

Shifting the risk

Countering business strategies that reduce their responsibility to workers - improving enforcement of employment rights



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Section One

Executive summary

There is large scale noncompliance with basic employment rights in the UK labour market.

Up to 580,000 workers are being paid below National Minimum Wage (NMW) rates. At least 2 million workers do not receive legal minimum paid holiday entitlements, missing out on £1.6bn in paid holiday per year¹.

Existing enforcement mechanisms are clearly failing many workers. This report looks at how they should be strengthened, particularly in a climate where organisations are proactively taking steps to transfer their employment law and tax obligations to other parties.

Organisations are using a range of strategies to transfer accountability to other parties. This leads to them having little responsibility for the people who do work for them.

These include:

Outsourcing - contracting out tasks, operations, jobs or processes to an external contracted third party for a specific period. Companies providing outsourced services employ 3.3 million people across the UK²

Franchising – a franchisor grants a licence, which entitles the franchisee to own and operate their own business under the brand, systems and business model of the franchisor. Franchised businesses employ over 615,000 people in the UK³

Use of labour market intermediaries to source workers – the use of recruitment agencies, umbrella companies and personal service companies means organisations can avoid the employment law and tax obligations of directly employing their workforce. We estimate that there are approximately 2 million people employed via labour market intermediaries

Developing complex supply chains – hiring additional individuals or companies (subcontractors) to help complete a project and transferring liability to organisations further down the supply chain

Deploying these strategies means that workers who provide everyday services used by the public may not be employed by the organisation that benefits from their work. Employment relationships, which on the face of it seem straightforward, often involve third parties not directly involved in the day-to-day interactions between the worker and the organisation that directs their work. The fast food restaurant worker who serves customers their meals, for example, may not be employed by the restaurant brand that appears above the door and on the menus.

¹ Labour Force Survey (LFS) Q4 2016

² <http://www.bsa-org.com/wp-content/uploads/2017/11/BSA-Annual-Review-2017.pdf>

³ <https://www.thebfa.org/news/bfa-news/15bn-franchise-sector-reaches-record-highs/>

In this report, we highlight how these business strategies operate across a range of sectors, eroding the accountability that an organisation has to its workforce. This fragmentation of the labour market makes it more difficult for workers to enforce their employment rights. We'll demonstrate the negative impact on workers, including:

- Confusion over who their employer is and who has responsibility for employment rights,
- Restricted access to employment rights,
- Deteriorating terms and conditions,
- And breaches of basic workplace rights.

Our policy recommendations seek to restore accountability to the fragmented employment relationships in the labour market and make sure that organisations that rely on people to do work for them have a legal responsibility to protect their workers' core workplace rights.

We put forward a set of recommendations that will make it easier for workers to enforce their workplace rights. Our recommendations focus on:

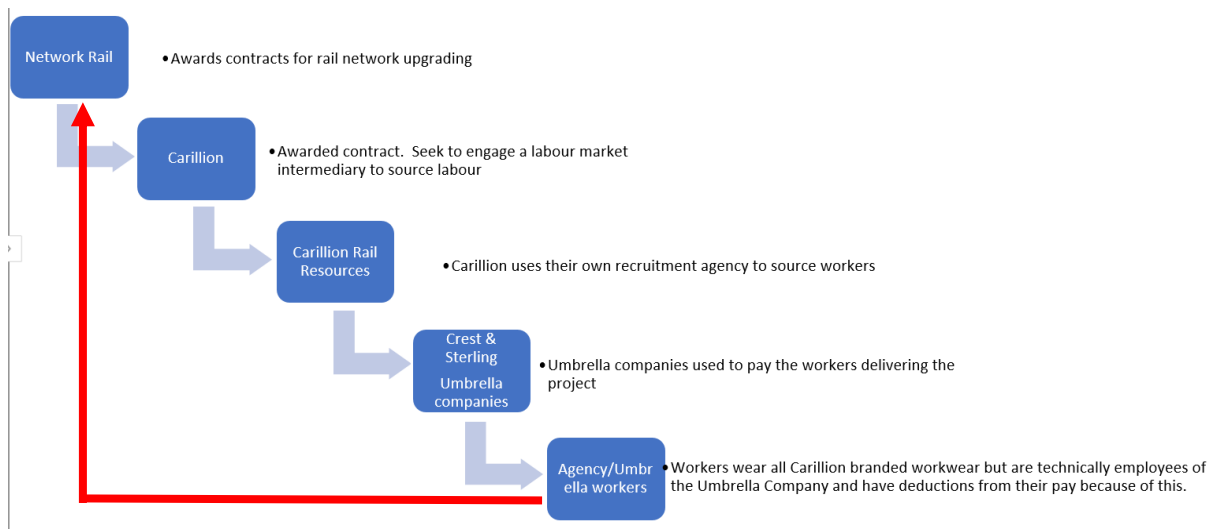
Extending existing legislation so that organisations who use strategies to transfer their obligations to other parties, can be found liable for any breaches of core employment rights of the people who do work for them

Promoting collective bargaining as the primary vehicle for raising workplace standards and ensuring compliance with labour standards

Boosting the effectiveness of state led enforcement activity, by making sure that agencies are sufficiently resourced and that existing licensing schemes are extended to new sectors to tackle noncompliance

The key message of this report is that companies should have a greater legal responsibility for the people who do work for them. The best way to achieve this is to move towards a system of joint and several liability for core employment law standards.

As an initial step, the TUC proposes that workers should be able to bring a claim for unpaid wages, holiday pay and sick pay against any contractor above them in the supply chain. Looking at the diagram below, the worker at the end of the supply chain, employed by an umbrella company, should be able to bring a claim for their unpaid wages against the client, Network Rail. The red line shows the proposed enforcement route.



We believe there are many reasons for establishing a system of joint and several liability:

- Organisations should take greater responsibility for the people that do work for them
- Joint liability opens up multiple avenues for a worker to seek compensation
- Joint liability ensures that where a company goes insolvent, in phoenix cases or where the employer disappears, workers still have a course of action to enforce their rights
- Widened liability would make contractors more diligent and careful in choosing their subcontractors
- Widened liability would strongly incentivise the lead contractor to risk assess and tackle potential breaches of employment standards in their supply chains
- Joint liability incentivises the creation of more secure, permanent employment, as less contractors are willing to take the risk of working with subcontractors who might create liabilities for them.

There are a number of areas of UK employment law where joint and several liability already operate. Under existing domestic law, employers using the strategies outlined above already have legal obligations to the people who do work for them, regardless of whether they are directly employed. If they breach these rights, they will be liable for providing a remedy to these workers.

The TUC is proposing an extension to these existing laws. We would like to see existing liability broadened so that principal employers/tier one contractors are also liable for key terms and conditions, such as wages, holiday pay and sick pay.

Business strategies to transfer employment law obligations to other parties mean that worker rights are often diluted and much more difficult to enforce. Millions of people are doing work for large organisations that are washing their hands of their responsibilities to their workforce. The TUC is calling for improvements in the enforcement system, which will make it impossible for organisations to shrug their shoulders and look the other way when the people who do work for them are not receiving their core workplace rights.

Collective bargaining, joint liability and improvements in state-led enforcement are necessary to restore accountability to the fragmented employment relationships that have developed in the UK labour market.

Section Two

Introduction

Exploitation of working people is not confined to the fringes of the labour market. It doesn't just manifest itself in the horrendous forms of modern slavery and trafficking. Our affiliated unions report that noncompliance with employment rights is commonplace across all sectors.

This is backed up by the statistics. The Low Pay Commission, for example, has reported that up to 580,000⁴ workers are paid below the National Minimum Wage (NMW) rate. At least 2 million workers who don't get legal minimum paid holiday entitlements are missing out on £1.6bn in paid holiday per year⁵.

Existing enforcement mechanisms are falling short. We need more effective mechanisms to help workers enforce their employment rights.

What are the causes of wide spread non-compliance with basic workplace rights?

Employment rights have become more difficult to enforce because the structure of the UK labour market has become increasingly fragmented. Organisations use different strategies to limit their responsibilities to the people who do work for them. These include:

- Outsourcing – contracting out tasks, operations, jobs or processes to an external contracted third party for a specific period
- Franchising – a franchisor grants a licence that entitles the franchisee to own and operate their own business under the brand, systems and business model of the franchisor
- Use of labour market intermediaries to source workers – the use of recruitment agencies, umbrella companies and personal service companies means organisations can avoid the employment law and tax obligations of directly employing their workforce
- Developing complex supply chains – hiring additional individuals or companies (subcontractors) to help complete a project, and transferring liability to organisations further down the supply chain

Deploying these strategies means that workers providing everyday services used by the public may not be employed by the organisation that benefits from their work. Employment relationships, which on the face of it seem straightforward, often involve third parties not

⁴ <https://www.gov.uk/government/news/low-pay-commission-report-on-non-compliance-with-the-minimum-wage>

⁵ LFS Q4 2016

directly involved in the day to day interactions between the worker and the organisation that directs their work.

