



# Pointmaker

## ESCAPING THE STRAIT JACKET

### TEN REGULATORY REFORMS TO CREATE JOBS

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#### SUMMARY

- The burden of employment regulation in the UK has swollen six times over the last 30 years. In 2011, UK business will spend £112 billion on compliance costs – the equivalent of 7.9% of GDP. Another £23 billion in costs on business will be imposed by 2015.
  - The UK is ranked 83<sup>rd</sup> out of 142 countries for placing the regulatory burdens on business.
  - For small businesses, the costs of compliance are disproportionately high, often crushing the spirit of enterprise out of small business.
  - Higher levels of employment regulation put the entitlements and rights of the employed above the plight of the unemployed.
  - Reducing the burden of employment regulation will help businesses to regain the confidence essential for economic growth and job creation.
2. Introduce no fault dismissal for underperforming employees.
  3. Strengthen power of employment tribunals to strike out and deter spurious claims.
  4. Install a qualified registrar to pre-vet tribunal claims.
  5. Promote greater use of alternative dispute resolution.
  6. Promote flexible working for senior employees and manage the Default Retirement Age.
  7. Require a majority of support from balloted members for any strike in the emergency and transport sectors.
  8. Reform TUPE to encourage business rescues and to promote successful business models.
  9. Abolish the Agency Workers Regulations 2010.
  10. Abolish the Working Time Regulations 1998.

#### **Ten proposals**

1. Exclude start-ups, micro- and small-businesses from the minimum wage for those under 21; from the extension of flexible working regulations; from requests for time off for training; and from pension auto-enrolment.
- These measures will help the Coalition meet the Chancellor's aspiration of clearing every obstacle to growth.

## INTRODUCTION

***“We will do everything, work with anyone, overcome every obstacle in our path to jobs and prosperity.”***

**Chancellor George Osborne, speech to Conservative Party Conference, 3 October 2011**

Unemployment casts a dark cloud. In August, the number of people out of work was at its highest level since 1994.<sup>1</sup> Young people in particular are suffering: almost one million 16 to 24 year olds are jobless, an unemployment rate of 21.3%.<sup>2</sup> For the next generation, the scars of this experience, if unaddressed, could be slow to heal.

The situation is urgent. In October 2011, the International Labour Organisation forecast that employment in advanced economies will not return to pre-crisis levels until 2016.<sup>3</sup>

The necessary response is easier to define than to deliver. Beyond deficit reduction, the number one economic priority for the Government is growth, while the number one social priority is to provide work for the unemployed. Increased job creation is the answer to both. Job creation fuels economic growth. Socially, jobs boost self-reliance and social mobility.

This poses a challenge for policymakers: how to give businesses and entrepreneurs the opportunity and the confidence to create those jobs? At this point, we need to consider the dragging anchor of regulation, which is holding the British economy back.

The facts are stark. The burden of employment regulation in Britain, originating both domestically and from the European Union, is vast. Over the last three decades, it has swollen six times in size.<sup>4</sup> This comes with a price-tag attached. In 2011, British business will spend £112 billion to comply with the administrative requirements – the equivalent of 7.9% of Gross Domestic Product, or the entire output of a country the size of Singapore.<sup>5</sup> The costs of compliance are disproportionately high for smaller firms, often crushing the spirit of enterprise out of small business.<sup>6</sup>

The business community recognises the problem. In a recent survey, 77% of firms of all sizes, from those employing fewer than 50 people to more than 5,000, identified employment regulation as the leading threat to UK labour market competitiveness.<sup>7</sup>

It does not have to be this way. The World Economic Forum ranks Britain 83<sup>rd</sup> out of 142 countries for placing the largest regulatory burden on business.<sup>8</sup> This places the UK far behind rising powers such as Singapore (1<sup>st</sup>) and Hong Kong (3<sup>rd</sup>). But it also leaves Britain trailing countries with strong records of employment rights, like Finland (11<sup>th</sup>), Denmark (19<sup>th</sup>) and New Zealand (20<sup>th</sup>). As the Federation

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<sup>1</sup> ONS, [Labour Market Statistics](#), October 2011, p. 2.

<sup>2</sup> *Ibid.*, p. 9.

