay was included, a practice that has been illegal since a 2006 ECJ ruling<sup>xii</sup>. The union locally reported it difficult to engage with workers and the situation remained confused with no further contact with either company.

The NAECI agreement was renegotiated following the disputes in 2008-2009. Its 2010 rates are in Tables 2 and 3<sup>xiii</sup>, with six pay grades that include three craft levels:

- Grade 6 (advanced Grade 5 craft worker who has supervisory duties);
- Grade 5 (advanced craft level, for example someone has been assessed to S/NVQ level 3);
- Grade 4 (someone has the competence required at Stages A and B and the mandatory trade specific units of competence for working in the engineering construction industry under NSDS/TECSkills);

Then three operative grades (Grades 3 and 2 are for experienced operatives, with grading dependent on the work undertaken; Grade 1 is for those new to the industry).

These grades are for workers who may or may not be registered under NSDS/TECSkills but who are engaged in work, which provides no opportunity for training or assessment under NSDS/TECSkills.

**Table 2 – NAECI categorised work rates of pay**

<b>Categorised Work Rates (1-3)</b>	<b>Grade 1*</b>	<b>Grade 2*</b>	<b>Grade 3*</b>	<b>Grade 4</b>	<b>Grade 5</b>	<b>Grade 6</b>
Basic Pay	£8.89	£10.21	£11.58	£13.68	£14.28	£14.88
Nights	£11.26	£12.95	£14.66	£17.31	£18.06	£18.84
Afternoon	£10.49	£12.07	£13.68	£16.15	£16.84	£17.56
Double day - Morning	£10.33	£11.85	£13.44	£15.87	£16.57	£17.26
Double day - Afternoon	£11.03	£12.70	£14.35	£16.96	£17.69	£18.43
3 shifts 5 days	£10.89	£12.51	£14.18	£16.75	£17.46	£18.21
3 shifts 7 days	£11.03	£12.70	£14.35	£16.96	£17.69	£18.43
Rolling shifts Days	£10.69	£12.28	£13.89	£16.41	£17.13	£17.83
Rolling shifts Nights	£11.74	£13.52	£15.29	£18.05	£18.84	£19.65
Overtime A	£12.45	£14.32	£16.24	£19.15	£19.98	£20.83
Overtime B	£16.00	£18.40	£20.87	£24.61	£25.68	£26.79

\* These grades also have rates for 16/17 years old

**Table 3 – NAECI national guaranteed rates of pay**

<b>National Guaranteed Rates</b>	<b>Grade 1*</b>	<b>Grade 2*</b>	<b>Grade 3*</b>	<b>Grade 4</b>	<b>Grade 5</b>	<b>Grade 6</b>
Basic Pay	£8.10	£9.28	£10.53	£12.34	£12.95	£13.54
Nights	£10.26	£11.76	£13.32	£15.64	£16.40	£17.16
Afternoon	£9.56	£10.98	£12.40	£14.57	£15.27	£15.99
Double day - Morning	£9.40	£10.80	£12.20	£14.31	£15.00	£15.74
Double day - Afternoon	£10.05	£11.54	£13.05	£15.33	£16.05	£16.80
3 shifts 5 days	£9.93	£11.37	£12.88	£15.12	£15.84	£16.59
3 shifts 7 days	£10.05	£11.54	£13.05	£15.33	£16.05	£16.80
Rolling shifts Days	£9.73	£11.17	£12.63	£14.82	£15.52	£16.27
Rolling shifts Nights	£10.68	£12.28	£13.88	£16.29	£17.10	£17.90
Overtime A	£11.35	£13.01	£14.72	£17.28	£18.12	£18.96
Overtime B	£14.59	£16.73	£18.93	£22.22	£23.29	£24.39

\* These grades also have rates for 16/17 years old

Table 2 is for categorised work, with Category 1 being major new construction projects. Category 2 is for long term repair and maintenance. Category 3 is for major events. Whilst Table 3 is for what was previously termed Category 4 work.

