

Chapter 11

The governance of employment protection in the UK: how the state and employers are undermining decent standards

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1. Introduction

Current debates place the UK at the weak end of the spectrum of employment protections, characterising it as having a flexible or liberal market economy approach towards hiring and firing (e.g. Barbieri and Cutuli 2015; Berg and Cazes 2007; Heyes and Lewis 2014; Sarkar 2013). The UK is differentiated from most EU countries in two key respects. First, its standards of employment protection are weak. Among the 24 EU countries listed in the OECD database, the UK ranks bottom for the measure of individual dismissal protection (standard contracts) and 19th for the measure of collective dismissal protection (2013/2014 data¹). Moreover, there are few restrictions in the UK on hiring workers on atypical contracts, such as fixed-term, temporary agency, part-time and zero hours contracts, except for those related to equality of treatment established by the relevant EU directives.

The second way in which the UK differs from much of Europe is its form of labour market governance. Studies emphasise three dimensions: the strong role of the market through cost competition; the increasing role of statutory rules since the 1990s; and the limited influence of collective bargaining (e.g. Dickens and Hall 2010). The combination of the latter two aspects is relatively unusual in Europe where governments' approaches to legislation tend to align with or to be supplemented by collective bargaining, often at the industry level. Moreover, as Crouch (2015) and Rubery (2015) have argued, our understanding of employment protection reforms is extended by a fourth dimension of labour market governance – that of employer strategy (Table 1). This is particularly relevant in the UK where employers enjoy strong prerogative to shape employment standards given the relative absence of trade unions in the workplace.

In the UK, the combined influence of markets, corporate hierarchies and legal rules, with only a weak role for joint regulation via collective bargaining, points to two important avenues of investigation to be pursued in this chapter into the nature and consequences of employment protection reforms. The first is the changing approach of government towards employment protection legislation. EU directives have provided a partial bulwark, until now, but Britain's majoritarian system of democratic government encourages ideological swings rather than incremental adaptation in labour market rule-making, which suggests a period of greater instability when/if the UK leaves the European Union. The second concerns trends in employer strategies towards managing workers. In a context of major 'protective gaps' in employment rights and social

1. OECD employment protection indicators available at https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV

protection rights, recent years have witnessed public concern about employers' misuse of non-standard forms of employment – especially zero hours contracts, temporary agency work and false self-employment.

This chapter begins by laying out Britain's record on job growth since the 2008-09 crisis and then focuses on these two areas of investigation. It concludes by arguing for a new approach to correct for the failures in Britain's governance of employment protection. This new approach must include representative organisations that can give voice, in different ways, to the diverse workforce groups in today's labour market – including trade unions, independent inspectorate bodies and civil society groups.²

Table 1 Labour market governance in the UK and employment protection

Form of governance	Relative influence in the UK	Issues for employment protection
(1) Government legislation	Strong – relatively low level; boosted by EU directives	Sets minimum statutory protections against dismissal; rights to redundancy payment; maternity/paternity leave and right to return; equal treatment for atypical contracts (EU law) and preservation of acquired rights for outsourced workers (EU law)
(2a) Inclusive collective bargaining (industry-level)	Weak/absent – except parts of public sector; undermined by poorly coordinated private sector employers' associations	Jointly regulated top-ups to statutory rights, automatic extension to all directly employed workers, but largely confined to parts of the public sector
(2b) Organisation-level collective bargaining	Weak/absent	Wholly dependent on local strength and priorities of unions
(3) Corporate hierarchy (Employer strategy)	Strong	Both good and bad practices – some employers top-up statutory provision while others evade through opportunistic use of non-standard forms of employment
(4) Market	Strong	Labour cost competition fuels changing segmentation between winners and losers –risks for vulnerable groups (migrants, low skilled, youth, black, minority ethnic) and subcontracted workers

Source: column 1 adapted from Crouch (2015: table 1)

2. 'Jobs, jobs, jobs' – Boosting employment and cutting unemployment

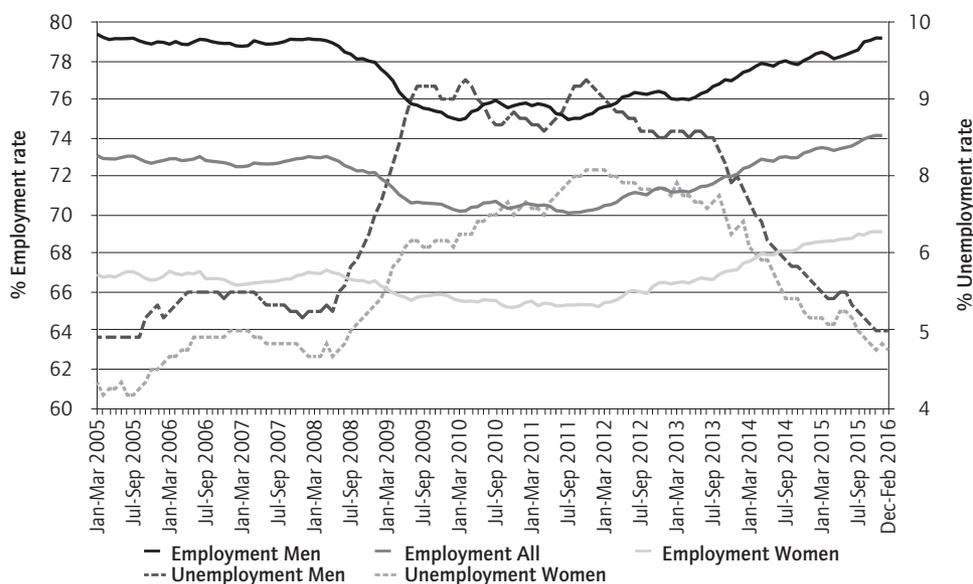
'Jobs, jobs, jobs' has been the mantra of the political elite charged with steering the British economy out of recession since 2010. From 2012/2013, the strategy appears to have been successful. In terms of the share of the working age population in paid employment, the distribution of job growth among men and women and the historically low unemployment, compared with many EU states, the UK has witnessed a strong labour market performance (Figure 1).

