

OPEN ACCESS

ISSN 2280-4056

*E-Journal of
International and Comparative*

LABOUR STUDIES

Volume 1, No. 3-4 October-December 2012



ADAPT
www.adapt.it
UNIVERSITY PRESS

Who Can Help Britain's Vulnerable Workforce?

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1. Introduction

Research undertaken in Britain by the Trade Union Congress (TUC) identified members of the workforce who it regarded as vulnerable. Vulnerability was interpreted as liable to physical injury or ill-health as a result of exploitation by an employer. The TUC's report, *Hard Work, Hidden Lives*¹ defined vulnerable employment as

[...] precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship.

The focus was on what might be described as an under-class, poorly qualified, under paid, over-worked and possibly dependent on the employer for both work and accommodation and unable to offer services to another employer. Such workers were often migrants, perhaps in the power of a gang master or domestic servants brought into the country by their employers².

In this paper vulnerability is defined as liability to suffer injury or more especially ill-health. The questions raised are whether vulnerability is now much more widespread in the workforce than these reports suggest, and

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¹ TUC Commission on Vulnerable Employment, 2007, (Last accessed 13 October 2012).

² Kalayaan, an organisation which provides advice, advocacy and support for migrant domestic workers, has also produced a report The New Bonded Labour. (See V. Wittenburg *et al.*, 2008, www.kalayaan.org.uk), (Last accessed 13 October 2012).

whether the TUC's concept of a two tier labour market makes a greater distinction between the people it identifies in its case studies and the workforce more generally. Further, in many of the situations considered here employers would be likely, with some justification, to deny both that they were exploitative or that they were the cause of the vulnerability of those in or seeking employment. If employers are not to be deemed entirely responsible who can help?

2. Who are the Vulnerable in 2012?

The TUC's report was published in 2007, while the economy was still in the "boom years". The recession, following the financial crisis of 2008 has been described as "the worst recession since the 19th century"³. While Britain is not suffering to the extent of many other countries, there is increased unemployment; many having been made redundant⁴, and there is insecurity among those who have managed to remain in employment. The Labour Market Statistics for the second quarter of 2012 showed:

- The employment rate for those aged from 16 to 64 was 70.3%.
- The unemployment rate was 8.2% of the economically active population.
- There were 2.61 million unemployed people.
- The inactivity rate for those aged from 16 to 64 was 23%.
- There were 9.3 million economically inactive people aged between 16 and 64.

A more recent news item suggests women over 50 are the hardest hit as their unemployment has risen faster than any other group⁵.

Total pay (including bonuses) rose by 1.4% during the year.

Regular pay (excluding bonuses) rose by 1.7% during the year.

Inflation towards the end of 2011 was over 5%⁶.

³ W. Hutton criticising the Government wrote similarly on 25th March 2012, 38 of The Observer under the title *This Disgraceful Budget Smacks of Incompetence and Cowardice*.

⁴ The Chartered Institute for Personnel Development reported in March 2012 that 2.7 million had been made redundant since the financial crisis of 2008 www.cipd.co.uk. (Last accessed 13 October 2012).

⁵ *The Daily Mail*, 29 September 2012 www.dailymail.co.uk (Last accessed 13 October 2012).

⁶ The Office for National Statistics.

A Report by the Joseph Rowntree Foundation states that families need to earn 33 percent more post-recession to maintain their standard of living⁷. The employment rate may be misleading as many of the employed are in part time employment because they cannot find full time employment⁸, though some hold a portfolio of part-time jobs and work longer hours than those specified in the Working Time Regulations 1998⁹. Many of those aged 16-24 classified as “economically inactive” are in full time education, but excluding those in full-time education, there were 731,000 unemployed 16 to 24 year olds; 20.8% of the economically active population for 16 to 24 year olds.

The Chartered Institute of Personnel Development’s press release based on its own Work Audit Report, *Counting the Cost of the Jobs Recession*¹⁰ states:

- Two-thirds of people made redundant are paid less in the next job they find. On average the pay penalty is 28%.
- High and rising unemployment has put downward pressure on pay increases since 2008. In cash terms the average worker is £3000 a year worse off than if pay had increased at the pre-recession rate.
- Higher inflation has resulted in a real pay squeeze. Private sector workers are on average earning 7% less in real terms than in 2008 and public sector workers 4% less.

Other statistics show that since the recession began in 2008, 46,931 companies have closed, which in itself must clearly have an impact on unemployment¹¹. In addition the government is attempting to reduce the number employed in the public service, though when this is achieved by contracting out the provision of services this will not necessarily increase the number of unemployed¹² because compliance with EU law usually requires the new service provider to employ those whose work is

⁷ www.jrf.org.uk (Last accessed 13 October 2012).

⁸ The Office for National Statistics said that in January 2012, 1.38 million worked part-time, (a record) and 1.3 million of these wanted full-time employment. The Times, 15 March 2012, 45.

⁹ SI 1998/1833.

¹⁰ March 2012 www.cipd.co.uk. (Last accessed 13 October 2012).

¹¹ www.businessandleadership.com. (Last accessed 13 October 2012). The same site indicates that closures are outnumbered by new start-ups which stand at 55,539, but it is unlikely that the number employed in the new enterprises will compensate for the number of job losses by company failures.

¹² In March 2012, 6 million were employed in the public sector www.civilservant.org.uk, (Last accessed 13 October 2012).

transferred¹³; in fact statistics show that the number employed in the private sector is increasing while the number employed in the public sector is falling¹⁴.

In the light of these statistics the TUC's definition of "vulnerability" appears too narrow. It may not be too far-fetched to say that the majority of those classified as "economically active" are "vulnerable" whether or not they are currently in employment, bearing in mind that the Government's own report, *Improving Health and Work: Changing Lives*¹⁵ found unemployment had an adverse impact on health.