With the NAECI agreement specific examples of its operation with regard to posted workers are initially the case of SFL (SAB Ltd) in 2005. Here Hungarian workers were found to be receiving £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. Following union industrial action an audit system was set-up of wages, with SFL transferring wages from an offshore bank account into workers own Hungarian accounts. However, a posted worker reported that a 'managing' fee of £2,380-£2,584 per month was being taken from the final wage that workers received in their personal Hungarian bank accounts. The union again resorted to industrial action and temporary UK bank accounts were set-up for Hungarian workers. This audit scheme has now been developed and is incorporated into the recent NAECI agreement (NJC, 2010, Annex D). With the more recent disputes discussed in 2008 there is no information on the actual wages that posted workers were receiving. The unions (GMB and Unite), though, believe that posted workers wages and conditions were below the NAECI and local agreed rates. With the Lindsey example during the Acas inquiry IREM were unable to produce any form of evidence to disprove this assertion. However, Gibson (2009) reported finding no evidence to support these claims and instead noted early audit discrepancies which were rectified.

### **3.2 Working time**

The WRA states that the working week is normally 39 hours, with shift work 40 hours. Breaks are set by the employer and should not altogether exceed one hour per day, with a lunch break being not less than half an hour. There are agreed overtime rates for working beyond the maximum weekly hours. The agreement also states that the average weekly working hours for a seven day period should be calculated by using the formula set out in the Working Time Regulations 1998. No details were known by the unions of posted workers working time issues.

Those covered by the NAECI agreement are expected to work 38 hours per week; these working hours are over a five-day week. If a Saturday or Sunday is part of this working period overtime payment is given, Saturday at Overtime rate A and Sunday at Overtime rate B. If overtime is worked on a Saturday or Sunday it is paid at Overtime B. Shift working on a Saturday or Sunday is not part of this arrangement as it already has a higher rate of pay (see Tables 2 and 3). Timings and facilities for breaks are at the discretion of the employer after consultation with the local full time officers of the signatory trades unions. There is provision for a daily-unpaid meal break of 30 minutes duration and one paid refreshment break of 10 minutes duration. The agreement makes specific reference to foreign workers, including posted workers, emphasising that whilst they may not be aware of the working culture and NAECI agreement, foreign contractors must comply with the NAECI provisions around the scheduling and taking of periodic leave.

With the SFL (SAB Ltd) example posted workers reported that they were working a six-day week, with a nine and a half hour day Monday to Friday and up until early Saturday afternoon. There were no rest or tea breaks and no provision was made to the workload to accommodate periods of inclement weather. This was clearly all contrary to NAECI and underpinned the disputes discussed earlier. With the more recent Lindsey dispute there were two key issues with working time reported by Acas (2009: Sec10). The first was that the unions believed that IREM posted workers were not able to take rest breaks during their shifts; management disputed this arguing that these were added to their midday lunch break. As significantly IREM workers were changing into their protective clothing and preparing for a shift prior to the shift starting. Local practice was that this was undertaken at the beginning of each shift. IREM did not dispute this and Acas noted that IREM were being paid on a lump sum basis of a fixed number of hours in which to complete the job.

### ***3.3 Paid leave and the role of funds***

The WRA guarantees 21 days holiday pay for those employed which is based on Winter, Easter and Summer periods laid down in the agreement (WRA, WR.18 Annual Holidays). Pay is calculated on the normal working week. The NAECI agreement guarantees 25 days paid holiday, with the agreement laying out how these are to be taken (NJC, 2010, Section 10, Holidays with Pay). Again pay is calculated on the normal working week. Both agreements note that there is also an entitlement to eight public holidays. Both unions had nothing to report in this area.