The fast food restaurant worker who serves customers their meals may not be employed by the restaurant brand that appears above the door and on the menus. The hospital cleaner who ensures that wards are clean and safe may not be employed by the hospital trust. The construction worker contributing to a large-scale development may be employed by an umbrella company at the end of a lengthy supply chain, several links in the chain away from the developer. The supply school teacher may be employed by a recruitment agency, rather than by the school or local authority. And the airline pilot, transporting thousands of people across the globe on holiday and for business, may be categorised as self-employed rather than employed by the airline.

A common factor of these business strategies is the transfer of risk and accountability from the main contractor to third parties. Perhaps the most significant implication for working people is that the organisation that they are directly employed by is often no longer responsible for:

- Setting the substantive terms on which they are employed. Often a company higher up the supply chain will decide the rate for the job and therefore how much workers are paid
- Deciding what, when or how work is done. Often the end-user will oversee and direct their work
- Ensuring that they are treated fairly in the workplace

As a result, individuals face significant difficulties in accessing and enforcing any workplace rights.

These aren't new developments, but the use of these strategies is growing. This report highlights business strategies across a range of sectors, demonstrating that subcontracting, franchising, outsourcing, and the use of intermediaries to provide labour, erodes the accountability that an organisation has to its workforce.

The report will demonstrate how business strategies to transfer risk impact negatively on the workforce, causing significant difficulties for many workers including:

- Confusion over who their employer is and who has responsibility for employment rights
- Restricted access to employment rights
- Deteriorating terms and conditions
- Breaches of basic workplace rights

The key takeaway from this report is that companies should have a greater legal responsibility for the people who do work for them.

We put forward a set of recommendations that will make it easier for workers to enforce their workplace rights. Our recommendations focus on:

- Restoring accountability to supply chains;

- Promoting collective bargaining as the primary vehicle for raising workplace standards and ensuring compliance with labour standards;
- Boosting the effectiveness of state led enforcement activity.

The next section of the report looks at how businesses outsource their responsibility to workers. We then turn to address solutions.

Business strategies to transfer accountability to other organisations

Business strategies to transfer risk and responsibility

Businesses have increasingly sought to reduce their costs by limiting the number of people they directly employ, pushing the risk of managing variations in demand for their product or service on to sub-contractors, or working people themselves.

For workers, these increasingly fragmented employment relationships mean that while the lead business or contractor may have a significant influence over their terms and conditions through setting the terms of a contract and determining the price that is paid for their labour, the workers' direct relationship is with a third party. This makes it harder for workers to identify their employer and to hold them to account when their rights are breached.

This section looks at the various strategies that businesses have used to distance themselves from their workers, their scale in the U.K. and the impact of these arrangements on working people. It covers:

- Outsourcing
- Franchising
- The use of agency work
- Umbrella companies
- The use of personal service companies and bogus self-employment

Outsourcing

What is it?

Outsourcing is where an organisation contracts out tasks, operations, jobs or processes to an external contracted third party for a specific period. This may form part of a business strategy to reduce costs, devolve risk or source additional capacity or specialisms.

Types of outsourced activity can include:

Telecommunications and IT Services	Facilities Management	Business Process Outsourcing	Construction-related Services	Outsourced Public Services
Telecoms; IT and data-related services	Catering; combined facilities management; cleaning services; landscape and security services	Office administrative, office support and other business support activities	Property, repair and maintenance; property development services; engineering-related consultancy and testing	Frontline services for local and central government; complex public services

Table taken from the Business Services Association 2017 Annual Report.

What's the scale of it in the UK?

Companies providing outsourced services employ 3.3 million people across the UK⁶. The UK has a "mature" public services outsourcing market, with 30 years' experience of contracting public services out to the private and voluntary sectors⁷.

70% of business services are provided for the private sector as outsourcing non-core business functions allows companies to invest more elsewhere⁸. While full details are not available, it is estimated that around half of the £200bn that the UK public sector spends on goods and services is through the outsourcing of services to external providers⁹.

What's the impact on working people?

Outsourced contracts will often be awarded to the company that can deliver the contract at the lowest cost. Companies bidding for contracts may seek to minimise their overall contract price by lowering their labour costs. This inevitably drives down wages and worsens other terms and conditions. Companies that are awarded outsourced contracts often find themselves in a position where they don't have enough money to comply with labour standards and deliver the service.

This is evident in the social care sector, where a recent legal ruling found that some 200 organisations employing carers, some of which are charities, were liable to pay up to six years of back pay due to the large-scale underpayment of the National Minimum Wage¹⁰.

⁶ <http://www.bsa-org.com/wp-content/uploads/2017/11/BSA-Annual-Review-2017.pdf>

⁷ <https://smithinstitutethinktank.files.wordpress.com/2014/09/outsourcing-the-cuts-pay-and-employment-effects-of-contracting-out.pdf>

⁸ <http://www.bsa-org.com/wp-content/uploads/2017/11/BSA-Annual-Review-2017.pdf>

⁹ <http://www.smith-institute.org.uk/wp-content/uploads/2018/01/Out-of-contract-Time-to-move-on-from-the-%E2%80%98love-in%E2%80%99-with-outsourcing-and-PFI.pdf>

¹⁰ <https://www.unison.org.uk/news/article/2017/07/care-minimum-wage/>

A 2014 Equality and Human Rights Commission (EHRC) investigation¹¹ into outsourcing in the cleaning sector reveals high levels of non-compliance with core workplace rights such as pay, working time and holiday pay.

It flagged up that public-sector organisations struggling with significant budget cuts had been forced to lower the amount they could pay for outsourced cleaning services. Organisations saw cleaning and facilities management contracts as an easy way to find cost savings, but did not consider the impact on cleaning firms and workers when contract values reduced.

The EHRC investigation uncovered evidence about the significant scale of underpayment or non-payment of wages. A substantial number of workers stated that they had experienced problems receiving their pay in full and on time. Unclear payslips exacerbated this problem. Workers did not understand how pay was calculated, and if they had been paid the correct amount. This was particularly so for migrant workers whose English was limited.

The report also highlighted that non-compliance with NMW rates was a key problem for workers in the hospitality industry where they were paid piece rates: a rate per caravan or per hotel room. Unrealistic piece rate targets meant that the effective hourly rate was well below the NMW.

Significantly the report highlighted that workers found it difficult to resolve problems with pay. Workers reported that it was time consuming and stressful to try and recoup their pay. And in some cases they were not sure how to do this as they did not know who to contact.

Franchising

What is it?

Franchising is the granting of a licence by one person (the franchisor) to another (the franchisee). The licence entitles the franchisee to own and operate their own business under the brand, systems and business model of the franchisor¹².

The franchisor retains a great deal of control over the franchisee, as the relationship is regulated by a contract that sets out the parameters in which the franchisee can operate the business. Many franchisees will seek to maximise their profits where they can, which would include cutting labour costs and workforce terms and conditions – an area where they generally have discretion to deviate away from the franchisor.

Many fast food outlets are owned by franchisees. On the face of it, the public may assume that these workers are employed by the large, famous brands that appear all over the restaurants. In fact, these workers are employed by the franchisee. The large brand will have

¹¹ https://www.equalityhumanrights.com/sites/default/files/the_invisible_workforce_full_report_08-08-14.pdf

¹² <https://www.thebfa.org/about-franchising-the-bfa/>

no employment law obligations towards these workers, despite these people doing work for them.

What's the scale of it in the UK?

Franchised businesses employ over 615,000 people in the UK. This figure is up 10% since 2013.

What are the risks for workers in franchised businesses?

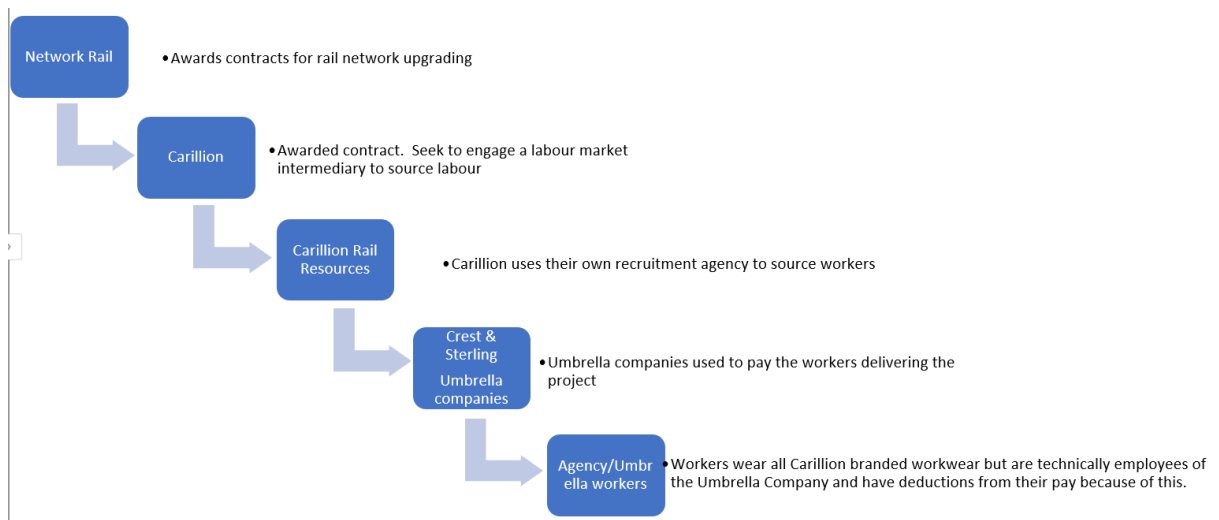
The franchisor is no longer responsible for upholding the employment rights of the people working in the franchisee's business. One legal expert in the US¹³ summed this up as being a "common way that a big entity effectively contracts out running the show at the ground level."