The position of the young is of special concern. Richard Scase, writing in 2000, in a paper produced through the Economic & Social Research Council, and published by the Department of Trade and Industry¹⁶, asserted "University qualifications are recognised to improve employability, earnings and career development"¹⁷. This is no longer entirely true: graduates are no longer assured of employment, nor if they are employed can they be confident that their career prospects are good enough to enable them to pay off the large debts with which they leave university¹⁸.

While he did not foresee the recession, Scase nevertheless rightly predicted that by 2010:

Individuals, in a more unstructured and rootless society, will feel more insecure. They will experience greater uncertainties and perceive society as high risk and often threatening¹⁹.

The recession hit a society that was already undergoing considerable change. By 2000, as Richard Scase's work demonstrated, the nature of work, the life style of the population and individual expectations had changed greatly from that of earlier generations. There was an expectation that work would be available for those able to work, welfare to support those who could not and credit facilities to enable purchases that would not have to be paid for immediately. Yet even then individuals were

¹³ Transfer of Undertakings (Protection of Employment) Regulations SI 2006/246 broadly terms and conditions of employment cannot be changed by the transferee.

¹⁴ National Labour Survey.

¹⁵ www.dwp.gov.uk, 2008.

¹⁶ Foresight *Britain Towards 2010: the Changing Business Environment*, DTI, London, 1999.

¹⁷ *Ibid.*, 006

¹⁸ See The Observer, 30 September 2012, 4 *Half of Graduates Face Long Hunt for Work as Regional Divide Grows*.

¹⁹ *Ibid.*, 36

insecure and predicted to feel more so by 2010. They were not prepared for the shock of the recession, not least because the practice of “buy now, pay later” had encouraged them to incur large debts which in the changed times they were unable to honour.

The questions are therefore: “How can the lot of the workforce be improved?” “What can be done to help those at work?” and “What can be done to improve the employability of job seekers?”

3. Caring for the Workforce

3.1 *The Role of Trade Unions*

In 2007, in its report on vulnerable workers, one of the recommendations of the TUC was:

Unions must act to ensure they represent the interests of vulnerable workers. Unions should organise all workers in workplaces where there is a union presence, whoever employs them and whether their employment is direct or temporary. Unions should also focus on areas of the economy where exploitation is rife and where trade union membership is low. Trade unions should commit to a TUC co-ordinated drive to boost membership among vulnerable workers²⁰.

This aspiration will be hard to achieve. Changes in the labour market have seen trade union membership fall. Richard Scase commented that even in 2000:

More people work in Indian restaurants than in shipbuilding, steel manufacture and in coal mining combined. There are three times as many public relations consultants as coal miners²¹.

²⁰ TUC *Commission on Vulnerable Employment*, 2007, 5.

²¹ *The Times*, 4 June 2012, 29 provided the following percentage changes in industry structure between 1977 and 2011 Employment in Public Administration rose 9%, in Banking rose 10%, Manufacturing fell 18%; statistics apparently taken from a report by J. Cribb, P. Johnson, Z. Oldfield, *Jubilees Compared: Incomes, Spending and Work in the Late 1970s and Early 2010s*, Briefing Note 128, Institute for Fiscal Studies. www.publicfinance.co.uk. (Last accessed 13 October 2012).

In 1979, union density was 55.4%; there were 13 million union members²². A major government annual survey updated in 2011²³ provided that in the UK:

Around 6.4 million employees were trade union members;

Trade union density for employees was 26.0%.

Union density was highest in professional occupations at 45.4% whilst managers, directors and senior officials had the lowest at 13.8%.

Employees of a UK nationality had a higher union density than non UK nationals whose union density was 11.8%.

It is notable that these percentages relate only to employees while a large part of the labour force is made up of workers rather than employees. For example agency workers are not usually employed either by the agency or the end user of their services. It is also misleading to include professional associations which in some cases may operate a “closed shop” so that only those who are professional trained, are entitled to practice. On the other hand most members of the teaching profession are members of a trade union, though membership is not essential to employment. Where there is a union strong enough to be recognised by an employer working conditions can be negotiated with the fall back of strike action, but this possibility does not necessarily produce a healthy, risk free profession. Teachers are among the most stressed employees. The medical profession is also highly unionised but nurses are likely to suffer physical attack, or personal injury in the form of musculoskeletal disorders. At the other end of the spectrum Unite has a strong presence among the low paid, especially in the public sector, but it is not clear that it can assist its members to improve their terms and conditions of employment with better job security. Unions may help their members to obtain compensation if they become unemployed, or suffer injury or ill-health as a result of their work, but compensation is a poor substitute for

²² www.unionhistory.info. (Last accessed 13 October 2012).

²³ www.bis.gov.uk (Last accessed 13 October 2012).

prevention.

3.1. The Role of Employers

There are unlikely to be many employers who intend to exploit workers but in times of recession their priority is to maintain the organisation as a going concern. Demand for goods and services falls and many businesses entered this recession with large loans outstanding, and became unable to incur further debt when financiers were reluctant to grant loans in even the most promising situations. In such circumstances re-structuring the business may be necessary with a reduction or a painful redeployment of the workforce. However one commentator has recently suggested that unemployment has been contained because so many “zombie” employers have not taken the drastic steps the situation needed and their reluctance is hindering economic recovery²⁴.

3.2. The Role of Government Agencies

There are a number of Government agencies concerned with employment issues. The Health and Safety Executive (HSE) is, as its title suggests, the agency most directly concerned with the health, safety and welfare of those in employment, but other Government Departments have a role particularly when considering the unemployed. The Department for Business Innovation and Skills (BIS) offers a range of services to help businesses. The Department for Education (DfE) is responsible for education from infancy up to school leaving. The Department for Work and Pensions (DWP) provides assistance to job seekers, and controls the system of benefits and pension for those who are not in employment. The Department of Health (DH) is responsible for public health issues. The Bank of England, the Serious Fraud Office and the Financial Services Agency have important responsibilities for regulation of national finances.