### ***3.4 Health and safety***

Both the WRA and NAECI make reference to health and safety and have separate literature on this issue, for example the engineering construction NJC Guide to Health, Safety and Welfare. UCATT had nothing to report with regard to posted workers, neither did the HSE. Although, a recent report published by Irwin Mitchell Solicitors highlights that migrant worker deaths in construction had risen from two in 2002-2003 to twelve in 2007-2008 (CCA, 2009). Importantly, UCATT and the other construction trade unions do have recognised safety representatives at the workplace. These have legal representation, investigation and inspection rights and functions. However, this right can be difficult to establish and maintain. In interviews the HSE respondent commented that if they received a construction health and safety complaint they would involve a recognised union safety representative in any investigation.

In engineering construction health and safety has been highlighted as a posted worker issue for a number of years. This seems to some extent to be based on the role of competency and differing ways of working. Unite nationally reported that prior to the new NAECI agreement it was left for subcontractors to decide if their operatives were competent to undertake onsite tasks. A Unite official who was central to the Lindsey dispute gave two examples of this differing way of working. The first involved posted workers welding above other workers, considered a dangerous practice in the industry. Secondly, it was reported that posted workers were moving their own scaffolding, which is not a current practice and is again considered dangerous. The recently re-negotiated NAECI now makes it a requirement that managing contractors

ensure that foreign contractors are aware of the requirements of health and safety legislation and that their workforce must be fully competent to perform the contract tasks (NJC, 2010, Part 3 Appendix G).

### **3.5 Transport, lodging and other living conditions**

The WRA agreement contains daily allowances for travelling; these range from 0.98 pence for 15 kilometres travel to £4.26 for 45 kilometres. There is also a subsistence allowance of £30.47 per night for accommodation. The NAECI agreement has daily allowances for travel and accommodation. The travel allowance is termed a radius allowance and is not paid to those who receive an accommodation allowance (NJC, 2010, Part 1 sc9). It ranges from a payment of £2.10 (£2.20 if tax free) for those travelling between 8–11 miles up to £8.11 (£14.23 if tax free) to those travelling 30–35 miles. There is a range of lower payments for those who get free transport to work (NJC, 2010, Part 3 Appendix A 4). There is also an allowance for air travel (NJC, 2010, Part 1 sc9.5). Accommodation payments are based on a daily rate of £31.67 and a weekly rate of £221.70. There are further retainers if payments have to be made to keep accommodation during public holidays and periodic leave (up to £9.30) and annual holiday and sickness absence (£5.35 per day and £37.41 per week). There is finally an allowance for those working in London (£9.66 per day and £67.62 per week).

With regard to maintaining these conditions UCATT reported that there had been a number of issues with migrant workers housing and transport but none were known with regard to posted workers. With NAECI, though, Unite nationally commented that local and regional officials believed ‘...over the years...’ that posted workers were having deductions taken out of their wages for accommodation and travel, but hard evidence was difficult to obtain. However, one case in particular was identified. Here SFL (SAB Ltd) did provide flights back to Hungary once a month; however with regard to accommodation the situation was very poor. It was found by the union that there was at any one time between eight and ten people living in a small terraced house. The Unite national officer stated that the employer seemed to be aware of local council inspections as posted workers were ordered to take some beds out of the house and ‘hide’ them. These were then replaced once the inspection had taken place. More recently with the Lindsey dispute it was widely reported (Kington, 2009, Kilpatrick, 2009, Meardi, 2009) that workers lived on barges in Grimsby docks away from the local population. In interview the Acas respondent commented that due to this Amicus had formed an alliance with the local chamber of commerce and a number of businesses in the local hospitality, hotel, restaurant and caravan park trades. This was because normally workers travelling to the site used local hotels, the caravan park and local shops.