Developing complex supply chains for the provision of services and labour

What is it?

Subcontracting is a business practice, where a main or principal contractor of an investor or client hires additional individuals or companies (subcontractors) to help complete a project¹⁴.

The actors involved in subcontracting processes usually consist of a client, a main or principal contractor as well as one or more subcontractors. An example of a supply chain¹⁵ can be seen below:



¹³ Cynthia Estlund, a New York University School of Law professor

¹⁴ [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU\(2017\)596798_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

¹⁵ [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU\(2017\)596798_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

The construction sector was one of the first economic sectors in which subcontracting became widespread, raising concerns about the possible erosion of workers' rights at the lower end of a subcontracting chain. Complex, lengthy supply chains make it easier for clients and principal contractors to transfer liability for wages, taxes and social security contributions to other organisations.

It's often the case subcontractors further down the chain will be working directly for the principal contractor. This can be seen clearly in the above example of a Network Rail supply chain where Carillion were contracted to provide rail maintenance work. Each time the rail maintenance work is subcontracted further down the supply chain, another organisation is taking a cut of profits from the original contract. This suppresses wages further down the supply chains. It means that subcontractors look to cut corners and this often manifests itself in noncompliance with core labour standards.

This is also the conclusion drawn by the Director of Labour Market enforcement in his recent introductory report:

The sectors commonly linked with non-compliance such as care, cleaning, agriculture, construction, food processing and hospitality are regularly under pressure to cut costs. Often this is associated with sub-contracting and squeezed profit margins. In some cases this spills over to false self-employment and tax evasion. ¹⁶

In this report we focus on the fragmented employment relationships that are typically found in complex supply chains. We look at how organisations use labour market intermediaries to source people to do work for them, and therefore avoid employing people directly.

Use of intermediary bodies to fragment employment relationships

As responsibility for employment rights is shifted to other organisations, workers' employment rights are diluted. This could involve:

The use of agencies (employment businesses) to supply workers

The expanded role of umbrella companies. While in the past such companies primarily performed payroll functions, they are increasingly performing the role of intermediary employers, marketing themselves as being able to help reduce workers' tax liabilities

The growing use of personal service companies, which is spreading beyond high-skill professional workers, such as IT specialists, freelancers and management consultants, to become increasingly prevalent in other sectors, including construction and the public sector. This means the company can avoid hiring an employee and the consequential tax and employment obligations which arise

¹⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629872/labour-market-enforcement-strategy-introductory-report.pdf

Individuals employed via an agency or umbrella company will often not know who their employer is, while those who sign papers setting up a personal service company will often not be aware that they effectively employ themselves.

The use of recruitment agencies

There are at least 740,000 people in the UK today working through an employment agency¹⁷.

This figure comes from the Labour Force Survey (LFS), but many estimates put the figure higher than this. The Recruitment and Employment Confederation estimate that there were 1.2 million temporary work placements in the UK in 2014/15¹⁸.

Agency work provides employers with additional flexibility as they can hire and fire agency workers as and when needed. Using agency workers can also be cost effective for employers as they are able to save on wage costs normally associated with employees, such as pensions and other "on costs".

Traditionally the agency worker employment relationship is a tripartite one consisting of a/an:

- Hirer (business)
- Recruitment agency
- Agency worker

In practice, the agency worker is employed and paid by the recruitment agency. The hirer pays the employment business for the supply of the agency worker and the work that they carry out for the hirer.

This tripartite relationship makes it more difficult for agency workers, particularly those on long term assignments, to understand who their employer is, who is responsible for upholding their rights and who to take action against if they need to enforce their rights.

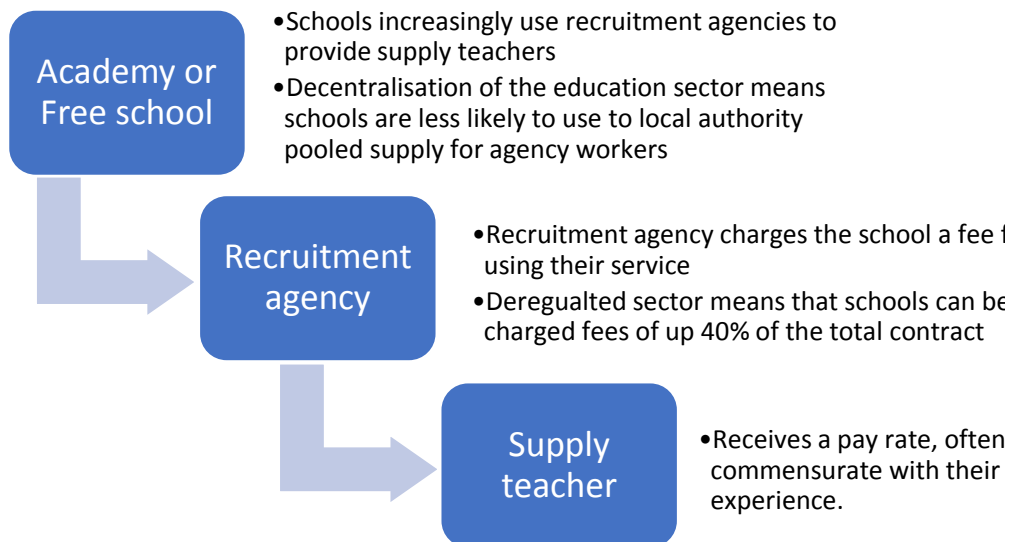
The case study on the next page illustrates noncompliance and exploitative conditions in the education sector, triggered by the use of recruitment agencies.

Supply teachers – education sector – agency work/umbrella companies

There is a growing use of agency workers in the education sector. The majority of supply teachers are now provided to schools by recruitment agencies. Below is an example of one type of agency worker supply teacher employment relationship:

¹⁷ Labour Force Survey July September 2017

¹⁸ Cited in BEIS (2018) Good work: the Taylor review of modern working practices; consultation on agency workers recommendations



The diagram above shows that although supply teachers are doing work for the school, their employment relationship is with the recruitment agency. This employment relationship makes it more difficult to access workplace grievance procedures and resolve issues that impact upon their core workplace rights, such as statutory sick pay (SSP) and breaches of holiday pay.

The use of agency work has increased dramatically over the last two decades. A 2017 NASUWT survey confirmed the extent of recruitment agency involvement in the sector. 79% of supply teachers who responded said that they were employed through an agency. The NUT section of the National Education Union (NEU) reports a similar proportion (76%) of supply teachers being engaged through an agency.

Data published by the Department of Education shows that schools across the UK spent an astonishing £792m on supply teacher agency staff in 2016/19.

What does the increased use of labour market intermediaries mean for supply teachers?

Complex supply chains and the increase in labour market intermediaries, such as recruitment agencies and umbrella companies, has a number of negative consequences for workers.

The use of labour market intermediaries in the education sector means that supply teachers receive lower wages.

In some instances, the commission fee charged by the employment agency can be up to 40% of the total contract for employing a teacher on a daily assignment. This has a direct impact on driving down the wages of supply teachers, as schools can't afford to offer higher wages. When this level of

¹⁹ <https://www.gov.uk/government/statistics/income-and-expenditure-in-academies-in-england-2015-to-2016> & Benchmarking Return (Accounts Return) 2016, DfE data tables

commission is compared to the recruitment industry averages of 16.5%²⁰ it's clear there's a real problem with profiteering in the education sector.

Umbrella companies deduct their profit margin from the wages paid to agency workers. Agency workers are often not aware of this, so the pay rate they've agreed with the employment agency is not reflected in their final pay packet.

NASUWT reports that it's extremely rare for agency teachers to receive a pay premium. Most agency teachers report being paid at a rate equivalent to that for an unqualified teacher. Supply teachers will also miss out on pay progression relating to annual pay awards that teachers in direct employment receive. The NUT section of the NEU has found that pay rates for agency teachers are going down. Almost one-third of their survey respondents are being paid less, or significantly less, than they were three years ago.

Supply teachers are often not paid for all the work they do. Underpayment of the National Minimum Wage is rife in the education sector.

Working outside contractual hours is a problem for agency teachers. Such teachers agree hourly rates and working hours with the recruitment agency. However, they are often expected to complete tasks that have not been agreed with the agency, sometimes outside of the working hours that they have agreed. This results in supply teachers not being paid for work they are carrying out. This means they are effectively paid below NMW rate for the hours they have worked.

“ I fully agree with the idea that any work taught by me should be marked by me. However, I often have three sets of books to mark and when I take into account the time spent marking as well as teaching, I am often actually earning less than the minimum wage.

Feedback from a supply teacher, NASUWT Supply Teacher Survey, 2017.