²⁴ D. Wighton., *Help ... Zombies are Attacking the Recovery*, The Times, 19 September 2012, 27.

4. Vulnerability of those at Work

The Report of the Robens Committee²⁵ led to the Health and Safety at Work Act 1974 which remains the principal legislation addressing the health and safety of workers. HSE is the body whose duty it is to see that the intentions of the Act are achieved, it can propose to Parliament regulations either to implement the Act or to comply with EC directives; it appoints inspectors, draws up codes of practice and publishes guidance. The Act imposes on employers general duties intended “to ensure that they do all that is reasonably practicable” so that their activities do not put anyone at risk of personal injury. Employers first duty is “to ensure the health, safety and welfare at work’ of their employees”²⁶, but there is a similar duty to ensure that persons not in their employment who may be affected by the conduct of their undertaking “are not thereby exposed to risks to their health or safety”²⁷. This duty protects both those workers who are employed by another organisation and the self-employed, though incidentally the general public are covered. However, there is no general duty specifically directed at the safety of workers who are neither employees nor self-employed, and many regulations protect only employees²⁸.

Duties may be broken wherever there is a risk of injury. The intention is to manage risks so that injury is not suffered. The full significance of this was apparent when the Management of Health and Safety at Work Regulations 1999²⁹ placed on the employer a duty to carry out assessments of the risks of personal injury arising out of the conduct of its organisation in order to identify, and put in place, the measures necessary to comply with the law. Employees are required to take care for their own safety and the safety of others³⁰. The Act empowers inspectors to enter workplaces to find out whether they are conducted in compliance with the

²⁵ *Safety and Health at Work* Report of the Committee 1970-1972 London HMSO CMND 5034.

²⁶ S.2(1).

²⁷ S.3(1).

²⁸ The changing nature of the workforce and EEC directives has caused “workers” to be given statutory recognition. For a definition of worker see Working Time Regulations, SI 1988/1833 regulation 2; similarly s.54(3) of the Minimum Wage Act 1998.

²⁹ SI 1999/3442. These regulations, followed the EEC Framework Directive on Improvement in the Health and Safety of Workers at Work (89/391/EEC).

³⁰ S.7; the self-employed have a similar duty s.3(2).

law and to prosecute where the law is broken³¹. Inspectors are also empowered to issue notices: improvement notices, require that faults be rectified; prohibition notices require dangerous operations be discontinued. The failure to comply with a notice is a criminal offence. In 1977 regulations were made enabling trade unions to appoint safety representatives at workplaces where the union was recognised for negotiating terms and conditions of employment³². At this time, when trade unions were commonly recognised by employers, there was a strong take up of this entitlement. The European Union has subsequently laid stress on the importance of the social partnership and as a result regulations in 1996 extended similar rights to employees who had no trade union representative³³. Since the *Strategy Statement June 2000*³⁴ HSE has emphasised the importance of worker involvement and its web site indicates its commitment to employer and worker co-operation³⁵ but employee safety representation has fallen with the decline in workplace recognition of unions.

4.1. The Incidence of Work-related Injury and Ill-health

In the 1970s about 1,000 workers were killed every year. In 2011/12 only 173 workers were killed³⁶. This improvement owes much to the loss of dangerous heavy industries. Nevertheless an estimated 603,000 workers had an accident at work in 2010/11. Slips, trips and falls made up more than half of all reported major injuries but there were an estimated 341,000 physical assaults on workers.

³¹ For many categories of workplace HSE has delegated power to inspect and prosecute to local authority inspectors. Inspectors cannot enter domestic premises; so they are not able to assist exploited domestic workers or check the living accommodation of migrant workers.

³² Safety Representatives and Safety Committees Regulations 1977 SI 1977/500 made under S.2(4) of the 1974 Act.

³³ Health and Safety (Consultation with Employees) Regulations 1996 SI 1996/1513. Deemed necessary to comply with the EU Framework Directive(89/391/EEC).

³⁴ This statement was actually published by the Health and Safety Commission (at that time a body created by the 1974 Act) and the Department for the Environment Transport and the Regions.

³⁵ See also *Improving worker involvement –Improving health and safety* Consultative Document, 2006 (CD207 C10 04/06) and more recently advice to worker representatives, www.hse.gov.uk, (Last accessed 13 October 2012).

³⁶ www.hse.gov.uk, (Last accessed 13 October 2012).

These figures do not include work-related ill-health. In 2010/11 there were over 4,000 deaths from asbestos related diseases, due to exposure to asbestos many years ago. Reflecting current conditions, there were 1,152,000 cases of work-related illnesses in 2010/2011. The most prevalent cause was musculoskeletal diseases (MSD) with 158,000 new cases in 2010/11. The next highest cause of work-related illness is stress; there were 211,000 new cases in 2010/11³⁷.

4.2. Areas of Special Vulnerability

This account has mentioned at least five aspects of worker vulnerability and these will now be considered more fully.

Stress: The problem of psychological stress was identified in the second half of the twentieth century³⁸. Its presence at the workplace was recognised as early as the 1980s and HSE commissioned research, the first fruits of which were published by HSE Books in 1993³⁹ and a guide for employers “on the nature and causes of work-related stress” was published shortly afterwards⁴⁰. The problem was not necessarily a new phenomenon but once recognised its prevalence became apparent⁴¹. From that time onwards HSE has directed considerable resources to this matter. In 1999 it published a Discussion Document which concluded that the causes of stress were so diverse and individual responses to situations were so varied that it was not feasible to draw up regulations imposing duties on employers to reduce the level of stress at their workplaces⁴². Since that time HSE has continued to provide advice and guidance as its web site demonstrates⁴³. Currently its guidance, *Management Standards for Work Related Stress*, identifies the characteristics, or culture, of an

³⁷ HSE Annual Statistics Report 2010/2011 <http://www.hse.gov.uk/>. (Last accessed 13 October 2012).