2. The chapter draws on collective work produced as part of a European Commission funded project on 'Reducing Precarious Work in Europe through Social Dialogue', in particular the UK report by this chapter's co-authors (Grimshaw *et al.* 2016), <http://www.research.mbs.ac.uk/ewerc/Our-research/Current-projects/Reducing-Precarious-Work-in-Europe-through-Social>

For example:

- in the last quarter of 2015, the employment rate (the share of people aged 16-64 in paid employment) was 74.1%, the joint highest since records began in 1971, ranked fifth in the EU,³ and a marked improvement on the recessionary trough of 70%;
- net employment growth (headcount) has benefited men and women fairly equally – there are 9% more men in employment and 8% more women since early 2010. Labour market participation among men has recovered to its pre-crisis level and among women it is significantly higher (Britain’s female employment rate ranks 6th in the EU at 69%); and
- for a prolonged period after the crisis unemployment was above 8%, but the rate for both men and women has dropped dramatically. At just 5% the UK recorded the second lowest unemployment rate in Europe in early 2015 (after Germany), along with one of the lowest average unemployment durations.⁴

Figure 1 Trends in employment and unemployment rates for men and women, 2005-2015



Source: Office for National Statistics data (all persons 16-64 years old); authors' compilation

However, there are reasons to be critical of the UK’s labour market performance. First, the UK labour market has, for many decades, relied on low-wage jobs to prop up its high employment rate. Defined as those earning less than two-thirds of median hourly pay, the share of low-wage employment increased from 15% in 1979 to 22% in 1999 (Mason

3. The UK ranked fifth in the 2015 EU listing of employment rates (72.7%, within a range from 50.8% in Greece to 75.5% in Sweden) (Eurostat data at <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>, accessed 16-01-17).
 4. Sourced from EC (2016: table 1.2.2 and graph 1.2.6).

et al. 2008: 16), the year the statutory national minimum wage was introduced, and has persisted at around the 21-22% level since (Figure 2). The national minimum wage has been very effective at rooting out blatantly exploitative jobs, but it has not reduced the overall share of low-wage jobs despite rising in value against median earnings up to almost 56% in April 2016.⁵ The reasons are complex but include problems of limited pay progression in low-wage jobs, the absence of collective bargaining in most private sector workplaces and the use of in-work benefits to address low pay (although reduced since 2010) (Grimshaw *et al.* 2014). It is further notable that, since the crisis, the high share of workers in low-wage jobs has persisted against a backdrop of falling real wages: in 2013 prices, real median hourly pay for all employees fell from £12.89 to £11.35 during 2009-2015, a 12% drop; for female part-time workers, it fell from £9.22 to £8.27, a 10% drop.

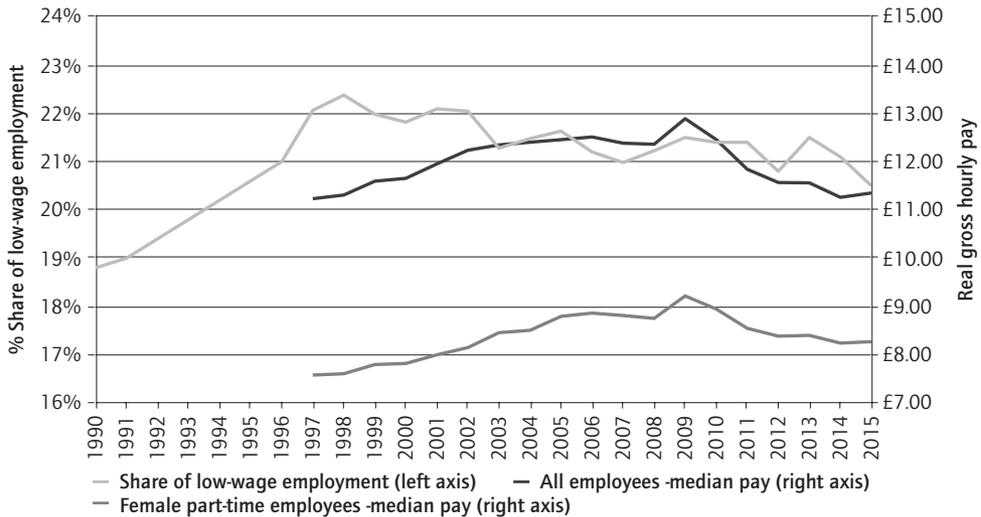
Working in low- and middle-paid jobs has thus become more and more disconnected from the real cost of living, generating problems of in-work poverty, rising welfare transfers to people in paid employment and less security of incomes among middle-income households (Hills *et al.* 2015). In 2011/12, for the first time on record, the majority of people in poverty in the UK were in working households: 6.7 million people out of a total 13 million in poverty (MacInnes *et al.* 2013: 27). Total expenditures on tax credits, one of the major welfare transfers to people in paid employment in low-income households, increased by 62% during 1997/8 to 2010/11 up to £197 billion in 2012/13 prices (DWP 2013).

In an effort to reduce in-work welfare, the government introduced a new 50 pence 'minimum wage premium' in April 2016 for workers aged 25 years and over (7% higher than the minimum for adults aged 21-24) and obliged the Low Pay Commission, the tripartite body that sets the minimum wage, to raise the new higher minimum wage to 60% of median earnings (of workers aged 25 plus) by 2020. Nevertheless, with its other hand the government is cutting welfare transfers so that the net effect for many minimum wage workers in low-income households is negative with more and more working households falling below the 'minimum income standard' defined as necessary for an acceptable standard of living (Hood 2015).

A second critical problem with the UK's labour market performance is the deterioration in employment standards. The evidence is double-edged and is analysed in detail in the following two sections. On the one hand, standards of full-time, permanent employment are slipping for many employees as rules covering pay, job security and employment rights provide weaker protections. On the other hand, many people are having to take 'second choice jobs' with part-time or zero hours, or temporary contracts, while queuing for better alternatives; others are shunted into self-employment and have to take on more of the risks of generating earned income. The 'wrong kind' of labour market flexibility appears to be thriving in the UK.

5. Median gross earnings excluding overtime for workers aged 25 and over were £12.77 in April 2016 and the adult minimum wage 'premium' was £7.20.