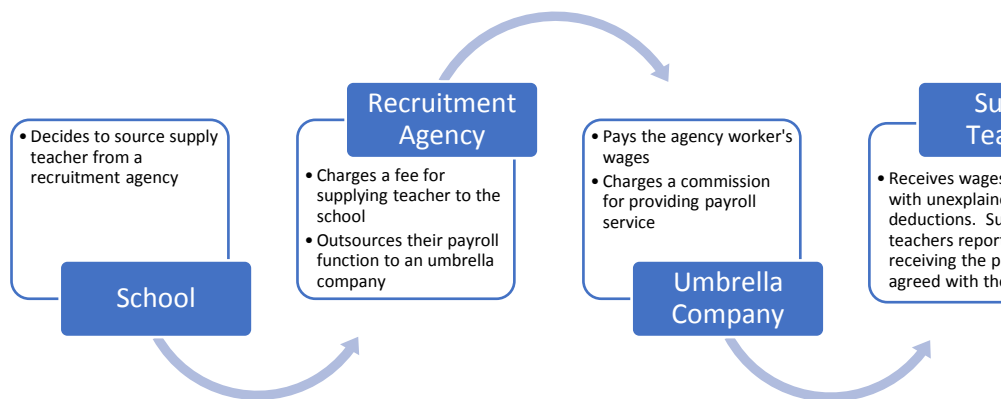
In 2017, 37,000 workers were being paid below NMW in the education sector²¹.

Umbrella companies – another link in the supply chain. A lack of transparency on pay rates. An unregulated market. Deductions from wage packets often leave workers short.

Below is a diagram of a typical agency worker supply teacher, umbrella worker employment relationship.

²⁰ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

²¹ 2017 Annual Survey of Hours and Earnings, conducted by ONS, 'Table 2a. Estimates of UK jobs paid below the NMW/NLW by industry' - <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/jobspaidbelowminimumwagebycategory>



Many supply teachers are pressurised by recruitment agencies to use umbrella companies. This is a pre-condition of the recruitment agency assigning the supply teacher to a school. According to the 2017 NAUSWT survey of supply teachers, two thirds of supply teachers (66%) reported that they have been asked to sign a contract or agreement with an umbrella company when working through a recruitment agency. Umbrella working arrangements in the education sector are commonplace.

NASUWT has reported incidences of further poor practice from umbrella companies. Some supply teachers using these intermediaries have not received payslips. And there is a real concern that some umbrella companies are behaving dishonestly by not being fully transparent about the impact of using an umbrella company on wage rates. For example, NASUWT has reported that there are cases where emails have been sent to supply teachers, from umbrella companies, saying “if you reply to this email you are accepting the terms and conditions set out below”.

The use of umbrella companies

What is an umbrella company?

Recruitment agencies can use a third-party company, such as an umbrella company or intermediary, to process an agency worker’s wages. Often, an umbrella company will directly employ the agency worker. We’ve included a diagram of a recruitment agency/umbrella worker relationship above.

The use of umbrella companies inserts another link in the chain between the agency worker and the business hiring them to do work. This is another link that transfers risk and responsibility away from the hirer and employment business. It’s also another intermediary who is seeking to profit from their involvement with the agency worker who is providing a service to the hirer.

What is the scale of use of umbrella companies?

HMRC have estimated²² that roughly 430,000 people work through umbrella companies. Unions have suggested²³ that this is an underestimate, as employers in sectors such as logistics, supply teaching and pharmaceuticals are increasingly using this form of employment. A recent BBC documentary²⁴ estimated that there could be between 300,000 and 400,000 umbrella workers in the construction industry alone.

Why do recruitment agencies use umbrella companies?

There are several reasons why recruitment agencies use umbrella companies:

Recruitment agencies moved to the umbrella company model to avoid paying employer's national insurance (NI) contributions – this duty transfers to the umbrella company who most often will employ the worker directly

The umbrella company will operate the payroll function for the recruitment agency

Some umbrella companies will pay a commission fee to incentivise employment agencies to give them business

It transfers the risk and employment law obligations from the recruitment agency to the umbrella company

Umbrella companies are businesses – where do they make their money?

They deduct a "margin" taken from the contractual rate paid from the recruitment agency to the umbrella company to cover their operating cost. This deduction is shown on the employee's/umbrella workers' payslip and is one reason they may receive less than the rate agreed with the recruitment agency.

Umbrella companies have a dual function. They act as a payroll for employees and as an accountancy service for personal service companies. Some umbrella companies will try to persuade agency workers to shift on to personal service contracts and then charge them for an accountancy service to manage their company. However, it's more routine for umbrella companies to offer agency workers a contract of employment. This means the agency worker is an "employee" of the umbrella company.

Despite recent changes in the law umbrella companies are still paying umbrella workers in the form of reimbursed expenses for home to work travel²⁵. This means they avoid paying employer's NI contributions on umbrella workers' wages.

²² Personal Services Company: recent debate, House of Commons Library, briefing paper, number 05976, 15 December 2017, page 54

²³ <http://www.unitetheunion.org/news/unite-demands-government-outlaws-umbrella-companies/>

²⁴ <https://www.youtube.com/watch?v=IHRAgNsyNZo>

²⁵ s289A ITEPA 2003

What is the impact on workers?

The main problem that umbrella workers face is not receiving the rate of pay that they have agreed with the recruitment agency. Where an umbrella company is involved in paying a work-seeker, the hourly or daily rate that the employment business has agreed to pay the work-seeker is paid to the umbrella company as the umbrella company's income. The umbrella company will then deduct their profit margin and a sum to cover employers' NI contributions and holiday pay (as the umbrella company is the employer).

The remainder is then classed as the work-seeker's gross pay, from which income tax and employees' NI contributions are deducted, with the work-seeker receiving the resultant net pay.

A report by UCATT26 (now Unite the Union) summed up the problem neatly:

By using these middle men to pay workers, employment agencies have engineered a situation where the amount a construction worker receives in their pay packet is often a lot less than the rate agreed when he or she took on the job.

Unite the Union provided a further case study to highlight the day-to-day experience of workers using an umbrella company:

On top of all of this, when I do work, I am having money taken off my wages due to an umbrella company's greed. I think it is ridiculous that I have to pay someone to receive my own wages I've worked hard for. This is public money for a public service, why are umbrella companies who add nothing of any value to the project I am employed on profiting from the tax payers money? Something needs to change and change very soon. Anonymised construction worker.

The Low Incomes Tax Reform Group points out²⁷ that contractual rates agreed between the recruitment agency and the umbrella company should include an uplift to make sure that the worker still receives the rate that had been agreed with the recruitment agency when the umbrella company has deducted their "margin" and any other costs. But this doesn't always happen, sowing confusion and anger amongst agency workers who have been promised an hourly wage rate, only to receive a lower rate.

Umbrella workers may find themselves facing unintended tax liabilities. Despite recent changes in the law, umbrella companies are still paying umbrella workers in the form of reimbursed expenses for home to work travel²⁸. Workers, employed by umbrella companies who are using these tax evading models, may find themselves subject to HMRC investigations and penalties.

²⁶ <https://www.ucatt.org.uk/files/publications/141023%20Umbrella%20Company%20Con-Trick%20Report.pdf>

²⁷ <https://www.litrg.org.uk/sites/default/files/Umbrella%20factsheet%202017.pdf>, page 4

²⁸ s289A ITEPA 2003

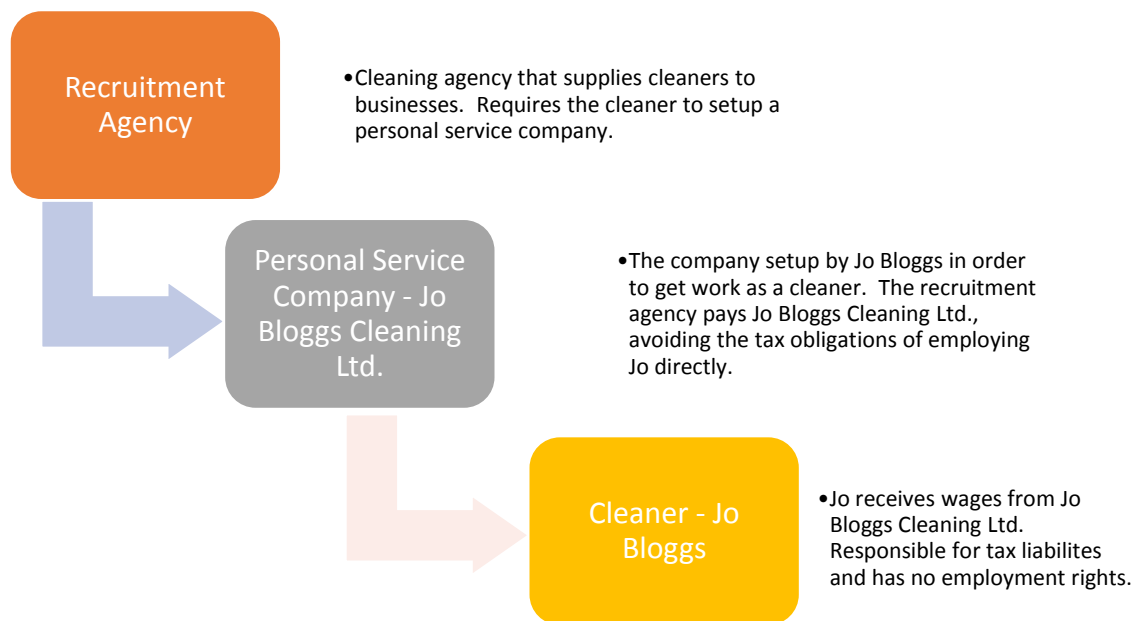
The use of personal service companies

What is a personal service company?