³⁸ *American Diagnostic and Statistical Manual of Mental Disorders DSM-III*. At first the concern was with post-traumatic stress disorders.

³⁹ E.g. T. Cox, *Stress Research and Stress Management: Putting Theory to Work*, HSE Books, 1993, CRR 61/1999, ISBN 0 7176 0684 8 (England).

⁴⁰ HSE, *Stress at Work A guide for employers* C100 5/95.

⁴¹ The first case for compensation for “slow burn” stress due to work overload was *Walker v Northumberland CC*[1995] 1 All E.R. 737.

⁴² In theory enforcement action could be taken relying on the general duty in s.2 of the 1974 Act.

⁴³ www.hse.gov.uk/stress. (Last accessed 13 October 2012).

organisation where the risks from work related stress are being effectively managed and controlled.

In 2004, as part of the EU strategy to improve working conditions by “soft law”⁴⁴, the social partners entered a framework agreement on work-related stress. The UK responded by publishing “*Work-related stress: A Guide*”⁴⁵. This document bore the signatures of the major national social partners⁴⁵ and representatives of two government bodies, the DTI⁴⁶ and HSE⁴⁷. Unsurprisingly HSE takes the lead in this document. It is arguable that the UK did not properly respond to the autonomous agreement given the national weakness of the social partnership but it is not clear what more could have been achieved given HSE’s argument that regulations would be difficult to compose and even more difficult to enforce. However, HSE’s guidance has no standing in a court and compensation cases deal only with employees, taking no account of workers.

Notably reports of claims for compensation for allegedly work-related stress often fail because evidence shows that employees who succumb while in employment are often stressed by factors in their private lives, such as divorce⁴⁸. Arguably stress is as much a life-style problem as a work-related problem. The conclusion has to be that while employers must strive to prevent their workers being stressed by their work, it is likely to be beyond the power of either employers or HSE to eliminate stress from the workplace. Nevertheless, where an employee shows signs of stress it is in the interest of the employer to address it, because whatever its cause stress is not conducive to a productive workforce. Interestingly HSE statistics suggest that the number of cases of absence from work due to stress has fallen slightly in recent years, but this may be due to employees being unwilling to take sick leave. Academic research suggests, as might be expected, stress at the workplace has increased since 2008⁴⁹.

⁴⁴ Consolidated Version of Foundation Treaty Art 136-140.

⁴⁵ CBI, TUC, CEEP, FPB.

⁴⁶ Department of Trade and Industry, now BIS.

⁴⁷ www.hse.gov.uk/stress. (Last accessed 13 October 2012).

⁴⁸ E.g. *Sutherland v Hatton* [2002] EWCA Civ 76; *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 06. Both these leading cases were consolidated actions each included 6 cases and in both only the minority of claimants were successful.

⁴⁹ Ulster and Nottingham Universities, *Psychosocial Factors and Economic Recession: the Stormont Study, Occupational Medicine*, No. 62, 98–104, 2012. This report revealed a significant rise in the number of workers suffered from work stress during an economic

Violence: the EU social partners entered an agreement to address this problem and it was implemented in the UK as guidance. Again HSE was a signatory⁵⁰. This guidance states:

The sectors identified as most at risk in the UK are those where third party harassment and violence are more likely. According to the 2006/7 British Crime Survey (BCS), respondents in the protective service occupations (for example police officers) were most at risk of violence at work. But high rates were also shown, for example, for workers in the transport, health, retail and leisure (e.g. pubs) sectors.

The guidance lists the considerable amount of legislation directed to the problem, including offences embedded in the general criminal law. HSE has long been aware of the potential for employees to suffer assault during the course of their employment⁵¹. It defines violence broadly to include verbal as well as physical attacks in the following words:

Any incident in which a person is abused, threatened or assaulted in circumstances relating to their work

HSE has provided a tool kit to assist employers to carry out risk assessments, take measures to control the incidence of violence and to provide support after an incident. Recognising that the potential for violence is considerable in the health and social care services where the perpetrators are patients, particular attention is given to this. Nevertheless the most recent statistics show that the incidence of workplace violence remains unacceptably high. Findings from the BCS and RIDDOR⁵² data show that in 2010/11:

downturn.. See also The Times, 11 May 2012, 23 reported *Slump Brings Surge for Sleeping Pills* and cited the Chief Executive of the Mental Health Foundation as saying: “Our research last year indicated that money and work were by far the most common causes of stress in Britain and the strains being put on our mental wellbeing by the current economic situation could well be the cause of rising sleep problems in the UK”.

⁵⁰ <http://www.hse.gov.uk/violence>, (Last accessed 13 October 2012).

⁵¹ <http://www.hse.gov.uk/violence>, (Last accessed 13 October 2012).

⁵² Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (SI 1985/2023): a system by which employers (and others) are required to report to HSE.

There were an estimated 313,000 threats of violence to British workers.

There were an estimated 341,000 physical assaults on British workers.

An estimated 43% of all people assaulted or threatened at work were repeat victims.

There were 6,078 reportable injuries to employees caused by violence at work⁵³.

Again the extent to which either employers or the HSE can do more to avoid the potential for workers to be subjected to violence is questionable. Training of workers to recognise situations in which violence can occur and to take measures which reduce the likelihood of their provoking violence is very important but the risk of violence is likely to remain and knowledge of this may be stressful.