<sup>3</sup> International Labour Organisation, [World of Work Report 2011](#), October 2011, p. viii.

<sup>4</sup> CBI, [Thinking Positive: the 21-century Employment Relationship](#), 2011, p. 10.

<sup>5</sup> Institute of Directors, [Regulation Reckoner 2011](#), p. 1.

<sup>6</sup> Professor P Urwin, [Self-employment, Small Firms and Enterprise](#), Institute for Economic Affairs, 2011, p. 120.

<sup>7</sup> CBI/Harvey Nash, [Employment Trends Survey 2011](#), June 2011, p. 21.

<sup>8</sup> World Economic Forum, [Global Competitiveness Report 2011/12](#), Table 1.09, p. 398.

of Small Businesses argues, this is not about protection; this is about efficiency.<sup>9</sup>

A change of mentality is needed – and quickly. Firms face a bill for a further £22.9 billion of employment legislation between now and 2015.<sup>10</sup> This is not simply a question of streamlining the economy. It is also fundamentally about fairness. The cost of employment regulation should not be measured simply in terms of time and money spent on form-filling. Regulation takes an invisible toll, in the form of the job-creation opportunities that are sacrificed to pay for it. Put another way, ballooning levels of employment regulation put the rights of the employed above the plight of the unemployed, who desperately want a foot on the ladder.

However noble their intentions, politicians must remember that the laws of economics cannot be suspended. Employment is no different to anything else: if you increase its cost, you cut its supply. There is a trade-off between increasing employees' rights and entitlements on the one hand, and denying job opportunities to the millions now seeking work on the other.

The ten practical measures put forward here could all be taken swiftly. The first seven can be implemented by changing domestic legislation and regulations, while the final three require the agreement of the EU. Together, they would send a clear message to every business in the land: that this Government is indeed on the side of business, enterprise and above all those who want to work.

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<sup>9</sup> Federation of Small Businesses, [The Burden of Regulation](#), May 2011, p. 1.

<sup>10</sup> Urwin, op. cit., p. 145.

## **PROPOSAL ONE: Exemptions for start-ups, micro-businesses and small businesses: promote enterprise**

Small is often beautiful. Small firms and start-ups created two-thirds of new jobs each year between 1998 and 2010.<sup>11</sup>

The financial crisis has been tough on small business.<sup>12</sup> Jobs created by start-ups declined by around 300,000 in 2009 and 2010.<sup>13</sup> What caused this? One-third of members of the Federation of Small Businesses cite the regulatory burden as the biggest barrier to their business, behind only cash flow and the recession.<sup>14</sup>

Targeted regulatory exemptions for smaller firms make sense.<sup>15</sup> These businesses cannot afford large Human Resources departments to keep pace with the latest UK or EU requirements. Nor can they afford to pay for their staff to enjoy some of the more generous

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<sup>11</sup> Professor M Hart, Dr M Anyadike-Danes and K Bonner, research for the Department of Business, Innovation and Skills, [Job Creation and Destruction in the UK: 1998 – 2010](#), October 2011, p. 5.

<sup>12</sup> A small business is defined as a company that employs fewer than 50 employees.

<sup>13</sup> Ibid., p. 30.

<sup>14</sup> Federation of Small Businesses, [op.cit.](#) p. 1.

<sup>15</sup> The exemptions would apply to start-ups, micro-businesses and small businesses. Start-ups should be defined as companies which have less than three years' operating history. These companies should be given the opportunity to establish themselves in the market and familiarise themselves with employment legislation. Micro-businesses are firms with fewer than 10 employees. Like small businesses (those with under 50 staff), for these companies the bureaucratic burden is a real concern. For example, [a survey by the British Chambers of Commerce](#) in August 2011 found that 60% of micro-businesses do not feel well-informed about changes to employment law.

– and less essential – aspects of the regulatory regime.

Exemptions should be granted from a series of recent and proposed changes in employment law to encourage small businesses and start-ups to expand, thereby hiring more people and creating new jobs.

**(a) The right to request flexible working**

The right to request flexible working was introduced in 2003 to help parents with young children, and has been progressively extended to cover carers and the parents of older children. The right comes with a presumption that a request should be granted. The grounds for rebutting the presumption are confined and tightly defined, so the employer has limited discretion.