Organisations often require individuals to set up personal service companies, and to effectively employ themselves, as a precondition to offering them employment. To further complicate things, recruitment agencies and umbrella companies will also often require an agency worker to setup a personal service company and employ themselves, creating even more links in the supply chain.

A personal service company is a limited company that typically has a sole director, the individual, who owns the shares in the company²⁹. This type of arrangement is widely used in well-paid sectors such as IT and engineering, where the contractor would benefit from these types of arrangement as they could split their income between salary and dividends, which means they do not pay employers or employees Class 1 NI contributions on a large part of their overall income.

However, these arrangements are being used more frequently in low paid sectors, by organisations seeking to transfer risk onto the individual.



Some organisations will not want the risk of there being a contract of service, or an employment relationship, with the people who do work for them. Employers can avoid NI contributions of 13.8 per cent and don't have to pay employee benefits, such as holiday pay. By requiring an individual to set up a limited company, and then contracting with this company, organisations are avoiding having an employment relationship with the individual. This transfers the risk, as well as the employment law and tax obligations, to the personal service company.

²⁹ <https://www.contractorcalculator.co.uk/what-is-a-personal-service-company.aspx>

What is the scale of the problem?

About 450,000 people earn most of their income through personal service companies, figures from the Office for National Statistics suggest³⁰.

What is the impact on workers?

Individuals working for a personal service company could have all the employment characteristics of an employee, yet still be denied even the most basic employment rights and be instantly dismissed without warning.

The LITRG, the charitable arm of the Chartered Institute of Taxation, said it was concerned that workers themselves risk being challenged by the HMRC if they are required to work on terms that enable employers to avoid tax.

Many low and moderately paid individuals, including supply teachers, cleaners and subcontractors “are being forced to use limited companies to obtain work when they would be better off being employed either by the agency or the client and indeed probably should be employed³¹”, warned LITRG chairman Anthony Thomas.

“IR35” Rules – preventing the misuse of personal service companies

There is tax legislation in place to prevent the misuse of personal service companies.

In 2000 rules were introduced to cover any engagement where: a worker provides services under a contract between a client and an intermediary; and, but for the presence of the intermediary, the income arising would have been treated as coming from an office or employment held by the worker under the existing rules used to determine the boundary between employment and self-employment income for tax purposes, if the individual had contracted directly with the client³². In these cases, the intermediary is required to account for tax on this payment in just the same way as employee earnings (ie, charge income tax under PAYE and Class 1 NICs). This legislation governing intermediaries is often referred to as ‘IR35’, after the number of the Budget press notice that first announced this measure.

In the situation above, Jo is forced to use a personal service company, before she is given any work as a cleaner. She setups up Jo Bloggs Cleaning Ltd. For all intents and purposes, she is an employee of the end user. This setup is considered unlawful and the intermediary (JB construction ltd.) will have to pay tax on this payment in just the same way as employee earnings (i.e., charge income tax under PAYE and Class 1 NICs).

³⁰ <https://www.thetimes.co.uk/article/philip-hammond-eyes-1bn-budget-raid-on-freelancers-9bm6ljs6>

³¹ <https://www.taxation.co.uk/Articles/2012/11/12/49701/litrg-warns-misuse-limited-companies>

³² <http://researchbriefings.files.parliament.uk/documents/SN05976/SN05976.pdf>

Case study: bogus self-employment in the agency sector

Pilots are generally employed under decent terms and conditions, due to high union density and effective negotiations between BALPA and the airlines that employ pilots.

However, bogus self-employment has grown in the sector, particularly in one airline, a large non-UK short haul airline with numerous bases in the UK. It's estimated that around half of the pilots employed by this one airline work under self-employed arrangements.

BALPA estimates that there are around 500 pilots in bogus self-employment in the UK, out of a total of 12,000 pilots.

Pilots are typically required to setup personal service companies and then employ themselves. This personal service company is then engaged by a labour market intermediary to provide the services of the pilot to the airline.

Because the pilots are not classified as employees or workers of the airline they have no entitlement to sick pay, paid holidays or maternity/family friendly rights.

Although these pilots are technically self-employed, it's virtually impossible to work for another organisation. This is mainly due to regulatory requirements in place to ensure safety in the aviation sector.

For example, pilots are only permitted to carry out 900 flying hours in a year. The airline using self-employed co-pilots uses all or the vast majority of these hours so there would be no legal flying hours for a "self-employed" pilot to use with another operator. Also, a pilot has to undergo a competence check, further regulatory requirements and get to grips with the operating procedures for one airline. It's just not practical to work on a self-employed basis for more than one airline.

The co-pilots area also, in effect, unable to refuse work from the airline. The airline determines their rotas and carries out sickness absence procedures.

Section Four

How can we restore accountability to businesses?

We've outlined the business strategies that organisations use to transfer accountability, employment law obligations and tax liabilities to other organisations.

Organisations are able to water down their responsibilities to the millions of people who carry out work for them.

Our policy recommendations seek to restore accountability to the fragmented employment relationships in the labour market and make sure that organisations that rely on people to do work for them, have a legal responsibility to protect the core workplace rights of the people who do work for them.

We set out a number of policy recommendations that would make it easier for working people to enforce their employment rights and to raise working conditions across the labour market.

Our recommendations focus on:

- Extending existing legislation so that organisations who use strategies to transfer their obligations to other parties can be found liable for any breaches of core employment rights of the people who do work for them
- Promoting collective bargaining as the primary vehicle for raising workplace standards and ensuring compliance with labour standards
- Boosting the effectiveness of state-led enforcement activity, by making sure that agencies are sufficiently resourced and that existing licensing schemes are extended to new sectors to tackle noncompliance

Collective bargaining – collective agreements - robust governance frameworks – effective enforcement of employment rights

The most effective method of safeguarding and improving workplace rights is via collective bargaining.

Collective bargaining is a constructive forum for addressing working conditions, terms of employment and relations between representatives of employers and trade unions. It's often more effective and flexible than state regulation³³.

Negotiations between unions and employers are enshrined in collective agreements that establish terms and conditions for the workforce, but also the processes for resolving any disputes. For this reason, collective bargaining can be an important governance institution. If workplace issues arise, collective bargaining can lead to swift, effective enforcement of employment rights.

Where unions and employers are engaged in collective bargaining breaches of employment rights are much less likely to take place. Where they do, they can be resolved swiftly and cheaply through negotiations between unions and employers.

The TUC is proposing that new sectoral bodies should be introduced that bring together unions and businesses to negotiate pay, progression, training and conditions. These should be piloted in the low-paid sectors where the need to improve conditions is greatest. There are many examples of this happening already, where unions and employers voluntarily enter into collective agreements.

Below we'd like to highlight several multi union collective agreements, supported by the client or the developer of large scale construction projects, as they recognise that collective agreements continue to provide effective governance for industrial relations on projects.

Four Sector Agreements Civil Engineering, Engineering Construction , Facilities Management and Supervision - Hinkley Point C construction site – constructing two nuclear reactors at Hinkley Point C, in Somerset

This agreement was negotiated between NNB Generation Company (HPC) (a subsidiary of EDF Energy), the tier one contractors at the site and Unite the Union, Prospect and GMB, to provide a comprehensive framework for industrial relations at the Hinkley Point site.

The agreement applies to every tier of contractor engaged on the project and their workforces. Workers can use the negotiated structures within the agreements to resolve all issues where necessary.

³³ http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_CB_FAQ_EN/lang--en/index.htm

Furthermore, the agreement stipulates that each tier 1 contractor is responsible for ensuring that their tier 2 subcontractors also comply with these requirements. These agreements restore the accountability that can often be diminished due to convoluted supply chains.

“All workers within the scope of this Agreement will be directly employed by a Tier 1 Contractor or sub-contractor under a contract of employment”

These agreements have a “social covenant clause” agreed between all the parties (client, contractors and trade unions) comprising 14 principles. The covenant includes the following important principles:

- “Best in class” employment terms and conditions – setting out decent pay rates for workers on site, holiday pay entitlements and clear rules around overtime payments and bonuses
- A commitment to only using “direct employment” – meaning that the use of labour market intermediaries is restricted. This means workers have access to a wider range of employment rights and greater job security
- Structured social partnership to support a constructive working environment and high levels of union membership

The agreements set out further controls that require all new subcontractors coming into the supply chain to comply with the collective agreements. Any new labour supply sub-contractors must be approved by the “site joint council” before mobilising any employees on site.

Not only do these collective agreements establish workforce terms and conditions, they also set out clear structures and processes to make sure that negotiated labour standards can be effectively enforced. For example, at Hinkley Point C, an “employment affairs unit” (EAU) and “joint project board” have been established to monitor and ensure compliance with the agreements.

The three trade unions are directly involved in the governance of the EAU. The EAU oversees the operation of the grievance, disciplinary and performance support procedures, in full consultation with the contractors and the trade union shop stewards.