Musculoskeletal diseases: these are the largest cause of work-related injury and subsequent ill-health. Some categories of workers are particularly susceptible to repetitive strain injuries, for example supermarket cashiers⁵⁴ and keyboard operators.

The Manual Handling Operations Regulations 1992⁵⁵ require employers to avoid expecting their employees to undertake manual handling wherever this is reasonably practicable and where this is not possible to “make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, take appropriate steps to reduce the risk of injury to employees undertaking manual handling and provide information about the weight of loads”. The duty of the employer extends only to employees and the employee is under a duty to follow any system put in place by the employer. Guidance notes provide comprehensive advice about lifting loads but there is no express instruction in the regulations that employers should provide training (though in practice

⁵³ www.hse.gov.uk/statistics, (Last accessed 13 October 2012).

⁵⁴ See HSE guidance books.hse.gov.uk, (Last accessed 13 October 2012). A major problem was lifting purchases from the point where the customer deposits them to be scanned by the computer, but better design of check outs has largely eliminated this. However cashiers are normally employed to cover 4 hour shifts and for 3 hours they have no rest break. At busy periods this can be stressful.

⁵⁵ SI 1992/2793, implementing 90/269/EEC.

training is likely to be necessary to comply with the duty to reduce the risk of injury⁵⁶).

The enforcement of the regulations is within the remit of HSE. HSE's web site records only one instance of prosecution of an employer (in 2004) for failure to undertake the risk assessment the regulations require and this prosecution apparently occurred as a result of a coincidental site inspection. However it is a relatively rare instance of HSE prosecuting to prevent an injury occurring⁵⁷. Nevertheless guidance issued to inspectors states tackling musculoskeletal disorders is a priority saying, "Strong enforcement action is encouraged"⁵⁸. Claims against employers for compensation allegedly due to breach of the regulations often involve "one off" situations where the employee is away from the workplace and not under supervision. In these circumstances, if the employer can provide evidence of appropriate training it may not be liable because there is an expectation that the employee will use "common sense"⁵⁹. Compensation claims, being founded on breach of the regulations, can deal only with employees.

The Health and Safety (Display Screen Equipment) Regulations 1992⁶⁰ have also been the subject of guidance by HSE to inspectors⁶¹. This guidance states:

The main health risks associated with DSE are musculoskeletal disorders, stress and visual fatigue. While the risks to individual users are often low, they can still be significant if good practice is not followed. DSE workers are also so numerous that the amount of ill-health associated with such work is significant, and tackling it is important.

The guidance continues that HSE recognises that securing compliance with these Regulations has potential to make a significant contribution towards hitting the targets for ill health reduction in the Priority Programme on Musculoskeletal Disorders. However there is no evidence

⁵⁶ However HSE states training alone is not very effective as it is not carried out in practice and the real answer is better systems. Paper OC 313/5 – guidance to inspectors

⁵⁷ www.hse.gov.uk, (Last accessed 13 October 2012).

⁵⁸ OC 313/5. www.hse.gov.uk, (Last accessed 13 October 2012).

⁵⁹ E. *Koonjul v Thames Link Health Services* [2000] P.I.Q.R 123 and *King v Sussex Ambulance NHS Trust*, *The Times*, July 27, 2002, the employer was not liable for injury suffered by an ambulance worker when carrying an elderly man downstairs.

⁶⁰ SI 1992/2792 implementing Directive 90/270/EEC.

⁶¹ OC 202/1 www.hse.gov.uk, (Last accessed 13 October 2012).

of prosecutions and indeed, as with manual handling, much depends on the individual employee to ensure that the work station is appropriate and procedures are observed.

Agency workers: In January 2010 in an assessment of the EU's Temporary Agency Workers Directive⁶² the Government admitted that it had no clear idea of how many agency workers there were in the UK. It referred to three governmental estimates which differed significantly, so it chose 1.3 million, to take account of the seasonal nature of a proportion of the work⁶³. Others have said that one in twenty workers may be an agency worker⁶⁴. It is estimated that there are more agency workers in the UK than any other member state of the EU with one in eight of all agency workers in the EU working in Britain⁶⁵.

The TUC's report *Hard Work Hidden Lives* identified some agency workers as vulnerable but agency work covers a wide spectrum of occupations. Agency workers may be cleaners or seasonal workers brought to the end user through gangmasters or they may be highly qualified professional workers, who perhaps could be classified as self-employed. Between these two extremes are many categories of workers, for example temporary cover for peak periods or for sickness or maternity leave. The EU directive was intended to improve the lot of the whole spectrum. The UK was reluctant to implement the Directive, the industry feared that it would be detrimental to the economy, suggesting "Agency work helps maintaining employment, facilitates job creation and enhances mobility in the labour market"⁶⁶.

The UK Regulations⁶⁷ took advantage of the derogation which permitted postponing the granting of the rights intended by the Directive until the worker had been assigned to the end user for 12 weeks, thereby disenfranchising those on short term assignments, but it is doubtful

⁶²2008/104/EC.

⁶³ Department of Business Innovation and Skills, *European Parliament and Council Directive on Working Conditions for Temporary Agency Workers*, January 2010. www.bis.gov.uk, (Last accessed 13 October 2012).

⁶⁴ O. Boycott, D. Hencke, *Fear for Deal on Agency Workers Payoffs*, The Guardian 21 February 2009, cited in Chapter 3 of E. Renton, *Struck Out*, Pluto Press, London, 2012

⁶⁵ European Confederation of Private Employment Agencies Position Paper, 5 May 2009 cited in E. Renton, *op. cit.*

⁶⁶ European Confederation of Private Employment Agencies, *Position Paper*, 5 May 2009 cited in E. Renton, *op. cit.* The best match found for this citation is www.eurociett.eu, (Last accessed 13 October 2012).