## **4. Assessment**

It is clear from the available E101 data and interviews that the numerical impact of posted workers on the UK labour market is limited. Although, with the fragmented nature of the construction supply chain it can be difficult to identify posted workers. Only in the engineering construction subsector was there an identified ongoing

impact, which had caused significant industrial relations challenges. The key social partners in this subsector currently support the recently renegotiated national agreement (NJC, 2010). From an employer perspective financial penalties and the cost of non-completion on time are of paramount importance. Whilst from a union perspective the NAECI national agreement provides guaranteed terms and conditions. There are also now a number of ‘safeguards’ to make sure that these industry rates and standard practices are followed by foreign contractors. The anticipated expansion of both nuclear and new renewable energy technologies mean a considerable amount of work will be created in this subsector over the coming 10-15 years. This would seem to indicate that both employers and unions remain as firm social partners. However, there maybe tensions in this relationship, initially from those outside of the employer associations and potentially from trade union stewards and members who fear unemployment.

Underlying this potential conflict are two combined factors, the first is demographic with engineering construction having an ageing workforce with over sixty-five percent of workers over 40 and forty-one percent over 50 (Gibson, 2009). Second, is an ongoing skills crisis which is compounded by the fact that no nuclear plant has been built for over 30 years. Given this the unions are campaigning hard to make sure that significant training is in place, when decommissioning of nuclear plants ends and rebuilding begins. A training levy does exist for the industry administered by the Engineering Construction Industry Training Board (ECITB) and employers do support their own training. However, as has already been discussed construction has a significant issue with competence. Moehler et al. (2008) also identify a complex system of training provision, which is often based not on what employers require but on what policy, and funding dictates. Given this employers often find it difficult to engage with training bodies to meet their needs. So what skilled labour is available? Aside from those skilled workers that the industry already has the re-skilling scenario detailed means that what is likely to happen, not just in engineering construction but also in the sector as a whole, is the perpetual introduction of migrant workers. Given the particular skills that are needed in engineering construction these may well be posted workers and opportunities exist for some subcontractors to introduce a cheaper alternative to the labour already deployed in the sector. This is a worrying scenario not only for unions but the members that they represent and the industrial unrest, which culminated in Lindsey, may not be the last.

#### ***4.1 Equal treatment on site***

Fundamental to the construction sector is the government endorsement of a neo-liberal agenda that was only slightly abated under the last Labour governments. What this means for our labour markets is that they are mainly open, welcoming to capital with a growing government and employer disdain for enforcement and regulation (CCA, 2009; Tombs and Whyte, 2010). This leaves the trade unions and genuine employers to counter the worst excesses of any poor treatment of workers. With regard to posted workers there is a potential that given the ECJ rulings the minimum may become the maximum for a range of posted workers, with dire consequences for the construction sector as a whole. In engineering construction the new NAECI ‘safeguards’ of industry rates and the ‘standard practices to be followed by foreign

contractors' are a workable framework for equal treatment on site but as noted above there are potential tensions. The site stewards are crucial for the enforcement of equal treatment on site.

#### **4.2 *The right to representation and negotiation***

Both the WRA and NAECI have a number of provisions that guarantee representation and negotiation of issues in the workplace. With posted workers it is clear that even though these rights are in place they have not on the whole been exercised. For example the Tyne Tunnel example provides a good case in point where the union went to the lengths of having leaflets printed in Portuguese for posted workers. Even though they were able to obtain a posted workers contract they admitted that full communication was very limited and no one joined the union. With engineering construction the real success came in 2005 when the unions were able to recruit some SFL (SAB Ltd) workers and one of these provided vital information, which led to the development of the audit process that is now a main safeguard in the NAECI. Latterly, posted workers have been more difficult to engage with, here Lindsey is the prime example with posted workers living on barges being kept away from other workers, the union, and surrounding community.