Figure 2 Trends in low-wage employment and real median hourly pay, 1990-2015



Source: Annual Survey of Hours and Earnings; real earnings adjusted using RPI (2013 prices), gross hourly earnings (overtime excluded) for all employee jobs; authors' compilation

3. Labour market governance part one: Statutory reforms

Over the last three decades, the approach towards British employment protection can be characterised by employer-led flexibility underpinned by minimum statutory rights. The sphere of minimum protections widened under the Labour governments (1997-2010) and has been cut back under the post-2010 Conservative-led coalition and majority Conservative governments. In Britain, not since the 1970s has collective bargaining been the dominant way of developing and sustaining employment protection – a trend also witnessed in some other European countries, albeit not as dramatically as in the UK. Moreover, the Westminster majoritarian model has enabled politicians to enact radical changes. Starting with the 1980 Employment Act, Thatcherite deregulation presented an ideological attack on collectivism and, while not dismantling the thin framework of established individual rights, it did weaken their content and reduced their coverage in ways that were especially damaging for workers in non-standard employment. The Thatcher governments attacked employment protection provisions as ‘burdens on business’ which prevented employers from hiring more people (Edwards *et al.* 1992). Governments gradually added more ‘business friendly’ factors to the list of circumstances to be considered by employment tribunals when deciding the unfairness of a dismissal and extended the period of eligibility from six to 24 months continuous employment. One intervention with lasting, albeit ‘haphazard’, impact was the new status of ‘worker’, established in the Employment Rights Act 1996, which potentially extends protections to forms of casual work (Adams and Deakin 2014: 797; see Box 1).

Box 1 **Extending protections with the new 'worker' legal status**

Traditionally, as in other European countries, UK labour law distinguished between employees and self-employed in order to determine who enjoys employment rights such as unfair dismissal, redundancy payments, maternity leave, flexible working and so on. An employee in the UK works under a contract of employment. However, because there is no statutory definition a series of court cases have established (ongoing) tests around what is employer control, the alternative notions of 'implied contracts' and the issue of mutuality of obligation – the latter typically excludes agency and many other casual workers. Importantly, courts do not work to a checklist, nor is any one factor decisive; the specificity and context of the employment relationship matters.

The legal concept of 'worker' was introduced in the 1996 Employment Rights Act (Section 230) and is defined as someone with a contract of employment or who personally performs the work. This definition encompasses all employees, as well as (potentially) many other persons in casual forms of paid employment who fail the narrower legal definition of employee. Court judgements have found it applies to varied forms of casual, freelance and self-employed persons; ultimately, it is the court not an employer decision that decides legal status (Freedland 2003). For example, one case found a self-employed joiner who worked exclusively for a construction firm was a worker despite paying his own tax and social security contributions and owning his own tools (Thompsons 2005). Worker status might potentially extend the net of labour law, but it only promises a sub-set of rights:

- worker rights: minimum wage, working time (including holidays), pro rata equal treatment for part-time work, unlawful deduction of wages
- employee rights: *the above rights plus* dismissal, redundancy, notice, maternity leave, parental leave, equal treatment for fixed-term employment, disciplinary and grievance

During the Labour governments (1997-2010), the reversal of the UK's opt-out from the EU social chapter⁶ and legal intervention on the minimum wage and family support policies represented a 'significant legislative development' (Dickens and Hall 2010: 302). At the same time, however, Labour retained much of the Thatcherite legislation of the 1980s that curbed strikes and dismantled statutory support for collective bargaining. Collective bargaining and union membership continued to decline meaning that, especially in private sector workplaces, supplementary protections formerly negotiated through collective bargaining, such as more generous severance pay, sick pay or maternity leave, were eroded.

The right-wing coalition government (2010-15) and the Conservative government since 2015 have, on balance, weakened employment protection. The exceptions to the largely deregulatory agenda have come from EU law. Table 2 summarises six areas of employment protection rights provided under the legal framework in 2010 and the changes since then.

6. In 1991, the Thatcher government negotiated an opt-out from the social chapter of the Maastricht Treaty on European Union, although several other EU measures had an impact upon British workers' employment rights, such as equality and discrimination legislation.

Table 2 Six areas of employment protection standards and reforms since 2010

Employment protections in 2010	Reforms since 2010
1. Protections against dismissal and right to redundancy payment for all employees with 12 months continuous employment	<ul style="list-style-type: none"> – Reduced consultation period for collective redundancies from 90 to 45 days – Reduced eligibility for unfair dismissal by increasing required tenure from 12 to 24 months – Removed fixed-term workers from collective dismissal rights
2. Free access to employment tribunals	<ul style="list-style-type: none"> – Introduction of fees to lodge a case and have it heard for wide range of issues
3. --	<ul style="list-style-type: none"> – Introduction of 'shares for rights' legislation – enables employers to offer company shares to employees in exchange for renouncing rights with new legal status of 'employee shareholders'
4. Maternity and paternity leave and pay, and right to return to work	<ul style="list-style-type: none"> – Shared parental leave to run alongside maternity leave and pay
5. Equal treatment provisions for part-time workers and fixed-term contract workers (EU law)	<ul style="list-style-type: none"> – Additional equal treatment provision for agency workers (EU law)
6. Preservation of acquired rights on the transfer of undertakings (EU law); supplementary Two-Tier Code extended acquired rights to all workers in public sector subcontractor firms	<ul style="list-style-type: none"> – Restriction of TUPE transferred rights to 12 months – Two-Tier Code abolished

Source: authors' compilation adapted from Dickens and Hall (2010) and Grimshaw *et al.* (2016)

Minimum standards of protection covering unfair dismissal and redundancy compensation are low by European standards and, in April 2012, the eligibility threshold of continuous service was increased from 12 to 24 months. The government and main employer bodies argued the shorter qualification period disincentivised hiring. The director general of the British Chambers of Commerce said: 'Dismissal rules are a major barrier to growth for many businesses. The majority of small businesses have ambitions to grow, and this will boost their confidence to hire'.⁷ Also, the notice period for large-scale (100+) dismissals was halved to 45 days (from April 2013) to facilitate downsizing. The then TUC General Secretary responded that,

'The last thing we need is for the government to make it easier to sack people. Unemployment has not gone as high as many feared because employers have worked with unions to save jobs, even if it has meant sharing round fewer hours and less work.'⁸