⁶⁷ SI 2010/93, came into effect in 1st October 2011.

whether those on longer assignments will obtain much benefit from the Regulations. The Directive assumes that agency workers will have a contract of employment with the agency which will have some responsibility for ensuring the wellbeing of the worker while on the assignment⁶⁸. However, the normal situation in the UK is that the arrangement between the worker and the agency expressly states that it is not a contract of employment and the worker has no contractual relationship with the hirer who is the end user of the worker's services.

The Regulations state that the worker will, after 12 weeks, have in most respects (as the Directive intends) the same terms and conditions of employment as the employees of the hirer and will have the right to lodge a complaint to an employment tribunal if s/he does not receive the terms and conditions to which s/he is entitled. However, as the regulations fail to rectify the most serious problem of the previous law, the worker has no contract of employment and therefore no entitlement to claim for unfair dismissal; so the hirer can at will terminate its relationship with the agency worker. Further the right to the same terms and conditions as other workers of the hirer will be meaningless if its workforce consists entirely of agency workers. It is true that some statutory rights, such as minimum hourly pay, are not limited to employees so that workers may claim these; but again with no security of tenure these may be of little value⁶⁹.

Agency work will undoubtedly continue to be valuable to people such as professionally qualified workers many of whom fall back on this kind of employment while building up a private practice, but the Directive will be of little help both to the vulnerable whom the TUC identified, and many others. The courts may wish to find that those workers, typically cleaners, who have been arbitrarily dismissed after working for the same organisation for more than two years (the current qualifying period for claiming unfair dismissal) have by implication a contract of employment, but case law shows the facts of these cases usually make it hard for courts to do this⁷⁰.

Working time: it was with reluctance that the UK government implemented the EC Working Time Directive⁷¹, alleging that it had been wrongly

⁶⁸ Article 1.2.

⁶⁹ The National Minimum Wages Act 1998, s.31 makes it a criminal offence for an employer to pay less than the statutory minimum wage but the enforcement of this which rests with HMRC (the tax authorities) is weak.

⁷⁰ E.g. *James v London Borough of Greenwich* [2008] ICR 545.

⁷¹ 93/104/EC.

adopted under Article 118A of the Treaty of Rome as it had nothing to do with health and safety. The Working Time Regulations 1998⁷² were not introduced till after the European Court of Justice had rejected this challenge⁷³. The Directive requires employers to limit the working week to 48 hours and to ensure that workers get a minimum of 11 hours rest every 24 hours, one day's rest per week, and four weeks paid annual leave. However, the UK secured an opt out to the 48 hour maximum working week, so that employees aged 18 and over may "opt out" of this agreement by way of a written and signed request. Such opt out clauses are frequently written into contracts of employment which employees are required by their employer to sign. There is evidence that workers in the UK work longer hours, take shorter lunch breaks, and have fewer holidays than most of their European counterparts⁷⁴. Research suggests that:

Even though legislative measures have been introduced as a way of protecting employees, average working hours have only marginally decreased over the last decade in the UK generally. Moreover, closer scrutiny of the data highlights variations, with some regions of the UK actually experiencing increasing working hours. Only a third of the working population are aware of Working Time Regulations.

Approximately a quarter of the UK working population work more than 48 hours a week on average, and approximately 9% of workers report working over 60 hours a week.

According to 2003 figures, approximately two out of three people who reported working 48 hours a week on a regular basis, did so without having "opted out" of the Working Time Regulations. One in four employees who have signed an "opt-out" within the Working Time Regulations said they were given little or no choice about signing away their rights.

The majority of employees who work more than 48 hours a week suggest they would like the opportunity to work fewer hours. Managers and professionals are most likely to work long hours.

⁷² SI 98/1833.

⁷³ *UK v EU Council* [1996] All ER (EC) 877.

⁷⁴ J. White, J. Beswick, 2003; ILO, 2007; TUC, 2007. Cited by S.I. Giga, A.K. Jain, C. L. Cooper, in a Foresight research paper *Mental Capital and Wellbeing: Making the Most of Ourselves in the 21st Century, State-of-Science Review*, SR-C7 Working Longer: Hours of Work and Health, published by the Government Office for Science, London, 2008.

Two-thirds of female employees who work longer hours are in managerial and professional occupations.

The report continues that data suggest that less than half of the workforce actually use up their full annual leave entitlement and less than two-thirds of employees use up their full entitlement to lunch breaks, highlighting workload pressures and demanding managers as the reason for this. In addition, some employees work more than their contracted hours due to the incessant pressure of their work, which prevents them from completing it within contracted working hours, citing organisational culture, management style and high levels of personal standards as their main reasons.

While this report was published before the financial crisis which led to the present recession and high levels of unemployment there is no reason to suppose that the situation is much different for those who remain in employment. Indeed their plight may be worse if workplace re-structuring causes the allocation of tasks among a smaller workforce. The problem of those who feel they need to work beyond their official working hours in order to cope with their workload is likely to have increased. It is also possible that many who appear to have part time employment are actually holding down more than one job and are in total working long hours.

Meanwhile neither the enforcement agency nor the courts have shown much sympathy with the regulations. Although the regulations were not made under the Health and Safety at Work Act 1974 the HSE has been charged with their enforcement⁷⁵. HSE has published guidelines on enforcement by inspectors⁷⁶ and they purport to have been updated in the light of enforcement experience, but if HSE has actually secured convictions for breaches of these regulations they are hidden in the statistics. Research commissioned by HSE itself suggests that long working hours may cause fatigue and lead to accidents but provides no hard evidence of this⁷⁷.

Recent cases suggest that employment tribunals are not sympathetic to workers. In one case the Court of Appeal noted that it was common practice for three man teams to undertake 24 hour security guard duties. The length of the working week was not actually an issue before the court, so their Lordships expressed no surprise that this regime would mean each guard worked more than 48 hours a week, and nor were they

⁷⁵ Regulations 28 and 29.