#### **4.3 *Good practices***

This report highlights four main issues with regard to posted workers. The first of these is that communication with these workers can often be difficult and this is not just because of language and cultural barriers. Secondly, leading on from this is that the 'integration' of posted workers onto construction sites is also difficult. This includes not only issues around such areas as breaks and adequate canteen facilities but also with regard to working practices including health and safety. Thirdly, it is perhaps not surprisingly that this can mean there is a lack of information on posted workers. Leading initially to rumour that can then turn into 'facts' and ultimately industrial unrest. Lastly, because of these factors this can mean poor working and living conditions for posted workers. Having said this, though, there were three key good practices that begin to break with this cycle:

##### **a. The GLA:**

Even though there is pessimism in this assessment with regard to enforcement and regulation the GLA provides an important example of good practice. This relates to its overall working practice and in its engagement with other EU agencies. The GLA was set-up following the death of 23 Chinese migrant workers. Trade unions were central to the campaign and process that led to the authority being created. Carby-Hall (2010) has also argued 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 will now have a more formal recognition through a joint Bulgarian-UK memorandum;

##### **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 process:**

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.

**4.4 Recommendations**

From these three good practices come four main recommendations:

• **GLA extend to construction:**

The GLA protection of migrant workers in agriculture should not be over emphasised. But the GLA does now provide a sectoral framework of protection and importantly an environment in which social partners can improve conditions in the sector. With regard to posted workers GLA partnership working should involve the trade unions. The GLA should be extended to construction, a key recommendation from the recent government inquiry into construction fatal deaths (Donaghy, 2009). Its overall partnership working practices should be evaluated to identify if these are transferable on a European basis. How and who does this will of course be difficult but initially the social partners should be encouraged to identify this overall good practice;

• **Evaluation of NAECI audit process and foreign contractor provisions:**

Both the NAECI audit process and guidance on foreign contractors must be evaluated. This is not only to identify their success within a UK context but also to see what areas can be transferred to other EU countries that are experiencing challenges with posted workers. The EFBWW should seek funding to take this forward as this has a clear European dimension;

• **Cross boarder engagement with the National Stewards' Forum:**

The National Stewards' Forum provides a significant prospect for European trade union networking and cooperation. It gives European trade union officials an opportunity to address, discuss and potentially begin to resolve any cross boarder issues with posted workers. Again the EFBWW should establish contact with the relevant UK unions to try to identify opportunities to meet with the forum, and then European affiliates should be encouraged to engage;



- **Annual ETUI three day training session:**

There should be an opportunity for European wide site stewards and union representatives to share posted worker experiences. This in my opinion is essential. The EFBWW should identify a location in Europe where this can take place. The experience of this can be built on and if it is found that other subsectors of construction are experiencing significant issues with posted workers training can be extended. Again the EFBWW and the ETUI should source funding to support this initiative.

## **5. References**

Acas (2009) *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute*, Advisory, Conciliation and Arbitration Service 16th February 2009.

Blackman, B. (2007) 'Regulating the situation for migrants in the British construction Industry', *CLR News Migration Special*, No.4 2007.

Border and Immigration Agency (2009) *Accession Monitoring Report: May 2004 – March 2009*, joint online report from the Border and Immigration Agency, Department for Work and Pensions, HM Revenue and Customs and Communities and Local Government.

Brockmann M., Clarke L. and Winch, C. (2009) 'Competence and competency in the EQF and in European VET systems', *Journal of European Industrial Training*, Vol. 33(8/9).

Carby-Hall, J. (2010) *Partnerships*, paper presented at the 10th Jubilee International Academic Conference – 'State, Economy, Society: Globalisation in the Contemporary World', Andrzej Frycz Modrzewski Krakow University.

Carby-Hall, J. (2008) *The Treatment of Polish and Other A8 Economic Migrants in the European Union Member States*, report for the Commissioner for Civil Rights Protection of the Republic of Poland.

CCA (2009) *Migrants' Workplace Deaths in Britain*, Irwin Mitchell, March 2009.

Clarke, L. (2006) 'Valuing Labour', *Building Research & Information*, Vol. 34 Number 3 May-June.

Construction Industry Joint Council (2008) *Working Rule Agreement for the Construction Industry*, June 2008.