The trade unions’ national officers and the designated client and tier 1 contractor senior management representatives make up the joint project board – the “Top Table Forum”. This body provides oversight of the application of collective agreements and of the onsite industrial relations governance structure. These two formal structures ensure that the trade unions have a meaningful role in the monitoring and enforcement of the collective agreements.

The agreements go further by providing trade unions with access to meet with their members and encourage those workers who are not members to join a trade union. This facilitates workers becoming involved with trade unions. It also signposts them to unions, who can resolve any workplace issues which may arise.

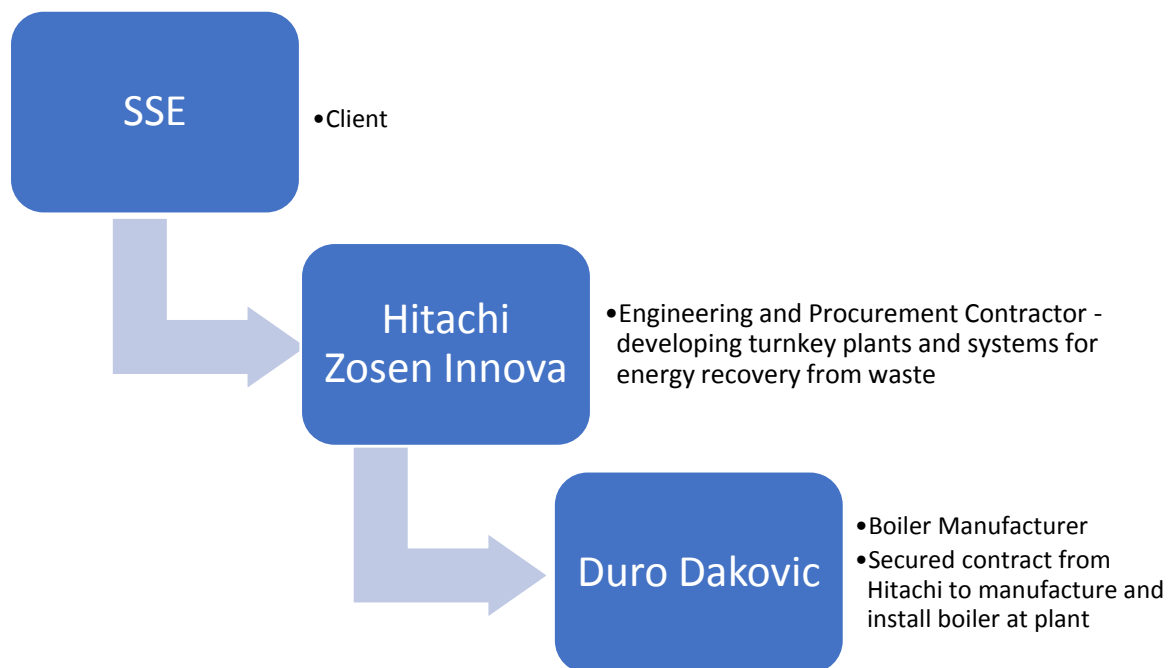
Ferrybridge Multifuel 1 – power plant using a range of fuel sources, including waste-derived fuels from various sources of municipal solid waste, commercial and industrial waste and waste wood

Like Hinkley Point C, this project was constructed under the National Agreement for the Engineering Construction Industry, a collective agreement that establishes a framework for industrial relations.

It also involved a supplementary project agreement being negotiated locally at this large-scale construction project. The client, SSE, agreed to the project being signed up to the national agreement³⁴. This agreement establishes a robust, comprehensive framework that sets out collectively negotiated terms and conditions and the procedures for resolving disputes.

Both Unite the Union and GMB are the signatory trade unions to this agreement. They also regularly negotiate with the Engineering Construction Industry Association, and engineering employers to keep the terms of the NAECI agreement updated.

Below is a diagram showing one strand of the supply chain at the Multifuels site:



Duro Dakovic employed approximately 120 Croatian workers on the project who were members of Sindikat Metalaca Hrvatske-Industrijski Sindikat (the Croatian metal workers' union). These workers experienced significant problems when their employer paid their workers at rates well below those agreed in the NAECI.

³⁴ http://www.ecia.co.uk/pages/index.cfm?page_id=4

Under the terms of the collective agreement, unions called for a full audit of the company where it was established that a large group of workers had been underpaid and as such the company was required to reimburse those employees. The audit revealed:

“From the audit a shortfall in payments £21,161.36 was highlighted across the board for all 94 employees that were audited”

“A calculation has been undertaken on the holiday accrual for each employee and what they would be owed if holiday pay has not been paid, this amounts to a total for all employees of £57,977.79”

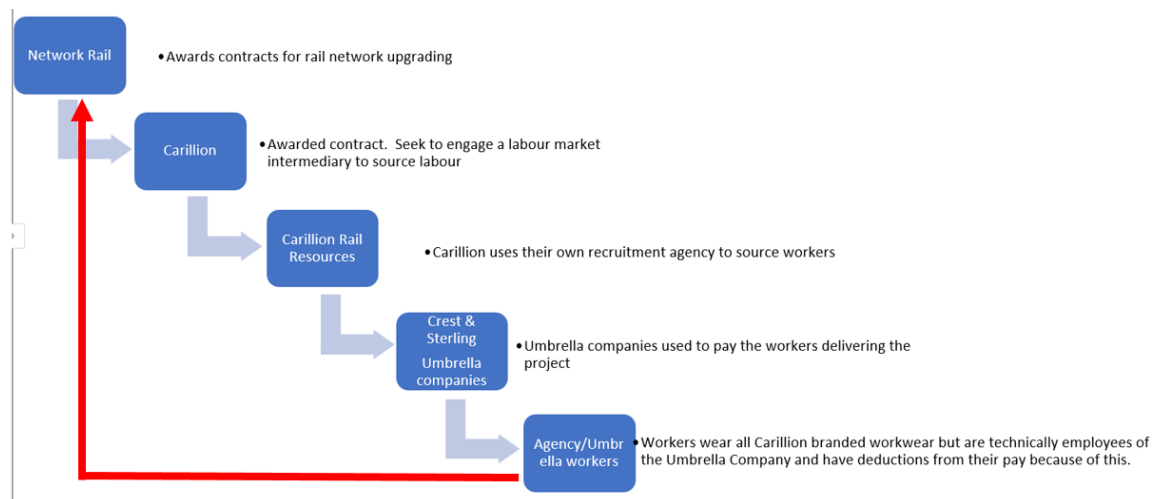
It's an impressive example of how collective bargaining and trade union involvement can lead to effective enforcement of rights for a group of non-UK posted migrant workers. Cooperation between GMB and Unite meant that the unions were able to monitor what was occurring on site and effectively intervene to ensure that those non-UK workers employed by Duro Dakovic were compensated for unpaid wages.

Upon the workers' return to Croatia, many of these workers continued to work for Duro Dakovic. The company attempted to recoup some of the additional wages that they had been forced to pay by making unfair deductions from the workers' wages. Unite and GMB have been working with Croatian union colleagues to take legal action to tackle this exploitation.

Joint and several liability – restoring accountability to fragmented employment relationships

We believe that the law needs to change to ensure that companies and organisations at the head of supply chains are accountable and responsible for maintaining minimum employment law standards throughout their supply chains. The best way to achieve this is to move towards a system of joint and several liability for employment law standards throughout supply chains.

As an initial step, we propose that workers should be able to bring a claim for unpaid wages, holiday pay and sick pay against any contractor in the supply chain above them. Looking at the diagram below, the worker at the end of the supply chain, employed by an umbrella company should be able to bring a claim for their unpaid wages against the client, Network Rail. The red line shows the proposed enforcement route.



The TUC believes there are many reasons for establishing a system of joint and several liability:

- Organisations should take greater responsibility for the people that do work for them
- Joint liability opens up multiple avenues for a worker to seek compensation
- Joint liability ensures that where a company goes insolvent, in phoenix cases or where the employer disappears, workers still have a course of action to enforce their rights
- Widened liability would make contractors more diligent and careful in choosing their subcontractors
- Widened liability would strongly incentivise the lead contractor to risk assess and tackle potential breaches of employment standards in their supply chains
- Joint liability incentivises the creation of more secure, permanent employment, as less contractors are willing to take the risk of working with subcontractors who might create liabilities for them

There are a number of areas of UK employment law where joint and several liability already operate. Under existing domestic law, employers using the strategies outlined above already

have legal obligations to the people delivering goods and services in their organisations, regardless of whether they are directly employed. If they breach these rights, they will be liable for providing a remedy to these workers.

The TUC is proposing an extension to these existing laws. We would like to see existing liability broadened so that principal employers/tier one contractors are also liable for key terms and conditions, such as wages, holiday pay and sick pay.

There are several examples of where joint and several liability already operate in the UK:

The Equality Act

Under the Equality Act, principal employers are prohibited from discriminating against, or victimising contract workers who are not in their direct employment³⁵.

Agency workers supplied by a recruitment agency would also be considered to be contract workers as long as they are employed by that agency³⁶. An agency worker supplied to a principal to do work and be paid by an employment business under a contract will also be protected.

The TUC is proposing that this principle should be extended to other areas of employment law, so that principal employers will have a duty to uphold the core workplace rights of people that do work for them, such as, national minimum wage, holiday pay and sick pay.