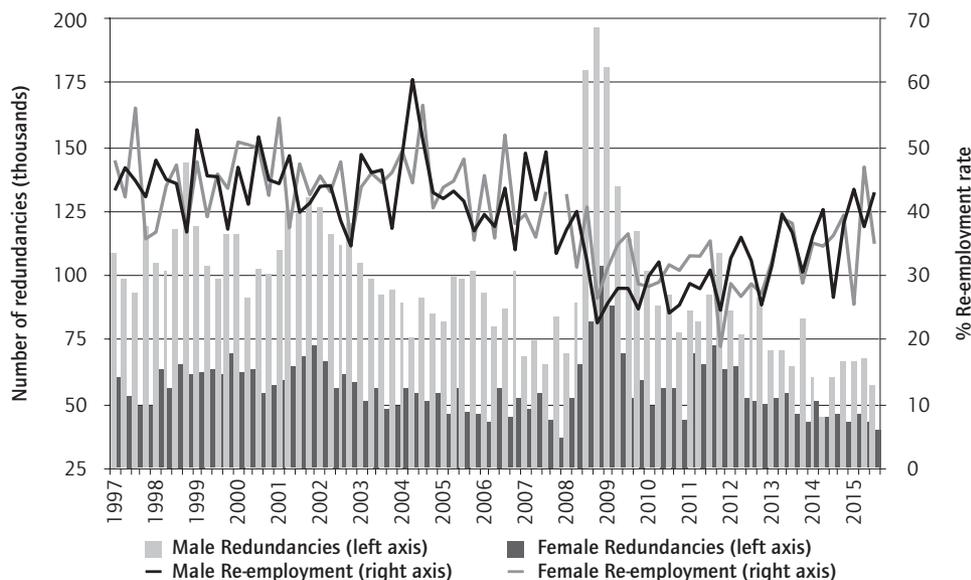
In fact, the reform came after the period of mass downsizing, which peaked during 2009-2010 (Figure 3). Despite the supposed enhanced employer flexibility, it has not improved the chances for redundant workers to be re-employed; post-2013, the data suggest a slow and sporadic recovery in male and female re-employment rates

7. *The Guardian* 06-04-12 <http://www.theguardian.com/money/2012/apr/06/unfair-dismissal-reform-government-unions>

8. Brendan Barber cited in *The Guardian* 18-12-2012, <http://www.theguardian.com/money/2012/dec/18/redundancy-consultation-period-45-days>

which, by 2015, are still below pre-crisis levels. The reforms did, however, enable public sector employers to embark on a major programme of downsizing under austerity, with especially deleterious consequences for women who are over-represented in the public sector (Rubery and Rafferty 2013).

Figure 3 Redundancies and re-employment rates, 1997-2015



Note: The re-employment rate is the percentage of people made redundant (dismissed) in the previous three months who are in employment during the survey reference week.

Source: Office for National Statistics dataset RED02; authors' compilation. <https://www.ons.gov.uk/employmentandlabourmarket/peoplenotinwork/redundancies/datasets/redundanciesbyindustryagesexandreemploymentratesred02>

At a time of considerable labour market turbulence, in July 2013 the coalition government also made seeking legal redress for unfair dismissal more difficult by introducing fees of £250 for making a claim and a further £950 for having the claim heard, which is equivalent to around one month's salary for someone working full-time at the minimum wage (2015 rates). Similar fees apply to complaints of sex discrimination, unauthorised wage deductions and equal pay. Claimants can apply for reduced fees on grounds of financial hardship, but this is based on a household means test so that a married woman working part-time, for example, would have to persuade her better-paid husband to foot the fee. Moreover, a high share of compensation awards goes unpaid. Employment Tribunals were set up to provide an accessible route for workers to enforce their rights (sometimes with trade union support), but these fees impede justice. Research suggests seven in ten potentially successful claims are now not going ahead.⁹ The number of claims fell from around 48 000 on average per quarter during 2012-13 to 11 000 in

9. Citizens Advice research reported in *The Guardian* newspaper, <http://www.theguardian.com/money/2014/aug/17/workers-cant-fight-employment-tribunals>

the two quarters following the imposition of fees.¹⁰ Despite providing no evidence, the government was adamant this change was necessary for business growth:

‘We are ending the one way bet against small businesses. We respect the right of those who spent their whole lives building up a business, not to see that achievement destroyed by a vexatious appeal to an employment tribunal. So we are now going to make it much less risky for businesses to hire people.’¹¹

A third feature of employment protection is unique to the UK among European countries and is the most ideological of all reforms imposed since 2010. The policy encourages workers to swap their employment rights for shares. Designed with small businesses in mind, the government implemented a voluntary three-way deal from September 2013: employers would give employees shares in their business; employees would swap their rights (to unfair dismissal, redundancy, etc.) for new rights of ownership; and government would charge no capital gains tax on profits made from these shares (up to £50 000). The then Chancellor announced, ‘Get shares and become owners of the company you work for. Owners, workers, and the taxman, all in it together. Workers of the world unite.’¹²

Few ordinary employees made the swap but some high-paid managers exploited the opportunity to profit from tax-free shares. Tax specialist law firms were quick to spot the opportunities – both for management teams (since executives can be defined as employees), subject to the restriction that each individual’s controlling stake in the company is less than 25%, and for private equity backed companies where share swaps are a main feature of acquisitions. Some legal advice even encourages new employment protections to be introduced so that managers are compensated for lost statutory entitlements:

‘The idea of giving up employment rights in exchange for illiquid shares in a portfolio company will not be for everyone. But it looks like it will be possible for companies to give employee shareholders who give up these statutory rights equivalent contractual protection. That could, for example, include a longer notice period and a contractual redundancy arrangement.’¹³

Indeed, the *Financial Times* reported that the first known use of a shares-for-rights swap was in the sale of Whitworths food company by one private equity company to another. Eight members of the management team acquired equity stakes exempt from capital gains tax.¹⁴

10. Data sourced from the government’s Tribunal Statistics Quarterly, <https://www.gov.uk/government/collections/tribunals-statistics>

11. The then Chancellor, George Osborne, cited on BBC news (03-10-11), <http://www.bbc.co.uk/news/business-15154088>

12. Excerpt from the Chancellor’s speech <http://www.newstatesman.com/blogs/politics/2012/10/george-osbornes-speech-conservative-conference-full-text>

13. Excerpt from online advice by the law firm Macfarlanes, <http://www.macfarlanes.com/media/382350/the-shares-for-rights-proposal-a-tax-favoured-employee-share-scheme-for-private-equity-portfolio-companies.pdf>

14. *Financial Times* 15-09-13, <http://www.ft.com/cms/s/0/cb93fa00-1c8b-11e3-a8a3-00144feab7de.html#axzz453YMEZfe>

Employment protection for women wishing to take maternity leave or for men taking paternity leave is one important area that has not been cut. The rate of progress might have slowed, but several family support policies continued to improve post-2010, notably with a new right to shared parental leave which allows mothers to share their leave entitlement with partners. Moreover, there has been no change in the fact that, while on leave, mothers and fathers are able to accrue time towards paid holiday entitlement, benefit from pay rises (and other improved conditions) and have a right to return to their job – all key elements of modern employment protection (Smith 2010). Nevertheless, in the absence of collective agreements, women in the private sector face difficulties in managing exits for childbirth due to strict eligibility criteria for maternity leave, very low levels of maternity pay and high risks of discrimination by their employer and colleagues while pregnant (EHRC 2016).¹⁵

