

# Assessing Employment Regulation for Global Britain

## Regulating for Globalization

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### *Deepening Precarity*

Although it outlines rules for the workplace, employment regulation has also been imbued with perceived potential for economic stimulus. There has been an inherent tension in this dualism that sees the latter given greater importance. The certainty underlying these plans, however, does not match the unpredictability of economic changes. How can employment regulation that may weaken workers' situations be avoided while also stimulating the economy? The adjective 'precarious' has been of expanding application as well as a means of assessing regulation. Recent employment law reforms in the UK have arguably increased workers' exposure to risk. While talk of economic growth must remain, greater attention can be given to the sum effect of weakened employment protections in the effort to stimulate the economy.

### **The Precariat**

Guy Standing's *The Precariat* has been a touchstone for much of the discourse. The precariat is the cohort that is in the direst of situations; with a difficult climb out of the 'precarity trap'. And yet, those in paid employment (even Standing's 'salarariat') experience differing levels of exposure to precarity. Assessing whether the proposed regulatory step deepens workers' exposure to precarity can be one means by which to weigh the impact of employment regulation reforms: does a reform or initiative expose workers to further risk on the basis of an unrealistic premise of economic growth? The emphasis is on considering whether a regulation will exacerbate current challenges, and, if so, whether the perceived trade-off is in fact a realistic outcome.

'Precarity' is adapted here for two reasons. First, precarious workers have been understood as a defined group. And yet, recent developments in UK labour law suggest precarity may be found beyond the one cluster. Second, precarious and 'secure' workers may only be separated by dismissal (what *The Economist* has termed 'the hedge against being sacked').

### **Stimulus or exposure to risk**

The early years of twenty-first century UK labour/employment law offer a number of examples for collective consideration. Reforms have been passed undercutting dismissal protections: doubling the period for qualification for unfair dismissal protection to two years or halving the minimum 90-day consultation period for dismissals of 100 or more workers. There have been diminished protections for freedoms of association and speech. In 2013, the government introduced fees for bringing employment claims (filing and hearing fees). Looking at the recent reforms collectively, these have been indications of a more pervasive and growing vulnerability for workers. It should be noted, though, that the UK is not alone. About one-third of OECD countries between 2008-2013 liberalised employment protection laws.

### **Deepening Precarity and the Rule of Law**

The courts have been the traditional path for assessing the increased exposure to risk of reforms to employment regulation. The premise has been the rule of law. Citizens in a democracy participate within a framework that relies upon the rule of law; its acceptance, enforcement, adherence. And yet, there can be obstacles along this route.

In 2017, the fees scheme for employment claims was found to be unlawful by the United Kingdom Supreme Court in *R (on the application of UNISON) v Lord Chancellor* ([2017] UKSC 51). This decision provides a means of discussing how to assess regulations as set against the potential risk exposure to workers. In this case, the majority ruled that tribunal fees were unlawful because the threshold of a 'real risk' was met with the result of 'effectively prevent[ing] access to justice'. And so, the courts may appear to be a viable path. If legitimate claims were brought, the expectation was that claimants would be awarded what was owed through a court order. This understanding also explains why the introduction of fees for employment claims made that route more difficult.

Challenging the rule of law, however, was the data regarding successful claims. 53% of successful claimants were paid (fully or partially) what they were owed. Enforcement mechanisms only increased that figure by 11%. While the rule of law underpinned introduction of employment tribunal fees, the data discloses a troubling ambivalence of employers to court orders.

### **The courts' role**

The tribunal fees decision also reveals a further challenge to using courts as venues of redress for impugned employment regulation. Courts seem best situated to address larger issues than finer details; the concept of access to justice in a fee scheme, rather than the precise details of a balanced fee schedule. The UKSC did not write of fees being unlawful, but rather the government's scheme: 'In the present case, it is clear that the fees were not set at the optimal price: the price elasticity of demand was greatly underestimated. It has not been shown that less onerous fees, or a more generous system of remission, would have been any less effective in meeting the objective of transferring the cost burden to users.' There remains scope for fees and the question of the threshold at which the level of fee is 'too much' remains. Moderating the competing arguments may be the imbalance of

bargaining power between parties recognised at common law. Nevertheless, this framework cements the court's position as assessor; along with some of the limitations of this role.

### **A lingering question**

At a time of continued economic uncertainty, a troubling lack of resilience in the area of personal work protections persists. This situation underlines the more pervasive nature of the term precarity and the limitations of using the courts as venues for intervention.