TUPE Regulations³⁷

The TUPE Regulations protect employees' rights when the organisation or service they work for transfers to a new employer. TUPE has implications for the employer who is making the transfer (“transferor”) and the employer who is taking on the transfer (“transferee”).³⁸

These regulations place a duty on both the transferor and transferee to inform and consult representatives of their employees who may be affected by the transfer or measures taken in connection with the transfer³⁹. If the employer fails to comply with these regulations,⁴⁰ then both the transferee and the transferor can be held jointly liable⁴¹ to pay compensation for the breach of these regulations.

The TUPE Regulations apply in outsourcing situations. But the provisions relating to joint and several liability only apply in relation to the duty to inform and consult. TUPE falls short

³⁵ Section 41, Equality Act 2010

³⁶ <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>, paragraph 1.23

³⁷ <https://www.legislation.gov.uk/uksi/2006/246/contents/made>

³⁸ <http://www.acas.org.uk/index.aspx?articleid=1655>

³⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275252/bis-14-502-employment-rights-on-the-transfer-of-an-undertaking.pdf, page 34

⁴⁰ <http://www.legislation.gov.uk/uksi/2006/246/regulation/13/made>

⁴¹ <http://www.legislation.gov.uk/uksi/2006/246/regulation/15/made>, S9

because the organisation that a person continues to do work for, no longer has responsibility for upholding their employment rights. The TUC is proposing that these regulations are developed further to make both the transferee and transferor liable for the breach of minimum working standards in any outsourced activity.

The Posted Workers (Enforcement of Employment Rights) Regulations 2016

The Regulations provide that a posted worker in the construction sector can bring a claim against the contractor of the posted worker's direct employer for any underpayment of NMW⁴².

An extension of this legislation would benefit workers in supply chains and subcontracting situations.

The TUC is proposing a levelling up of this legislation, so that all workers, in all sectors, can make a claim against direct employers and contractors for any underpayment in wages.

Whistleblowing

The organisation hiring an agency worker may be treated as an employer for the purposes of the whistleblowing provisions⁴³.

Case law⁴⁴ has clarified this legislation saying that an agency worker would be considered a "worker" of the end user where the end user had "substantially determined" the terms on which she was engaged to do the work.

This legislation creates an employment relationship between agency worker and the hirer, for the purposes of protection from whistleblowing.

The TUC is proposing that if an agency worker has whistleblowing rights (in relation to the end-user) then they should also be able to claim key basic workplace rights against the end user, for example, holiday pay and national minimum wage.

⁴² http://www.legislation.gov.uk/uksi/2016/539/pdfs/uksi_20160539_en.pdf, Regulation 6

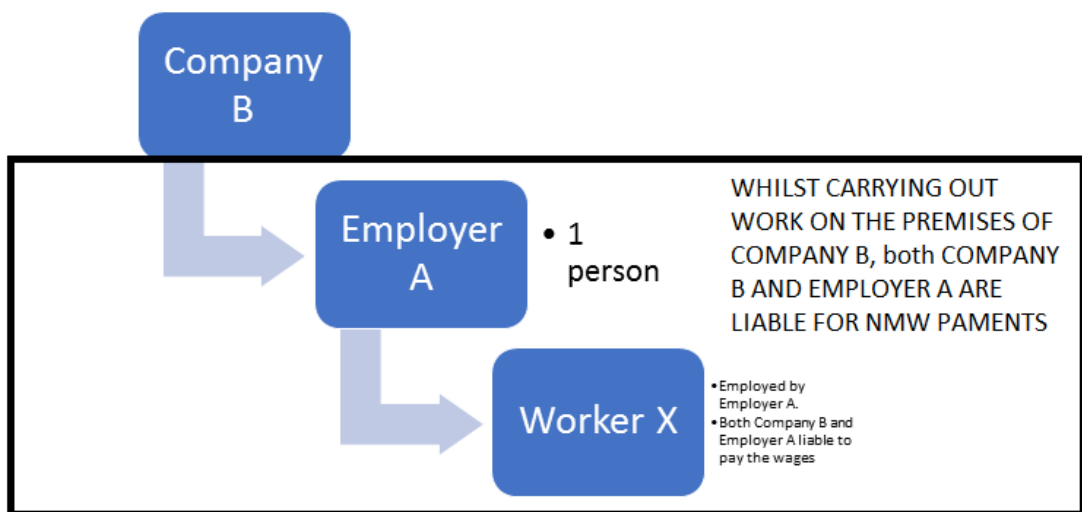
⁴³ Under the extended definition of "worker" in s.43K of the Employment Rights Act 1996.

⁴⁴ *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742 EAT

NMW regulations⁴⁵

There are existing rules under NMW legislation⁴⁶ that set out exceptional circumstances where a “superior employer” would be liable for any underpayment of NMW, for people working on their premises, where those people were not directly employed by the “superior employer”.

These rules cover instances where an employer of a worker is themselves in the employment of someone else, and the worker is employed on the premises of that other person. Please see the diagram below:



In these circumstances “Company B” is termed the “superior employer” and is deemed to be the joint employer of the worker together with the immediate employer. They are jointly liable for all NMW purposes.

Criminal Finances Act 2017 – extended liability to facilitators of tax evasion

The Government has introduced a new corporate offence⁴⁷ of failure to prevent the criminal facilitation of tax evasion. The Act makes businesses liable for the actions of their employees and other “associated persons” who intentionally facilitate tax evasion.

⁴⁵ HMRC Internal manual, “National Minimum Wage”, 2016: <https://www.gov.uk/hmrc-internal-manuals/national-minimum-wage-manual/nmwm05130>

⁴⁶ <http://www.legislation.gov.uk/ukpga/1998/39/section/48>

⁴⁷ Criminal Finances Act 2017 which came into force on 30 September 2017.

This legislation could be used to tackle umbrella companies that are breaching tax law and paying low paid agency workers in the form of expenses reimbursements rather than wages. Recruitment agencies will find themselves liable for the fraudulent activity of any umbrella company that they engage.

The FCSA, trade association for professional services companies, including umbrella companies, recognises the risks for recruitment agencies by suggesting they could be guilty of a criminal offence in the following situation:

“Business paying an intermediary which facilitates tax evasion (e.g. disguised remuneration).”

Businesses will be liable even in cases where senior management were either uninvolved or unaware of the acts. Those found guilty will potentially face unlimited fines, a criminal record, and will be barred from public sector procurement⁴⁸.

If it's appropriate to create a criminal offence for recruitment agencies that engage umbrella companies evading tax, then recruitment agencies should accept liability for engaging intermediaries who flout employment law.

If the UK were to extend this approach to protecting basic employment rights in supply chains, we would not be alone. Helpful examples can be found in other countries.

Germany's Minimum Wage and joint liability

The introduction of the Minimum Wage Act in Germany has established a minimum wage for all workers in Germany. These provisions⁴⁹ also establish a “chain liability” for any contractors and subcontractors (across all sectors) that do not comply with minimum wage. This liability applies, irrespective of any responsibility or fault, to every link of a subcontracting chain except the primary investor (unless they are acting as contractor themselves).

As a result, unpaid workers are entitled to claim their net wages directly from the contractor without the need of prior action against their employer.

Agency workers also fall within the scope of the legislation if a recruitment agency has been commissioned by a direct contractor or subcontractor of the principal to fulfil contractual obligations. This should apply to almost every subcontracting chain involving recruitment agencies as subcontractors.

⁴⁸ <http://www.fcsa.org.uk/wp-content/uploads/2018/03/FCSA-Criminal-Finances-Act-A4-4pp-EMAIL-Feb18-1.pdf>

⁴⁹ Article 13, German National Minimum Wage Act

Spain – joint liability for wages

A joint and several liability model of enforcement operates across all sectors of the Spanish labour market. This means that the principal contractor is liable for the wages and social security contributions⁵⁰ of workers in their supply chains.

The Spanish trade union confederation CCOO has cited examples where a tier 1 contractor would be liable for the wages of a cleaner or security guard who worked on a construction site.

Directors of companies found to be under paying wages can face criminal sanctions, including prison sentences.

Australia – extending liability to franchisors

In Australia, a significant new law⁵¹ has been passed that seeks to enhance protections for employees by extending potential liability to franchisors for employment law breaches by franchisees.

Liability is not automatic but will arise where the franchisor “knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur, or a contravention of the same or similar character was likely to occur”. A franchisor will have a defence where they can demonstrate that they have taken reasonable steps to prevent the breach.

The legislation is significant as it extends liability to the franchisor in a number of areas. The various civil remedy provisions under the Fair Work Act that can be contravened by a franchisee and that can expose a franchisor to the new statutory liability include contraventions of:

- National Employment Standards
- Modern awards
- Enterprise agreements
- Workplace determinations
- NMW orders
- Equal remuneration orders

The following can also expose a franchisor to the new statutory liability:

- Methods and frequency of payment
- Methods of payment specified in awards or enterprise agreements
- Unreasonable requirements for the employee to spend or pay an amount
- Employer obligations in relation to guarantees of earnings

⁵⁰ Article 42 of the Workers’ Statute Law

⁵¹ Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

- Misrepresenting employment as independent contracting
- Dismissing an employee to engage as an independent contractor
- Misrepresentations to engage an individual as an independent contractor
- Employer obligations in relation to employee records
- Employer obligations in relation to pay slips
- Franchisor's found liable for these breaches may face a civil penalty.