Cremers, J. (2007) 'Self-employed and the free provision of services', 'Poland's Construction Industry', *CLR News*, No2 2007.

Currie, G. (2010) *Fruit farm gangmaster; Berry picking boss guilty of bringing in Bulgarians to work illegally in Scotland*, Daily Mail 22<sup>nd</sup> January 2010. Available at

[http://findarticles.com/p/news-articles/daily-mail-london-england-the/mi\\_8002/is\\_2010\\_Jan\\_22/fruit-farm-gangmaster-berry-picking/ai\\_n48713967/](http://findarticles.com/p/news-articles/daily-mail-london-england-the/mi_8002/is_2010_Jan_22/fruit-farm-gangmaster-berry-picking/ai_n48713967/)

Currie, S. (2006) *The Role Played by Agencies and Employers in Facilitating Post-Accession Polish Migration to the UK*, COMPAS International Conference ‘International Labour Migration: In Whose Interests?’, University of Oxford, 5–6 July 2006.

Donaghy, R. (2009) *One Death is too Many – Inquiry into the Underlying Causes of Construction Fatal Accidents*, TSO: Norwich.

EC (2009) *Administrative Data Collection on E101 Certificates Issued in 2007, Administrative Commission on Social Security for Migrant Workers*, 8th October 2009.

ECIA (no date) *Guiding Principles for Companies: Principles to consider when using non-UK contractors and labour on engineering construction sites*, Engineering Construction Industry Association.

Fitzgerald, I (2007) *Working in the UK: Polish Migrant Worker Routes into Employment in the North East and North West Construction and Food Processing Sectors*, London: TUC.

Fitzgerald, I (2006) *Organising Migrant Workers in Construction: Experience from the North East of England*, Newcastle upon Tyne: Northern TUC.

Fitzgerald, I. and Howarth, T. (2009) *A Study of Migrant Worker Health and Safety Issues in the UK Construction Industry*, refereed paper for the CIB W099 Conference 2009 Melbourne, Australia 21st–23rd October 2009.

Forde, C., MacKenzie, R. and Robinson, A. (2009) ‘Built on Shifting Sands: Changes in Employers’ Use of Contingent Labour in the UK Construction Sector’, *Journal of Industrial Relations*, 51(5).

Gibson, M. (2009) *Changing to compete: review of productivity and skills in UK engineering construction*, London: Department for Business, Innovation and Skills.

Gribbling, M. and Clarke, L. (2006) *Undeclared Labour in the Construction Industry: Country report - Great Britain*, Brussels: European Institute for Construction Labour Research.

Harvey, M. and Behling, F. (2008) *The Evasion Economy: False Self-Employment in the UK Construction Industry*, London: Ucat.

Kilpatrick, C. (2009) *British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law*, LSE Law, Society and Economy Working Papers 16/2009.

Kington, T. (2009) *The view from the barge: 'We want to work with the British as brothers'*, <http://www.guardian.co.uk/politics/2009/feb/03/lindsey-refinery-dispute-italian-workers>.

Meardi, G. (2009) 'Worker strikes on foreign contractors', *International Union Rights*, 16(3).

Moehler, R. C., Chan, P. W. and Greenwood, D. (2008) 'The interorganisational influences on construction skills development in the UK', in: Dainty, A. (ed) *Proceedings of the 24th Annual ARCOM Conference*, 1-3 September 2008, Cardiff, UK, Association of Researchers in Construction Management.

NECC (2005) *Protecting national collective agreements in UK construction, a joint report by Amicus, GMB and T&G*, National Engineering Construction Committee.

NECC (2004) *Social-dumping: a crisis in the UK Engineering Construction industry, a joint report by Amicus, GMB and T&G*, National Engineering Construction Committee, February 2004.

NJC (2010) *National Agreement for the Engineering Construction Industry: 2010-2012*, January 2010.