⁷⁶ www.hse.gov.uk, (Last accessed 13 October 2012).

⁷⁷ HSL, *Working Long Hours*, No. 2, 2003.

concerned that the arrangements in the particular case meant that guards could not be guaranteed the 20 minute uninterrupted rest break the regulations stipulate⁷⁸. In another case care workers who were dismissed when found asleep were unsuccessful in their claim that their dismissal was unfair because they had not been given statutory rest breaks; the tribunal considered the employees ought to have complained to the employer. The claimants' refusal by conduct to accept their employer's failure was not sufficient⁷⁹.

The evidence appears to suggest that workers are willing, if not happy, to work long hours. In some cases this may be to earn more money in order to support their life-style, in others it may be to cover their workload. In time of high unemployment protesting the workload is too heavy for the time available may suggest incompetence, and indeed there are occasions when the work overload stems from failing to accept the systems changes which the employer wishes to introduce.

5. Vulnerability of the Unemployed

Vulnerability in the workforce is interpreted to include difficulty in obtaining employment. The high percentage of the unemployed has been noted and especially the large number of the young. Other vulnerable groups are older workers and the disabled. On March 2010 the European Social Partners adopted an autonomous framework agreement on inclusive labour markets⁸⁰. The signatories admit that the fulfilment of this ambitious agreement:

Entails various measures, actions and/or negotiations at all levels, which can be taken by employers, workers, their representatives, jobseekers and third parties. These should promote the creation of jobs and the employability of workers and jobseekers with a view to integrating all individuals in the labour market.

It suggests actions which the partners should take, for example organising awareness campaigns. The agreement invites the social partners in member states to implement it by March 2013. In Britain DWP published

⁷⁸ *Hughes v Corps of Commissionaires Management LTD* [2011] EWCA Civ. 1061.

⁷⁹ *Ajayi & Anor v Aitch Care Homes (London) Ltd* [2012] UKEAT/0464/11.

⁸⁰ www.etuc.org, (Last accessed 13 October 2012).

in 2005 a strategy statement on *Opportunity and Security throughout Life*⁸¹. Seven years later it seems unhelpful because, being written before the recession, it is based on the assumption that:

Today, Britain is working again. The welfare state is being transformed from a passive one-size fits-all model to an active system that delivers both rights and responsibilities, tailoring help to the individual and providing the skills people need to move from welfare and into work.

The BIS web site does respond to inclusive labour markets with a feature on the requirement to comply with the Equality Act 2010 and avoid discrimination in employment⁸². The rights set out in this Act, in relation to discrimination in, or in selection for employment, are enforceable by individual complaint to an employment tribunal and age, disability, race and sex are among the nine protected characteristics regarding which there must be no discrimination. The right to complain to an employment tribunal is of limited benefit to anyone who applies for a job and is not offered it. Searches of the TUC and the CBI web sites have failed to show any response to the EU Framework Agreement. The Government's announcement that it intends to withdraw funding from Remploy, an organisation which employs the disabled⁸³ and redirect the funding to providing support for employment of the disabled within the general workforce may be a well-intentioned attempt to address inclusivity but whether it will succeed is controversial when jobs are in short supply⁸⁴.

It can be regarded as inappropriate that, when there are so many unemployed among those who are domiciled in Britain, there are many migrant workers from abroad. Freedom of Movement within the EU prevents Britain from denying entry for the purposes of employment from those who are domiciled in other Member States⁸⁵. It is also questionable whether the unemployed British labour force has the skills, stamina or motivation to undertake the heavy manual work performed by

⁸¹ CM 6447.

⁸² www.bis.gov.uk, (Last accessed 13 October 2012).

⁸³ www.remploy.co.uk, (Last accessed 13 October 2012).

⁸⁴ union-news.co.uk, (Last accessed 13 October 2012).

⁸⁵ Foundation Treaty Articles 39-40.

migrant workers from Eastern Europe⁸⁶. It is worrying however that these migrants may work where the conditions of employment, including rates of pay, are below those required by British law. Neither the Home Office's Border Agency nor the BIS's Gangmaster Authority has been successful in controlling illegal immigration or exploitation of workers.

The problem of youth unemployment has attracted particular attention. It is controversial that increased longevity and the demands that makes on income provision for the elderly, especially stresses on pension schemes, are encouraging the elderly to remain longer in employment at a time⁸⁷ when the young are unable to obtain employment but there is no reason to suppose that if the elderly were discouraged from working the vacancies thus created would be taken up by the young.

The problem of youth unemployment is partly one of motivation and employability. This in turn reflects on social attitudes and education⁸⁸.

The current government is attempting to address these problems, reforming the welfare system⁸⁹ and emphasising the need for employability to feature in all levels of education⁹⁰. But even if these measures are moves in the right direction they will not produce an immediate improvement in the employment prospects of the young. During his successful campaign for his re-election as Mayor of London Boris Johnson pledged he would:

Directly create more than 200,000 jobs for those seeking work, and continue to improve skills by creating on average 1,000 new

⁸⁶ At one time the BBC broadcast a documentary in which the youth of the Wisbech, Cambridgeshire area proved unable to undertake manual agricultural tasks and not motivated to work in catering.

⁸⁷ *Business Briefing*, The Times, 14 June 2012, 44, drawing on the Office of National Statistics states there were 1.4 million older workers above state pension age at the end of 2011.

⁸⁸ The system of comprehensive education which currently exists retains in schools many young people who are not suited to academic learning. This is now being addressed by introducing university technical colleges which bear a considerable resemblance to the technical colleges of former times, which were condemned for limiting the opportunities of teenagers. K. Baker, *At Last, Schools for Getting your Hands Dirty*, The Times, 29 May 2012, www.utcolleges.org (Last accessed 13 October 2012).