A fifth feature of employment protection concerns new improved rights to equal treatment for workers with non-standard contracts, whether part-time, fixed-term or agency, implemented in response to EU directives prior to 2010. As in other member states, part-time workers and workers on fixed-term contracts have the same (pro rata) rights as full-time, permanent workers to holiday entitlement, pension benefits and hourly rates of pay, as well as promotion opportunities. Fixed-term workers have the right to a permanent contract after four years of successive fixed-term contracts with the same employer (unless the employer submits objective justification otherwise or a collective agreement removes the automatic right). Rights for agency workers are more restrictive since they require at least 12 weeks with the same client organisation before enjoying equal treatment with the client's employees (although see below). A waiting period was not approved by the European Parliament but emerged as a compromise between the TUC and CBI in response to UK government opposition to the directive (Forde and Slater 2016). Equal treatment covers pay but not all payments: it includes overtime, holiday pay and bonuses but, in line with their usual 'worker' status (Box 1 above), excludes sick pay, maternity pay, redundancy pay (above the statutory rate) and bonuses linked to company performance.

A sixth feature protects workers whose jobs are transferred between organisations, typically in cases of subcontracting. With their origins once again in EU law (the Acquired Rights Directive), TUPE rules¹⁶ ensure continuity of employment and associated terms and conditions. Their application was limited to the private sector in the 1980s, but then widened to public services following ECJ rulings. However, there are gaps in TUPE protection since it excludes most rights under occupational pension schemes (although various minimum conditions do apply), ignores many core features of work organisation (such as working time), allows subcontractors to recruit new workers on inferior conditions and is easy to evade by 'fragmenting' activities for subcontracting (Grimshaw *et al.* 2015).

15. Eligibility requires 26 weeks continuous service and minimum earnings equivalent to 17 hours at the minimum wage; levels of maternity pay place the UK second bottom to Ireland among the 15 western EU member states, according to the OECD 2015 family database.

16. The Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 conforms with the 1977 European Acquired Rights Directive (revised in 1998 and 2001).

2014 reforms further restricted continuity of protection by widening the reasons justifying employer changes to conditions (the job is now only protected if it is ‘fundamentally the same’ and dismissals due to change of location are easier to defend), limiting the protected duration of collectively agreed conditions to 12 months and allowing new and old employers to conduct pre-transfer redundancy consultations (ACAS 2014).

Overall, the substitution over the last three decades of legal interventions for joint regulation (via collective bargaining and other tripartite arrangements) has made workers in the UK vulnerable to government reforms and overly reliant on employer goodwill to upgrade low-level statutory employment protections. In the UK context, we therefore need to ask whether we trust employers to improve upon low-level protections; and, moreover, whether we trust them to abide by the law. It is likely that both regulatory and non-regulatory interventions are needed ‘simply because it is not possible to legislate for high quality employment or high trust workplace relationships’ (Coats and Lekhi 2008: 8, cited in Colling 2010).

4. Labour market governance part two: Employers and the wrong type of flexibility

Unlike much of Europe, many employers in Britain organise their workforces in a regulatory space that is largely unconstrained by trade unions (Table 1 above). There are still important pockets of joint regulation (especially the public sector) and it is certainly the case that those in full-time, permanent and relatively well-paid work are more likely to enjoy union representation than those in part-time, temporary and low-paid work. But the UK has followed a downwards trajectory in union membership; union density has fallen from one in three to one in four employees over the last two decades (32% to 25%, 1995-2014¹⁷). It stands at just 13% among part-time employees in temporary employment, is highly polarised between public (54%) and private (14%) sectors and is especially low among the lowest paid. The predominance of company level bargaining and the absence of extension rights explains why the decline in unionisation has been mirrored in collective bargaining coverage – from 36% to 28% over the same period; while coverage for employees in the private sector has declined to a mere 15%.

Unions’ low presence in the context of light-touch labour market regulation means that employers enjoy considerable scope to create alternative forms of employment. Lack of awareness of their rights is especially acute among workers in non-standard employment. This, combined with gaps in enforcement, means that employers are free to invent flexible forms much on their own terms – as Colling puts it, ‘to find space beyond [the reach of employment law] to avoid its requirements’ (2010: 324). Such strategies are facilitated by the legal ambiguities in distinguishing between ‘employees’ and ‘workers’ which allow employers to profit from the lack of robust contractual safeguards for a person’s ‘employee’ status (Box 1 above).

17. LFS data reported in BIS (2015) ‘Trade union membership 2014: Statistical Bulletin’, Table 1.2b.

The result is that cost considerations have been dominant in the British labour market and this has resulted in the wrong sort of flexible employment. We focus here on three forms that have received attention following the economic crisis – zero hours contracts, temporary agency contracts and false self-employment. Employer strategy is a key determinant shaping the presence and character of these three forms, particularly the extent to which they engender a state of precariousness for workers concerned, but specific management practices and business needs are framed by the wider context of labour market governance, shaped also by government regulations and labour supply conditions (Grimshaw *et al.* 2016; Rubery *et al.* 2016). For reasons of space we highlight only the employer considerations and accompanying gaps in employment protections in the following overview (Table 3).

Table 3 Employer considerations regarding three flexible employment forms and the potential protection gaps for workers

	Considerations for the employer	Potential gaps in employment protection
i) Zero hours contract	<ul style="list-style-type: none"> – accessible pool of labour when demand arises – no legal requirement to provide minimum or regular hours of work – avoids agency fees – can profit from legal ambiguity of employee/worker status with most only providing worker status 	<p>Where treated as ‘worker’ (legal status) likely to be excluded from employee rights to maternity pay, redundancy compensation, unfair dismissal protection and notice period of dismissal</p> <p>Considerable legal ambiguity of status plus major problems of poor awareness of rights among employers and workers</p>
ii) Temporary agency work	<ul style="list-style-type: none"> – accessible pool of labour for clients when demand arises – no legal requirement to provide minimum, regular or ongoing hours of work – clients benefit from potentially lower wage costs than directly employed staff 	<p>Where treated as ‘worker’ (legal status) likely to be excluded from employee rights to maternity pay, redundancy compensation, unfair dismissal protection and notice period of dismissal</p> <p>Option of ‘pay between assignments’ contract means no legal entitlement to equal pay with staff employed directly by client</p>
iii) False self-employed	<ul style="list-style-type: none"> – access to pool of labour (skilled/trained/stable) with minimal outlay – contracting organisation transfers risk and bureaucratic burden on to individual workers – employers avoid usual add-on costs associated with direct employment (social security, pension) 	<p>Not entitled to rights enjoyed by directly employed staff (e.g. minimum wage, paid holidays)</p> <p>False self-employed worker likely to be dependent on client for work but no guarantee of hours</p> <p>May not qualify for in-work benefits or other welfare entitlements (e.g. pension)</p>