Novitz, T. (2010a) *UK Implementation of the Posted Workers Directive 96/71*.

Novitz, T. (2010b) 'United Kingdom: The impact of the ECJ decisions on UK industrial relations', in Andreas Bücken and Wiebke Warneck, *Viking – Laval – Ruffert: Consequences and policy perspectives*, ETUI report 111, Brussels: ETUI.

ONS (2009) *Construction Statistics Annual*, Office for National Statistics, 2009 Edition.

Salt, J. and Millar, J. (2006) 'Foreign Labour in the United Kingdom: Current patterns and trends', *Labour Market Trends*, ONS, October 2006.

Tombs, S. and Whyte, D. (2010) *Regulatory Surrender: Death, Injury and the Non-enforcement of the Law*, Institute of Employment Rights, July 2010.

Unite (2009) *The Case for Fair Access to Employment in the UK Engineering Construction Industry*, London: Unite the union.

---

<sup>i</sup> See <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page19313.html>

<sup>ii</sup> This though excludes a large number of UK self-employed workers who are below the current VAT threshold.

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

- 
- iv The Bulgarian companies were Concordia Group Ltd and Total Services Ltd registered office Sofia, Bulgaria.
- v UK bodies involved: UK Border Agency, the UK Human Trafficking Centre, Gangmasters Licensing Authority, Health and Safety Executive, Tayside Police, Tayside Fire and Rescue Service and Perth and Kinross Council.
- vi The Bulgarian company was Todorov and Co Ltd based in Plovdiv, Bulgaria.
- vii [http://www.unitetheunion.org/campaigns/uk\\_workers\\_want\\_fair\\_access\\_to.aspx](http://www.unitetheunion.org/campaigns/uk_workers_want_fair_access_to.aspx)
- viii <http://www.amicustheunion.org/lavalvikingruffert/default.aspx>
- ix **Trade union representatives:** Unite the Union and GMB. **Employer representatives:** the Engineering Construction Industry Association (ECIA), the Thermal Insulation Contractors' Association (TICA) and the Electrical Contractors' Association of Scotland (SELECT).
- x **The Construction Skills Certification Scheme (CSCS)** is supported by the UK Contractors Group, the Civil Engineering Contractors Association, the Federation of Master Builders, GMB Union, National Specialist Contractors Council, the Construction Industry Council, the Construction Clients Group, the T&G Section of UNITE (Building Crafts Section), and the Union of Construction, Allied Trades and Technicians; **Assuring Competence in Engineering Construction (ACE)** is an industry initiative which is supported by all areas of engineering construction in the UK: Clients, Contractors (ECIA), the National Joint Council (NJCECI), The Engineering Construction Industry Training Board (ECITB) and the Trade Unions.
- xi **Trade union representatives:** Ucatt, Unite (T&G section) and the GMB. **Employer representatives:** Construction Confederation, Civil Engineering Contractors Association (CECA), National Federation of Builders (NFB), Home Builders Federation (HBF), UK Contractors Group (UKCG), Scottish Building (SB), National Specialist Contractors Council (NSCC), National Federation of Roofing Contractors (NFRC), National Association of Shopfitters (NAS), Painting and Decorating Association (PDA), National Association of Scaffolding Contractors (NASC).
- xii On 16<sup>th</sup> March 2006 the European Court of Justice (ECJ) ruled that “rolled-up” holiday pay is incompatible with the Working Time Directive (93/104/EC) (the Directive) (Robinson-Steele v PD Retail Services, Clarke v Frank Staddon Ltd, Caulfield & others v Hanson Clay Products Ltd (formerly Marshalls Clay Products Ltd), joined cases C-131/04 and C-257/04).
- xiii Further details [http://www.njceci.co.uk/index.php?option=com\\_content&view=article&id=26&Itemid=42](http://www.njceci.co.uk/index.php?option=com_content&view=article&id=26&Itemid=42)