We've demonstrated several domestic and international examples where joint and several liability is being used to make organisations responsible for the people who do work for them. Now is the time to bring this learning to the UK.

Increasing the effectiveness of state led enforcement

The TUC also believes that reforms are needed to the state led enforcement mechanisms, to improve their effectiveness.

Extension of GLAA licensing scheme

The TUC would like to see the licensing model⁵² currently used by the Gangmasters Labour Abuse Authority (GLAA), in the shellfish-gathering, agriculture and horticulture sectors, extended further across labour market.

Licensing would require organisations operating in a particular sector to prove that they can comply with minimum employment standards. This would involve providing evidence of compliance with core labour standards through initial and ongoing inspections.

Licensing is strongly supported by existing licence holders, retailers and food manufacturers. A recent independent survey by the Association of Labour Providers showed that 96% of labour providers are in favour of the GLAA licensing system. One of the reasons given by labour providers is that licensing creates a level playing field and ensures that exploitative labour providers cannot undercut the providers who play by the rules.

We've seen above how organisations shirk their responsibilities to workers, by deploying strategies that enable them to transfer risk and accountability to other organisations. We've focused on how these strategies lead to noncompliance with core workplace rights for outsourced cleaners, agency teachers, hospitality workers employed by a franchisee, construction workers in complex supply chains and agency workers who are employed by umbrella companies. As an initial step we're proposing that the GLAA licensing scheme should be extended to workers in these sectors.

Construction

This view was supported by the 2009 Rita Donaghy review⁵³ into the construction sector. Donaghy flagged up the issues that arise with fragmented employment relationships:

"I recommend that the remit of the Gangmasters Licensing Regulations should be extended to include construction. Alternatively, a Regulation should be made which has the same effect. The further down the subcontracting chain one goes the less secure the worker and the less satisfied with the management of health and safety on site. Society should accept that there needs to be a standard below which no construction worker should have to work. The Gangmasters Licensing Authority would need resources to take on this work and some consideration may have to be given to its existing constitution to ensure it is fit for purpose."

⁵² <http://www.glaa.gov.uk/i-am-a/i-supply-workers/i-have-a-glaa-licence/>

⁵³ One Death is too Many, Inquiry into the Underlying Causes of Construction Fatal Accidents, <http://webarchive.nationalarchives.gov.uk/20130102205518/http://www.dwp.gov.uk/docs/one-death-is-too-many.pdf>

Education

This view is also backed up by the recent NIESR report⁵⁴, which points out that a lack of robust quality assurance mechanisms mean that some staff are exploited:

“Unlike the health sector, the education recruitment agency industry is highly decentralised, operating entirely without framework agreements, or any other mandatory quality assurance mechanisms. Instead, school managers rely primarily on historic relationships, reputation and recommendations in their selection of agencies. The decentralisation of the agency market would seem to be behind a recent proliferation of agencies, raising concerns regarding the quality of staff they supply, and the ethics around some reported practices.”

The same report also highlighted that a licensing scheme should be introduced to tackle exploitation in the education sector.

This decentralisation had been aggravated by the Government’s abandonment of the official Quality Mark in 2013, which had only been replaced by a voluntary accreditation scheme operated by REC, which was not widely used by schools.

The abandonment of the Quality Mark had substantially reduced the barriers to entry into the education sector and led to a surge in the number of agencies operating in the market, with some agencies estimating that it had doubled as many smaller agencies were springing up. Lacking any quality assurance mechanism, schools did not express confidence in the recruitment procedures in some agencies, and as such the interviewed agencies generally recommended a reinstatement of some type of government mandated licence or accreditation scheme.

The TUC recognises that extending licensing will have an impact on existing GLAA resources, particularly if steps were taken to extend licensing across a whole new sector. However, licensing has proved to be effective in weeding out rogue labour providers and ensuring employers comply with minimum employment standards. Therefore, if resources need to be increased to expand licensing, we would suggest this is a strong case for increasing the licensing fee for labour providers as well as increasing funding for the GLAA.

Increased resources for state led enforcement agencies

It’s important that enforcement agencies have enough money to do their job properly. There should be a review of the resources at the enforcement agencies’ disposal and whether these are adequate to fulfil their enforcement obligations. There are some key indicators showing why this should take place:

The GLAA has a newly expanded remit, meaning they will be responsible for enforcing labour market offences for roughly 10 million working people. They previously covered 500,000 workers in the licensed sectors

⁵⁴ https://www.niesr.ac.uk/sites/default/files/publications/NIESR_agency_working_report_final.pdf

Unfortunately, the EAS is inadequately resourced. In the current year (2017/18) the EAS only has a budget of £725,000⁵⁵ to ensure that 23,980⁵⁶ recruitment agencies comply with the Conduct Regulations. They have a total of 12 full time equivalent staff. The resources available to the EAS make it impossible for them to stamp out abuse in the agency sector

The LPC has estimated that the 2020 £9.00 an hour target would raise coverage from around 5 per cent of the labour force in 2015 to around 14 per cent by 2020. New NMW sectors, for example, security and call centres, will require extra monitoring. The LCP has also estimated that between 300,000 and 580,000 people are being paid below the NMW

Compared with other countries in Europe, the UK enforcement agencies are inadequately resourced. For every 100,000 workers, the UK has 0.9 labour market inspectors (excluding health and safety inspectors). In France, there are 18.9 inspectors for every 100,000 workers

Procurement

Using the purchasing power of public procurement could be used to stronger effect to enforce compliance in the private sector.

Public authorities should take greater responsibility for safeguarding employment standards in their supply chains. The UK government awards £45 billion worth of government contracts to private firms each year, some of which operate in sectors where there is a high risk of exploitation for workers. This is an effective lever to ensure suppliers adhere to minimum employment standards.

Public procurement measures can help lower the risk of breaches of employment rights in supply chains through contractual terms that safeguard labour rights. This potential, however, has been left largely untapped. Policy aims such as these can be considered so long as they comply with EU treaty principles, EU directives and national law.

The primary source of procurement law for EU member states is the EU Procurement Directive of 2014/24/EC. The Directive strengthened the integration of human rights into public procurement and describes how public authorities should purchase works, supplies, and services. The Directive requires EU member states to adopt measures to ensure that, in the performance of public contracts, suppliers comply with applicable obligations in the fields of environmental, social, and labour law established by the EU, national law, collective agreements, or by international labour law provisions, including the ILO Core Conventions.

The UK Public Contracts Regulations of 2015, which implement the EU Procurement Directive, excludes a bidder from further participation in procurement if it has been found guilty of any offense under the Modern Slavery Act (slavery, servitude, forced or compulsory labour, and human trafficking). If the supplier has not prepared a slavery and human trafficking statement under the MSA and has been required to do so, the public body can exclude the bidder from

⁵⁵ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-02-02/126332>

⁵⁶ <https://siteassets.pagecloud.com/adelectus/downloads/Recruitment-Industry-Trends-2015-2016-ID-1cb824a2-b37c-4ead-a78c-b9f74f792d99.pdf>

the procurement process. This principle should be extended to breaches of all employment, equality and health and safety standards in supply chains.

Public authorities should take greater responsibility for safeguarding employment standards in their supply chains. Public procurement processes should be used more effectively to ensure that any contractors or suppliers that are reliant on public funding adhere to core employment standards. For example, the minimum wage legislation introduced recently in Germany establishes some important procurement principles, which contractors must adhere to. It is considered an administrative offence⁵⁷ to subcontract to subcontractors who do not respect the minimum wage.

HMRC to take targeted enforcement activity against umbrella companies

Many umbrella companies are acting unlawfully by paying low-paid agency workers in “reimbursable expenses” rather than wages which attract employer NICs. This is a form of tax evasion.

HMRC must do more to stamp out tax evasion (and, as a consequence, the use of exploitative labour market intermediaries such as umbrella companies) in supply chains. HMRC are not enforcing the rules on tax avoidance⁵⁸ when it comes to umbrella companies. Umbrella companies blatantly flout existing regulations. Following the introduction of the supervision and control rules in 2016, tax relief should not be available for any umbrella worker where they are under the “control and supervision” of other parties. This would apply to most low-paid agency workers.

HMRC should also revisit its strategy of solely targeting the individual for tax evasion.

HMRC should focus its efforts on the employer and end user of the umbrella worker. This would strongly disincentivise the use of umbrella companies.

Business strategies to transfer employment law obligations to other parties mean that worker rights are often diluted and much more difficult to enforce. Millions of people are doing work for large organisations, which are washing their hands of their responsibilities to their workforce.

Conclusion

The TUC is calling for improvements in the enforcement system, which will make it impossible for organisations to shrug their shoulders and look the other way when the people who do work for them are not receiving their core workplace rights. Collective bargaining, joint liability and improvements in state led enforcement are necessary to restore accountability to the fragmented employment relationships that have developed in the UK labour market.

⁵⁷ Article 21(2), German National Minimum Wage Act and § 23(2) AEntG

⁵⁸ <https://www.litrg.org.uk/sites/default/files/files/171010-LITRG-response-Director-LME-FINAL.pdf> - para 1.3