

# CLR-GB

## Newsletter 2/2009

The **CLR-GB** Office is a platform linking CLR activities at EU and GB levels as well as trade union and academic work in GB in the field of Construction Labour Research. It will support related initiatives specific to GB.

### Introductory Note:

The changing nature of employment relations in construction and the impacts on working conditions and wider aims of attaining social justice have always been recurrent themes in work reported in CLR publications. It is therefore useful to note that the recent report by Rita Donaghy (2009) investigating the underlying causes of construction fatal accidents stresses on employment issues as a critical factor in securing health and safety in the construction industry. In this newsletter, we review some of the recommendations made in the Donaghy Inquiry, and return to some of the questions raised about employment practices highlighted in the previous CLR-GB newsletter (1/2009). Specifically, we highlight the importance of establishing employer liability esp. given the multi-layer supply chains that typify construction work, the criticality of worker involvement in maintaining health and safety, the implications of employment status and the perpetuation of the flexible labour market on health and safety behaviour.

At the same time, the HM Treasury, following on from Mark Harvey and Felix Behling's report on false self-employment in the UK construction industry in May 2008, is undertaking a consultation process to proposed amendments to the taxation regime for construction. If the proposals are endorsed and implemented, this could result in a move towards regulating the employment status of the construction worker in the UK. Please visit the HM Treasury's

website, [http://www.hm-treasury.gov.uk/d/consult\\_falseselfemploymentconstruction\\_200709.pdf](http://www.hm-treasury.gov.uk/d/consult_falseselfemploymentconstruction_200709.pdf), for more information.

In this newsletter, we also report on two scandals that have recently blighted the construction industry. The first relates to the blacklisting of workers who have declared their participation in trade union activism and the wholly disproportionate penalty that was passed in favour of the possessor of the blacklist. The second scandal refers to the Office of Fair Trading (OFT) imposition of fines on 103 construction companies in the UK for colluding in bid rigging. Both these scandals highlight the existence of a chain of exploitation, yet the degree of responsibility that should extend to the client who ultimately pays for the construction products and services is rarely questioned. Specifically, the role of government is pertinent in stamping out illegal and corrupt practices and ensuring a socially just and equitable future for the industry. Again, the long-standing issue of the need for tighter regulation of the industry is raised in this issue. The newsletter therefore closes with an invitation to participate in a forthcoming research seminar to discuss on the future of construction labour policies in response to the ongoing financial crisis. This will take place on Friday 20 November 2009 in Middlesex University Business School.

### References

- Donaghy, R. (2009) *One death is too many: inquiry into the underlying causes of construction fatal accidents*. July. London: Department of Work and Pensions.
- Harvey, M. and Behling, F. (2008) *The false economy: false self-employment in the UK construction industry*. A UCATT report. London: UCATT.

*Paul W Chan/CLR-GB October 2009*

## One Death is Too Many: Lessons Learnt from the Donaghy Inquiry

The remit of the Donaghy Inquiry was narrowly focussed to examine the underlying causes of construction fatal accidents. Tasked by the then Secretary of State for Work and Pensions, James Purnell, in December 2008, she undertook the inquiry through a desktop review of recent academic research and work commissioned by the Health and Safety Executive (HSE), and speaking to relevant stakeholder representation groups including the families of victims to construction fatal accidents. Rita Donaghy was conscious not to duplicate work done in other inquiries into the industry, notably by Sir Michael Latham and Sir John Egan, but to drill down as precisely as possible the reasons behind construction fatal accidents. She however acknowledged that the industry has improved since the inquiries of the mid 1990s, although she maintained that more needed to be done to ensure that nobody should die from working on a construction site. It must be added that the inquiry was completed is just over half a year from the time of commissioning.

At the heart of the recommendations set out by the Donaghy Inquiry lie the issue of employer responsibility. She particularly focussed on the role directors of construction firms can play in ensuring that procedures for policing healthy and safe operations are adhered to. She suggested that directors should be held accountable and any lapses in health and safety would lead to the removal of directorship and possible prosecution via the Corporate Manslaughter legislation. She also noted the industry's lacklustre approach towards encouraging worker participation in affairs of health and safety, and bemoaned especially on the lack of awareness by senior figures of the industry on the European information and consultation directive; consequently, she recommended for greater worker involvement through trade unions. Training and education also featured highly on the menu of recommendations, including the need for higher education to ensure that managers of the future are appropriately informed of regulatory requirements and the health and safety implications arising from design, maintenance and site operations.