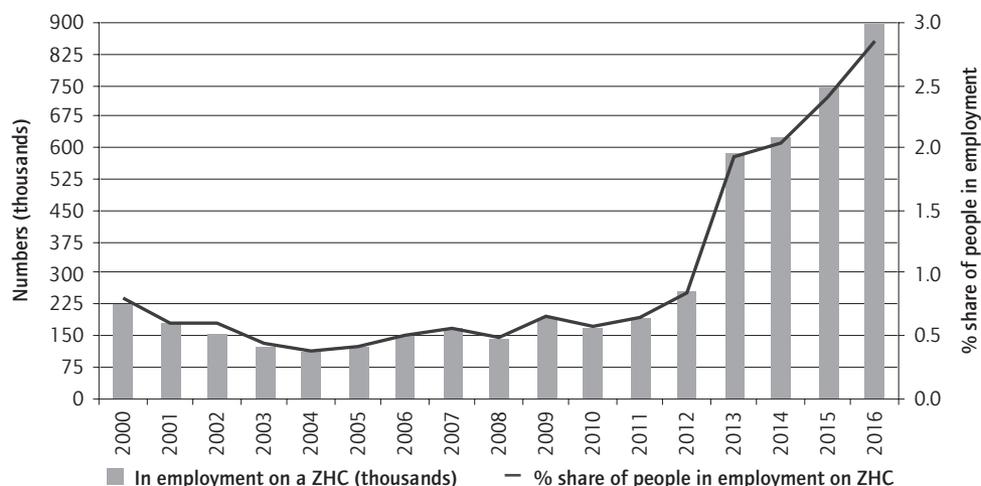
4.1 Zero hours contracts

A zero hours contract (ZHC) is not a legally defined term in the UK. It is offered when the employer is unwilling to guarantee work and equally the worker is not obliged to accept the work. This is possible in the UK because there is no regulation of minimum guaranteed working hours. ZHCs are not a new phenomenon, but have gained attention following a fourfold increase in their use since the 2008-9 recession

representing 2.8% of the total workforce in 2016¹⁸ (Figure 4). The expansion is related to workers' greater awareness they are on such a contract following media attention, but also coincides with new agency worker protections introduced in 2011 which some employers may wish to avoid – although the increase does not correspond with a drop in the number of agency workers.¹⁹ Why have workers conceded? There is no evidence that it results from concessionary bargains, such as a deal that promises higher pay in exchange for irregular, changing hours. More likely it is a reservation wage effect, since welfare reforms (especially punitive sanctions) have reduced entitlements and levels of welfare payments to those out of work, combined with a disciplinary effect caused by strengthened employer prerogative in labour market segments with weak or absent union representation (Shildrick *et al.* 2012).

Legal ambiguities about the employment relationship (Box 1) mean employers may treat ZHC staff as either workers or employees when it comes to employment rights – and a small number may even insist ZHC staff are self-employed and therefore deny them all employment rights. In a recent survey (CIPD 2013), two in three (64%) employers said they classified ZHC staff as employees, one in five (19%) as workers²⁰ and 3% as self-employed (14% had not classified them). However, these data conflict with employer responses regarding their entitlement to certain rights: one in five (21%) said they were not entitled to any protections, far above the 3% who said they treated ZHC staff as self-employed.

Figure 4 The number and share of all workers engaged on zero hour contracts, 2000-2016



Source: ONS data available at: <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-392551>; authors' compilation

18. A majority of ZHC workers are women (55%) and one-third are young (16-24); ZHC workers work varied hours (one-third work full-time), are found in diverse sectors of employment (although especially hospitality and social care) and many have long tenure (41% have more than two years with the same employer) (2016 Labour Force Survey; published ONS data).
19. Temporary agency work increased from 272 000 to 349 000 from Q1 2011 to Q1 2016 (ONS data).
20. With the legal status of 'worker', a person with a zero hours contract is entitled to the statutory minimum wage, paid annual leave, rest breaks and protection from discrimination.

Even if treated as an employee, it is likely to be very difficult for ZHC workers to meet eligibility criteria for employment protections. ZHC workers are more likely than other workers to fail the 24 months continuous employment test for protection against unfair dismissal and many will fall below the minimum weekly earnings threshold for maternity/paternity leave. The CIPD (2013) survey reported that more than one in three ZHC workers (36%), compared to one in five other workers (21%), have less than 24 months continuous employment service. Moreover, two in five ZHC workers reported not receiving any notice from their employer if work is no longer available (*op. cit.*: table 16). Rights to core employment protections are low from both employer and worker viewpoints (Table 4): only two in five employers extended rights to maternity/paternity pay and only 16% of ZHC workers believed they were entitled; also, only slightly more than half of employers (55%) believed their ZHC staff were entitled to the right not to be unfairly dismissed and, again, this was smaller among workers (just 18%).

Table 4 Rights to employment protections for zero hours contract workers

	% of employers who extend these rights to their ZHC staff	% of ZHC workers who believe they are entitled to these rights		
	Yes	Yes	No	Don't know
Right to receive a written statement of terms and conditions	60%	45%	31%	24%
Statutory redundancy pay (24m+)	31%	10%	61%	28%
Right to receive statutory minimum notice	52%	--	--	--
Right not to be unfairly dismissed (24m+)	55%	18%	40%	42%
Statutory maternity/ paternity pay	41%	16%	57%	27%

Source: adapted from CIPD (2013: tables 24 and 25)

4.2 Temporary agency work

National data reveal a modest rise in the total number of agency staff from around 270 000 in 2001 to nearly 350 000 in 2016, a rise of 30% relative to a 14% rise in total employment. However, the proportion of workplaces that make use of agency workers has remained stable at around 11-12% since 2004. This low-level use fits with the usual narrative that UK employers have little to gain from using temporary contracts since open-ended and fixed-term contracts are lightly regulated. However, alternative data sources suggest far greater agency use by employers. The main industry body estimated in 2013 that 1.1 million people were working on a temporary basis each day (REC 2014). The data gap is caused by large fluctuations in day-to-day agency placements so that many agency workers might not be working during the Labour Force Survey reference week.