⁸⁹ It is proposing to deny housing benefit to those under 25 years of age.

⁹⁰ The Education Act 2011 imposes a duty on schools to secure independent and impartial careers guidance.

apprenticeships every week and ensure they benefit from the same travel discounts as full-time students⁹¹.

It can only be hoped that he succeeds, though, as he also stated, London has been more resilient during the recession than the rest of the country. There has been a growth in the provision of voluntary employment with many organisations offering opportunities for the unemployed to work without pay in order to improve their employability. This development is very controversial because there is no guarantee that such work will lead to employment⁹² and volunteering may affect the right to claim job seekers allowance since eligibility for this depends on availability for employment⁹³, but it is advertised on the DWP web site⁹⁴.

The Welfare Reform Act 2012 is intended to make it more difficult to get welfare benefits but being deprived of benefits cannot be expected immediately to reduce unemployment: similarly if the emphasis on educating for employability is the correct path to take, it will take time to feed through to the labour market. Neither strategy will assist those who have completed their education and emerged as hard to employ. The focus on apprenticeship schemes⁹⁵ is unlikely to introduce to employment those who failed to benefit from the schooling they were required to undergo up to the statutory school leaving age.

*Improving health and work: changing lives*⁹⁶ was the Government's response to Dame Carol Black's review of the health of Britain's working age population; it asserts:

We want to create a society where the positive links between work and health are recognised by all, where everyone aspires to a healthy and fulfilling working life and where health conditions and disabilities are not a bar to enjoying the benefits of work.

⁹¹ www.backboris2012.com. The Conservative London Borough of Barnet has pledged £1 million to support businesses in the borough to take on apprentices reported in *The Hendon and Finchley Press*, Thursday, 7 June 2012 12 edition.pagesuite-professional.co.uk, (Last accessed 13 October 2012).

⁹² E.g. www.bis.gov.uk.

⁹³ www.jobseekers-allowance.com, (Last accessed 13 October 2012).

⁹⁴ www.direct.gov.uk, (Last accessed 13 October 2012).

⁹⁵ www.jobseekers-allowance.com, see website of Department of Work and Pensions search2.openobjects.com, (Last accessed 13 October 2012).

⁹⁶ Executive summary, 2008, 9. www.dwp.gov.uk, (Last accessed 13 October 2012).

6. Concluding Comments

This account has posited that the whole British workforce is more vulnerable than before the current recession, but that this vulnerability stems from work and life style changes which had occurred before 2000. It asks who can help the workforce and considers the roles of Government, employers and trade unions and implies that most reliance is being placed on Government.

In a time of recession and unemployment it is easy to believe that those in employment are fortunate, but the above account demonstrates that much employment exposes workers to risks of physical and psychological injury. It indicates that many more of the employed can be vulnerable than the TUC report suggests. Life is not risk free, but the employer has a statutory duty to carry out risk assessments in order to comply with the law. In some cases the law requires a risk to be avoided entirely, and in all other cases the employer's duty is to control it as far as is reasonably practicable. The risks identified here existed before the recession, but may well be exacerbated by it. Moreover it is of concern that so many of these risks can be attributed to behavioural patterns and persist in spite of regulation and HSE advice and guidance and in some cases in spite of employers best efforts. HSE campaigns on health and safety myths based on the assumption that we live in a society that is averse to taking responsibility for risk; such aversion is arguably a consequence of the readiness of accident victims to blame someone else if accidents occur and resort to litigation for compensation and/or expect that welfare benefits will be available to provide basic income maintenance. Personal training in and acceptance of responsibility for following safe procedures might go a considerable way to enabling the reduction of risk at the workplace. The extent of unemployment continues to be of concern; although some reports suggests more workers are being hired, the situation cannot be expected to improve substantially until the economy recovers⁹⁷. The Government is accused of hindering recovery by focussing too much on reducing the national debt. The system of "quantitative easing"⁹⁸ operated by the Bank of England has assisted the Government⁹⁹, but impacted on

⁹⁷ E.g. *UK Economy Perks up as Pressure Eases on Income*, The Times, 28 September 2012, 7 and C. Cavendish, *Green Shoots for Jobs, but not for Growth*, The Times, 20 September 2012, 29.

⁹⁸ Printing money.

⁹⁹ See D. Wighton, *Osborne Has at Least one Friend in King*, The Times, 22 September 2012, 55.

the value of the pay packet and further held back consumer spending already restricted by the difficulty of paying off personal debts. Most importantly, overseas markets will not improve while the Euro zone crisis continues and other economies, east and west of Europe remain fragile.

The steps being taken by various Government Departments to increase employability will take time to impact and will in any case only bear fruit when the demand for workers increases. The difficulty of achieving an inclusive society in which the whole population of those of employable age is employable and motivated to work is an even bigger challenge for government departments and society as a whole, but is a problem to be tackled in the interests of the health of the nation.

There are many problems which are only now receiving attention, but need to be addressed to achieve a fair society with a stable economy. For example there are many wealthy people who avoid paying taxes, the better enforcement of the minimum wage legislation to make it less attractive for employers to rely on migrant workers, and the reform of the financial sector to prevent the cycle of “boom and bust” which caused the current recession. The Governor of the Bank of England has predicted that the consequences of the financial crisis of 2008 will be with Britain for many years to come¹⁰⁰.

There are so many uncertainties that it is not possible to attempt a firm conclusion as to what the future will hold but it may be suggested that the workforce will have to accept more responsibility, adjusting to changed economic and social conditions; controlling personal debt, resisting the temptation to buy now and pay later, embracing lifelong learning and taking more care when at work.

¹⁰⁰ www.egovmonitor.com, (Last accessed 13 October 2012).

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

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