Perhaps an area that still remained ambiguous from the Donaghy Inquiry is the multi-layer supply chains that have come to typify the UK, and indeed global, construction industry in recent years. She recognised the extensive use of sub-contracting and the role of agents and non-standard forms of employment that add complexity to employment relations in construction. She also acknowledged that larger companies, most of which have become 'hollowed-

out' firms, are probably quite effective in policing health and safety procedures; however, it is the long-tail of smaller sized companies that one needs to pay more attention to. Nonetheless, she recommended for the extension of the Gangmasters Licensing Regulations to include construction, so as to minimise the exploitation of anyone working in the sector by mandating a minimum standard of working conditions that construction workers can expect. Of course, the jury is still out in terms of whether these recommendations will ever be taken seriously or even implemented. If you have further thoughts or suggestions, please write to us for inclusion in forthcoming CLR-GB newsletters.

## Grasping the Nettle of False Self-Employment

Rita Donaghy also acknowledged that successive governments in the UK have endeavoured rather poorly to deal with the problem of self-employment, esp. bogus self-employment, in the UK construction industry. Admittedly, she suggested that the "political will to grasp this particular nettle would be an important step to signal to the industry, and its workers, that society expects standards to be improved and obligations fulfilled (Donaghy, 2009: 12)". In a climate of fiscal contraction and falling government revenue through taxation, it is therefore unsurprising that the UK government is considering yet further amendments to the taxation regime that could see a transformation of the employment status of the construction worker.

In a report prepared for UCATT in 2008, Professor Mark Harvey and Felix Behling estimated that false self-employment amounted to an estimated loss of £1.7bn taxation revenue annually to the Exchequer. A consultation process is currently under way to tackle this by amending tax rules to distinguish between an employee and a genuine self-employed person in the sector. The proposed amendments, if endorsed, would supersede current arrangements of the Construction Industry Scheme (CIS), and would, in theory, clarify employer responsibility by applying statutory criteria that will determine who would constitute a worker for the purposes of drawing employment income and therefore payment of appropriate National Insurance Contributions. The statutory criteria for determining who is genuinely self-employed would include:

- Does the person have to provide the plant and equipment required for the job they have been engaged to carry out?
- Does the person have to provide all the materials to complete a job?

- Does the person have to provide other workers to carry out operations under the contract and is responsible for paying them?

Meeting one or more of these three criteria would mean that a worker can be classed as being genuinely self-employed. However, it remains to be seen whether this latest intervention in the tax regime would really deliver any material changes, since the responsibility for applying the criteria remains with the “engager” (which could include an employer, an employment agency or intermediary). As always, the critical point has to be its enforcement and it remains unclear as to whether the HMRC have the necessary resources and processes in place to police against fraudulent reporting. If successful, however, this intervention could transform the way the construction industry operates, especially in terms of curtailing the ambiguities associated with multi-layer supply chains. For more information of the proposals please visit [http://www.hm-treasury.gov.uk/d/consult\\_falselfemploymentconstruction\\_200709.pdf](http://www.hm-treasury.gov.uk/d/consult_falselfemploymentconstruction_200709.pdf).

## **A Tale of Two Scandals: Blacklisting of Workers and Penalties for Collusion**

A new campaign has begun for a public enquiry into the UK construction industry, following recent exposures of corrupt and potentially illegal practices. MPs, academics, barristers and construction workers endorsed this at a packed public meeting at the House of Commons on October 6<sup>th</sup>, where a report, *Ruined Lives: blacklisting in the UK construction industry*, prepared for UCATT by Professor Keith Ewing was launched (see [http://www.ucatt.info/images/stories/Ruined\\_Lives\\_05b1.pdf](http://www.ucatt.info/images/stories/Ruined_Lives_05b1.pdf)). The campaign follows the discovery by the Information Commission of a blacklist in the industry, which dates back at least since the 1970s and contains often detailed personal, employment and political data on over 3,000 construction workers held by an organisation called the Consulting Association Limited. Legal claims are being made against 44 major contractors. Under the Data Protection Act of 1998 it is an offence for a data possessor to fail to register with the Information Commissioner’s office. However, the result of the case against Consulting Association Limited for processing the blacklist was surprisingly disappointing; Mr. Ian Kerr of Consulting Association Limited was merely fined £5,000 by Knutsford Crown Court on 16 July 2009 for processing data without providing information to the Information Commissioner under the Data Protection Act 1998. The user companies of the blacklist got off scot-free.