Like ZHC workers, the rights of agency workers depend on their identification as employees or workers. They tend to be considered as workers and, therefore, are not entitled to many core rights including protections from unfair dismissal, statutory redundancy pay and maternity leave, among others. Even if deemed an employee,

many agency workers are likely to fail eligibility criteria requiring a minimum period of employment continuity for certain protections. The Agency Workers Regulations (from 2011 and based on the 2008 EU Directive) attempted to strengthen protections. They require that agency workers have equal treatment with their directly employed counterparts after 12 weeks service. The exceptions include where the agency worker is assigned a ‘substantively different role’ or has a break from the client organisation for more than six weeks. Moreover, where an agency pays the agency worker between assignments (and thereby treats them as an employee) there is no entitlement to equal pay due to the so-called ‘Swedish derogation’ in the Agency Workers Regulations.²¹ The experience of equal treatment is therefore significantly limited in practice.

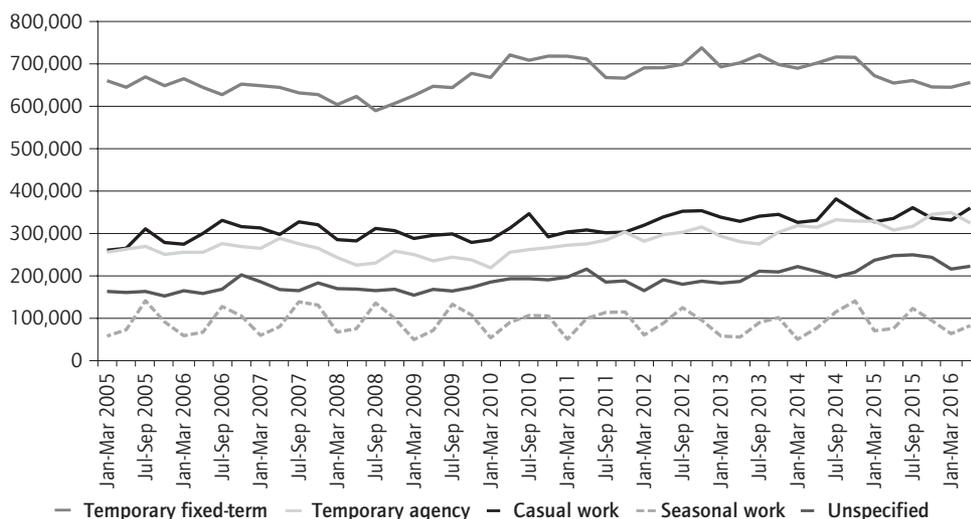
There are serious concerns about enforcing agency workers’ new employment rights. For an agency to manage a ‘pay between assignment’ contract, it must meet several criteria, including type of work, expected travel and minimum-maximum hours of work, as well as minimum pay between assignments (the higher of either half the rate of pay in the previous placement or the statutory minimum wage for the hours worked in the previous job). Agencies must honour this for four weeks before terminating the contract and must not move workers between jobs or work locations with the same client in order to reset the qualifying period. However, an agency may spuriously invent jobs for ‘de-assigned’ workers to move into within one week in order not to pay for downtime. Also, agencies cannot force workers to sign a pay between assignments contract, but it can be made a condition for being offered work. Moreover, the 12-week qualification period has proved to be a source of evasive strategies. Research commissioned by the government on employers’ attitudes towards the regulations found:

‘In most cases, employers that regularly used agency workers ... had changed their practices by shortening assignment lengths to less than 12 weeks, by bringing in different workers each week and by using fixed-term contracts for longer term cover.’ (Jordan *et al.* 2013: ii)

It is nevertheless difficult to identify aggregate evidence of substitution effects between forms of temporary employment (casual, seasonal, fixed-term and agency) from the UK labour market data (Figure 5). Another factor, as with ZHC workers, concerns agency workers’ limited awareness of their rights. An analysis of calls to a helpline found that many were ‘unaware of their rights, particularly around holiday pay, notice periods and, critically, the “twelve week threshold”’ (ACAS 2015: 2). Forde and Slater (2016: 602) found workers had very little knowledge about the implications of the new regulations, concluding that ‘Despite the potential for abuse, many agency managers felt that the [Agency working] regulations had effectively helped to legitimise and embed the “pay between assignment” approach in the UK, providing new business opportunities for agencies’.

21. The term refers to a request by the Swedish government to enter the clause into the European regulations.

Figure 5 Trends in temporary forms of employment, 2005-2016



4.3 False self-employment

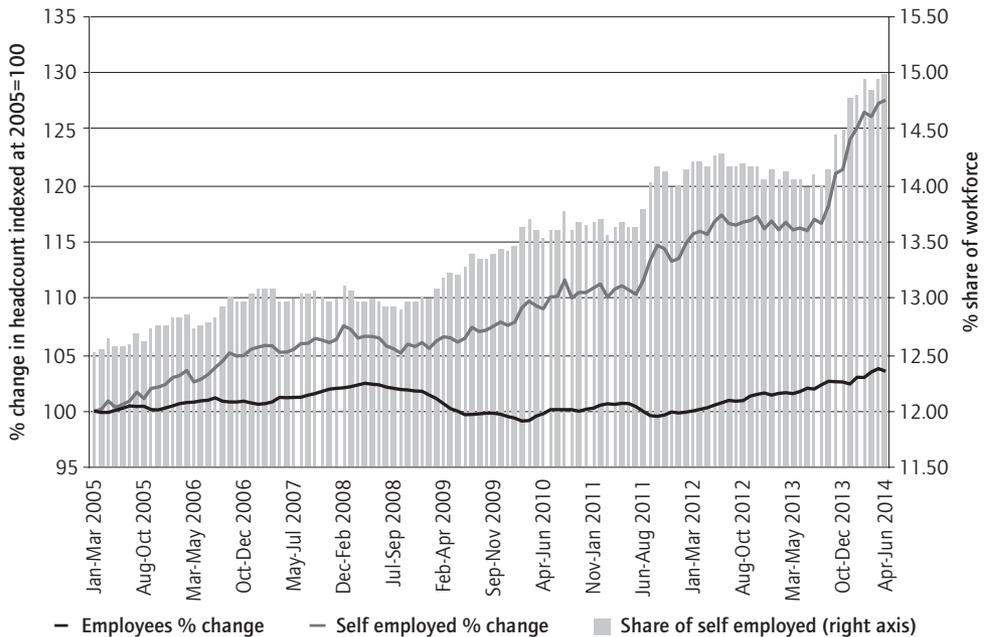
Subcontracted work and self-employment is not inherently precarious or poor quality work, but the conditions under which such forms of employment proliferate, and the complex and often opaque nature of the relationship between contracting organisations and individuals, can create serious issues in respect of low pay, limited legal rights and differential levels of bargaining power. One labour market trend that has facilitated the government's deregulatory agenda during the post-crisis jobs recovery is the large rise in the numbers of self-employed who only have very limited employment rights (Figure 6).

