Note from the Editor............................................................................................................. 4

Subject articles.................................................................................................................... 7
  • Lefteris Kretsos, The effects of the crisis on the Greek Construction Industry .......................................................... 7
  • Sven Ljung, The financial crisis and its impact on the Swedish Construction Sector .................................................. 23
  • Ernst Ludwig Laux, Dietmar Schäfer, Andreas Harnack, On the Actual Financial and Economic Crisis, its Impact on the Construction Industry and Labour Market in Germany. .................................................. 34
  • Elisabeth Campagnac, The case of France ............................................................................. 40
  • Gunde Odgaard, Camilla Vakgaard, Unemployment and wage situation in building and construction in Denmark .......................................................... 48
  • Paul Chan, British construction at a standstill: financial crisis and the British context .......................................................................................... 54
  • Hans Baumann, The Swiss Construction Industry Remains Stable ............................................. 63

Discussion.......................................................................................................................... 68
Jörn Janssen, Capital Strategies and Trade Union Responses ............................................. 68

Reports.................................................................................................................................. 72
  • CLR-AGM, 12th August 2010, Brussels .................................................................................. 72
  • The Political Economy of the Crisis, Workshop, 15th June 2010, Kingston University .................................................................................. 77
  • Whistle blowing, Seminar, 20th July 2010, Institute for Employment Rights, London .................................................................................. 79

Reviews.................................................................................................................................. 81
Richard Wilkinson, Kate Pickett, The Spirit Level: Why equal societies almost always do better. .................................................................................. 81

New projects.......................................................................................................................... 84
  • Support for posted workers – the bilateral way .................................................................. 84
  • Cultural Diversity on Australian Construction Sites: Challenges with Representation ........................................................................... 88
Support for posted workers – the bilateral way
Proposal for a CLR pilot project - Jan Cremers

Background and starting point
The European social partners in construction played a key role in the decision-making process that lead to the final conclusion of the Posting of Workers Directive (96/71/EC). They formulated two important joint statements: one in 1993 about the general principles of equal treatment and the fight against a distortion of competition through social dumping and a second joint statement with a way out of too many administrative and practical problems by recommending bilateral agreements between the partners of countries involved in (frequent) posting (Cremers and Donders 2004). The Directive lays down a core of minimum regulations for the protection of workers’ rights in the host state. To apply these rules one should be able to establish whether or not this minimum is met. Moreover, the interpretation of Article 3.7 is of importance. This provision states that the Directive shall not prevent the application of terms and conditions of employment that are more favourable to workers. This requires comparison of provisions on, for instance, the minimum wage, paid holidays, etc., that are very difficult to compare in practice. Nevertheless, all actors were convinced of the fact that the strengthening of the information flow to posted workers was needed. The European social partners initiated on this basis a website www.posting-workers.eu
The practical support of posted workers in sending and receiving countries has been less prominently envisaged. This is the starting point for a proposal for a new pilot project.

Some earlier pilot activities
Interesting within Dutch-Belgian practice for the construction sector is the mutual recognition of each other’s collective agreements. As a result of this bilateral agreement between
the social partners the Belgian collective agreement applies to a posted worker who usually works in Belgium during the period of posting in the Netherlands and vice versa. But if a posted worker from Belgium appeals to more favourable extended Dutch collective agreement provisions, the Belgian provisions have to yield as far as minimum entitlements are concerned. As long as posted workers are satisfied with the agreement, no objections against prolongation exist. This pragmatic attitude leaves enough room to make the comparison more workable in practice. The only reverse side is that it does not give 100% legal security, but this is no problem when no individual appeals for deviance are to be expected.

b. Bilateral cooperation.
Cooperation agreements exist in the Nordic countries between Finland, Sweden, Denmark, Norway, the Faeroe Islands and Iceland. The building and woodworkers’ unions of these countries have signed bilateral agreements on cooperation on issues related to the posting of workers. The main element in this agreement is the rule that for members of a union working in another country, as a minimum the collective agreement and legislation in the working country apply. In this case the host country’s collective agreement is the leading one, which is different from the Dutch-Belgian example where posted workers keep working under the collective agreement of the (home) country where they normally work. The Swedish and Danish unions have in addition signed a more detailed agreement in which information on posting related to the actual construction work is also exchanged.

c. Guarantee of social protection benefits.
Within the slipstream of the mutual recognition of each other’s collective agreements, participation in holiday paid leave funds was mutually recognised and Belgium, the Netherlands and Germany concluded an agreement to that affect. The German paid holiday leave fund reached a similar
agreement with Austria and France. In this way a very practical solution has been found to ensure the social protection of posted workers with regard to paid leave. However, situations can occur where one of the two Member States involved does not have a holiday paid leave fund or no such fund exists in either state. In the latter situation payment has to be made by the employer directly to the posted worker, depending on the most favourable conditions for the worker. Where a holiday paid leave fund exists in one of the states involved the posted worker is in most cases better off when participating in that fund. In situations where the paid leave arrangements are comparable, even when one of the two Member States does not have a paid leave fund, mutual recognition of each other’s arrangements can be accomplished by means of an agreement on a bilateral basis. Germany and Denmark concluded an agreement to that affect.

d. Avoid double payment.
In some countries an initiative was also taken at the level of the social partners to compare the different regimes so as to avoid the imposition on a foreign undertaking of obligations already applying in the undertaking’s home state. For instance, the social partners in Belgium tried to compare the employment terms and conditions with those of neighbouring countries. Preliminary research into the nature, quality and quantity of terms and conditions in Belgium, the Netherlands and Germany lead to bilateral agreements as a sort of tailor-made solution in any comparison. This procedure enforces reciprocal respect for the results of each other’s collective bargaining.

e. Bilateral contacts and practical support for posted workers.
Several social partners have made efforts to develop bilateral contacts between sending and receiving countries with frequent cross border activities. Also a special focus was given to direct recruitment. This, however, asks for special instruments (language skills, practical information material,
regular visits, training). Especially in cases where the social partnership (in both the sending and receiving countries) is weak the support for posted workers takes a different form and is, if not completely absent, provided by solicitors or cultural associations (Fitzgerald 2007). Besides going to working places, it is important to organise visits to places where migrants spent their leisure time, information sessions, or other activities with migrant associations and clubs. So far, the possible impact of these initiatives has never been seriously examined.

f. The return.
No attention has been given to the return of posted workers. There is some evidence that posted workers from the lowest stratum of the labour market have serious difficulties to find a decent place at the home labour market. Their labour relation ends as posting is, in many cases, the purpose of the contract, the (often long) period of posting has serious impact on their family life and the bright picture of returning home as a rich person needs readjustment.

Finally
The fact that social partners of several Member States with similar socio-economic development and structures or with strong sending-receiving links conclude bilateral agreements in order to recognise each others collective agreements, minimum wages and/or paid holiday schemes and to intensify the dissemination of relevant information to posted workers is a positive development. Bilateral (coordination) agreements between the social partners, social funds, social and labour inspections and between liaison offices are very useful to solve concrete problems at legislative, administrative and practical level. Such joint agreements on cooperation should be promoted and stimulated.

Between Member States with unequal socio-economic conditions or with strong disparities and/or weak industrial relations other instruments have to be tested and the possible contribution of NGO’s and other civil society
organisations to the support of posted workers has to be examined in detail.

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