Blacklisting as such is not illegal and provisions to outlaw it under the 1999 Employment Relations Act were never introduced. New regulations are now proposed and out for consultation but, as they stand, these place the onus on individuals to bring procedures and do not give the legal right not to be blacklisted. A blacklist support group has also been formed, (see <http://www.hazards.org/blacklistblog>). More worryingly, however, is the question as to who had access to the blacklist files. Professor Ewing, in his report, stated that “Although we have seen only a few of the files kept by the CA, it appears that the government in contrast has seen all or most of them, or has at least received a detailed report about their content (p. 8)”. He added that “This in itself is a matter of some concern, if it is the case that sensitive private information has been provided not only to the government, but specifically to a government department with close links with business (ibid.)”. This does raise the question as to the degree responsibility should be extended to include the government in their role as major client and regulator of the industry.

At the same time, 103 construction firms in the UK have been fined on 22 September 2009 to the tune of approximately £130m by the Office of Fair Trading (OFT) for a practice known as cover pricing (see <http://www.offt.gov.uk/news/press/2009/114-09>). Cover pricing is where one or more bidders in a tender process obtain an artificially high price from a competitor. Such cover bids are priced so as not to win the contract but are submitted as genuine bids, which give a misleading impression to clients as to the real extent of competition. This distorts the tender process and makes it less likely that other potentially cheaper firms are invited to tender. Some of the construction companies implicated in the OFT’s recommendations have suggested that such collusion had been taking place for a long time since it was common practice for companies to submit a bid that was deemed to fail so as to ensure that they get invited in future calls for tender.

In any case, illegal and corrupt practices in the construction industry should be discouraged. Yet interestingly, in the process of investigating bid rigging and uncovering the practice of cover pricing, the OFT is seen to ‘collude’ with a number of contracting firms by offering leniency discounts for their cooperation in the investigations. Again, there is a question that needs to be raised in terms of the role government can play in discouraging ill practices in the industry as regulator. Furthermore, as has been illustrated throughout this newsletter, where does responsibility start and end across the ever more complex food chain that typifies the industry? Crucially, what role should the government as major client play to limit bad practice?

## Reference

Ewing, K. (2009) *Ruined lives: blacklisting in the UK construction industry*. A UCATT report. August. London: UCATT.

## Construction Labour Policies in response to the Financial Crisis

Seminar, 20<sup>th</sup> November 2009, University of Middlesex

A research seminar has been organised at the Middlesex University Business School, Hendon Campus in North West London to discuss the impacts of the financial crisis on the construction industry across different European countries. It is anticipated that this seminar will set the scene for a wider, international debate on the future of strategies for labour policies, which will take place on 22 January 2010 (venue to be confirmed). The provisional programme for the seminar is as follows:

9.30am	Arrival, Tea/Coffee
9.45am	Welcome
10-12am	Short presentations on the impact of the financial crisis in construction and trade union responses in European countries
12am-1pm	Questions, summary Lunch break
2.00pm	Presentation of a programme for a workshop on strategies for labour policies 22 January 2010
2.30-3.30pm	Debate and decision on the workshop programme

Please email Professor John Grahl on [j.grahl@mdx.ac.uk](mailto:j.grahl@mdx.ac.uk) for more information.

## To Our Readers:

The CLR-GB Newsletter is the organ of exchange for CLR in Great Britain. This function depends on the co-operation of its readers. The editors ask everybody who is interested in construction labour to contribute with information and commentaries.

**For the next issue, we welcome contributions from readers especially on perspectives on the Donaghy Inquiry, the scandals of blacklisting and industry collusion and the efforts to stamp out false self-employment reported in this newsletter.**

Please send your suggestions, articles, information, letters, etc. to

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