Self-employment may take various forms ranging from highly-paid specialist freelance contractors to false self-employment where the line dividing employee and self-employed status is blurred. In general, self-employed workers are covered by civil and commercial law, not labour law; they therefore do not enjoy employment rights, aside from protections covering discrimination, health and safety and low-level maternity allowance, nor – for the most part – social security protections. The removal in 2016 of tax relief on travel and subsistence payments for contractors engaged through umbrella firms may push more workers into self-employment. One of the major problems of allowing labour-only subcontracting to flourish in certain industries with limited employment rights is that it becomes associated with the most vulnerable workforce groups in society.

Estimates of the numbers of false self-employed are difficult to make with any confidence, as are estimates of the number of workers engaged through subcontracting arrangements. False self-employment is defined narrowly as 'subordinate employment disguised as autonomous work' (Frade and Darmon 2005: 111) and more widely as

persons who are ‘not in business on their own account, come under the control and supervision of their engagers, are paid wages rather than work for a client under contract, and in most cases, continue to work for the same engager of their labour...and for long periods of time’ (Harvey and Behling 2008). The assumption is that an employer deliberately classifies the person as self-employed and makes a sales transaction for work provided in order to save on social insurance costs and/or curtail labour rights. In the UK, such ‘labour-only subcontracting’ is highly used in the cultural sectors (actors, musicians, performing artists, journalists), construction, logistics and IT, as well as by temporary work agencies that supply workers to all sectors of the economy.

Figure 6 Trends in self-employment – headcount and as a share of UK workforce, 2005-14



Source: ONS data available at www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-371749; authors' compilation

The construction sector is well-known for its fragmentation and displacement of employer responsibilities such that main contractors manage the project and finances but pass employer responsibilities down the chain to gangmasters, agencies and the false self-employed (Harvey 2001). Behling and Harvey (2015: table 4) estimate that, among self-employed workers – approximately one in four construction workers – half are falsely self-employed. Construction firms make widespread use of two strategies: first, hundreds of ‘payroll companies’ assist businesses in switching their workforce from employee to self-employed status; and second, specific tax rules for the construction industry allow firms to make a flat-rate income tax deduction from the pay of self-employed contractors. During 2016, high profile protests and legal cases by workers have centered on IT platform technology companies providing delivery services (e.g. Uber, Hermes, Deliveroo). Rather than directly employ drivers, these companies require

individuals to subscribe and seek job tasks from one day to the next as self employed. In 2016 the court ruled such practices illegal in the case of Uber and granted 'worker' status to Uber drivers. Further legal cases are expected.

Overall, the limited rights of self-employed workers are certainly magnified by the spread of false self-employment where individual workers are almost wholly dependent on contracts (formal or informal) with one firm or client but have no entitlement to the same terms and conditions of employment as directly employed, or even temporary agency, staff.

5. Conclusion: the need for a new labour market governance approach

The challenges of advancing employment protection standards in the UK are related to its peculiar model of labour market governance, described by a combined influence of market logic, strong employers, low-level statutory rules and limited coverage of either inclusive industry-level or organisation-level collective bargaining. For many workers, the statutory rules fix a ceiling rather than a floor for their employment standards since employers often limit provision to what is required by law (Dickens and Hall 2010), either because they are unwilling to raise standards for their workforce (with weak or absent pressures from trade unions) or are unable to do so due to pressures on margins in highly cost-competitive markets. This makes the debate about what is the appropriate level of employment protection standards set by law particularly important in the UK, and demands a clearer understanding of how employers respond to legal reforms in practice, what is the awareness of legal rights among employers and workers, and how gaps in protections potentially encourage employers to evade their social responsibilities.

The low standards of employment protection mean that UK workers suffered high levels of redundancies during the crisis: some 200-300 000 each quarter during the peak 2008-09 period. Also while the deregulatory model predicts easy hiring, the data suggest re-employment rates are taking a long time to return to pre-crisis levels. Moreover, despite permanent workers having some of the lowest protections in Europe, the post-crisis jobs recovery has been remarkable in the significant shift to non-standard employment forms: of the 2.07 million rise in employment during 2008-2016, self-employment has accounted for almost half (around 900 000) and zero hours contracts for more than one-third (around 760 000).²² The UK's deregulated labour market, with employers in the driving seat and the government looking sideways, has spawned a worrying development that does not support protected and decent employment standards for all.

A recurring issue in this chapter concerns the statutory definitions of employee, worker and self-employed in the UK and the wide inequality in employment protections afforded to each group. Supiot's (2001) proposal to extend protections to the

22. Published ONS data, Q1 2008 to Q2 2016.

proliferation of employment categories that do not fit clearly into traditional employee and self-employed statuses has not been effectively addressed. The entitlements granted to workers are inferior to those enjoyed by employees and court cases are said to be 'haphazard' in their assigning of ZHC, agency and self-employed to worker status (Adams and Deakin 2014). The TUC has repeatedly called for legal clarification and for a review to close the inequality in protections, including specific recognition of the exploitation caused by false self-employment (TUC 2008). With employers increasingly likely to use zero hours contracts and labour-only subcontracting since the crisis, we are witnessing a growing pool of workers with employment protections that are ambiguous at worst and sub-standard at best.

Statutory protections in the UK are pitched at a low level compared to other European countries, but the problem is exacerbated by significant enforcement gaps in the form of awareness and power gaps. Research reveals a real lack of worker knowledge about statutory rights, especially concerning non-standard forms of employment. Unions are often weak or absent and therefore need to be supported and given stronger powers and resources so that they can monitor, advise or take action where rules are ignored, or lend support to individuals who are often in highly disadvantaged positions and fearful of complaining (Pollert and Charlwood 2009). Added to this, the new financial costs for taking an employer to court are a real knock-out blow against workplace justice. Civil society organisations (e.g. Citizens Advice, London Citizens, Oxfam UK) are playing an increasingly important role in addressing employment problems, but again require resources and a formal role in shaping policy. Overall, therefore, while no-one doubts the UK labour market's continued capacity to generate jobs, there is a major disconnect with the rights of people to enjoy decent employment standards and an increasingly pressing need to question who pays for employment flexibility when government reforms are relieving employer duties at the same time as relieving the state's welfare responsibilities.

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