At the moment, ministers are considering extending the right to request flexible working to all employees. Flexible working can make sense for employer and employee alike, but smaller businesses in particular may not be equipped to accommodate it. The British Chambers of Commerce has found that two-thirds of business owners believe the extension would be detrimental to their business.<sup>16</sup>

Existing arrangements are specifically tailored to support working families. However, start-ups, micro-businesses and small businesses should be excluded from the extension to all staff if it goes ahead. Widening flexible working would lead to 37,000 new and additional requests to small firms – a real disincentive for employers contemplating hiring new staff.<sup>17</sup>

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<sup>16</sup> [Personnel Today](#), 1 September 2011.

<sup>17</sup> Department for Business, Innovation and Skills, [Extending the right of flexible working to all: Impact Assessment](#), May 2011, p. 15.

**(b) The right to request time off for training**

Training staff is important. But, the right to request time off to do so, again with a rebuttable presumption that this should be granted, can be an unaffordable luxury for small businesses in a difficult market.<sup>18</sup>

In 2011, this right was due to be extended to employees of small- and medium-sized businesses.<sup>19</sup> The Coalition has delayed this until at least 2015.<sup>20</sup> The Government's own figures show the cost to those firms would be £359 million.<sup>21</sup>

This is a good start. However, the law should not simply be postponed, but amended to exclude start-ups, micro-businesses and small businesses. These firms will be discouraged from taking on new staff if they are worried about being saddled with extra costs.

**(c) The requirement to pay a minimum wage to people under 21<sup>22</sup>**

Canadian research shows a minimum wage greater than 45% of the average wage hurts the employment prospects of low earners.<sup>23</sup> If so, young people in the UK are in trouble. For 18-21 year olds, the minimum wage is 65% of

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<sup>18</sup> Institute of Directors, [Time to Train? IoD response to Government consultation](#), 14 September 2010.

<sup>19</sup> Under the Apprenticeships, Skills, Children and Learning Act 2009.

<sup>20</sup> Department for Business, Innovation and Skills, [Consultation on the future of the right to request "Time to Train" Regulations – Government Response](#), July 2011, p. 14.

<sup>21</sup> Department for Business, Innovation and Skills, [Time to Train? Consultation on the future of the Right to Request time to train policy](#), August 2010, p. 10.

<sup>22</sup> By amending the National Minimum Wage Act 1998.

<sup>23</sup> Professor S. Gordon, [When the minimum wage bites](#), 8 November 2006.

the average for their age group, and for 16-18 year olds it is 76%.<sup>24</sup>

The Low Pay Commission, which sets the minimum wage, has told Ministers that it may be impacting on opportunities for young people, and has commissioned research into the “minimum wage effect”.<sup>25</sup>

With youth unemployment at a record high, suspending the minimum wage for those under the age of 21 who are working for small businesses would encourage employers to take the risk of hiring youngsters. This would benefit young people, who want to launch their working lives to gain experience. Ultimately, an initial period of lower paid work – and building up professional experience – is preferable to unemployment. Talented, hard-working people tend not to stay on the bottom rung of the ladder for long.<sup>26</sup>

#### **(d) The requirement to engage in pension auto-enrolment<sup>27</sup>**

From 2014, small businesses will have to enrol into a workplace pension all those workers who are at least 22 years old and who are not in an existing scheme.<sup>28</sup>

The administrative cost of this change falls heavily on small companies.<sup>29</sup> They are more likely than larger firms to have to set up a new pension scheme, and on average have lower participation rates in existing schemes.<sup>30</sup> They will therefore need to enrol a larger proportion of their workforce in a scheme under the new regulations.

This change should be made discretionary. Promoting saving for pensions is important – but not if it prices others out of the workplace entirely by raising employment costs.

#### **(e) Negotiations with the EU**

Further exemptions for micro-businesses could be pursued at European Union level, for example from the Acquired Rights (Transfer of Undertakings) Directive, the Parental Leave Directive and the Posting of Workers Directive.<sup>31</sup>

#### **PROPOSAL TWO: Introduce “no fault” dismissal – encourage firms to hire**

This is the nightmare situation, particularly for small firms: an employee has been coasting in their job. Their underperformance is holding the business back, but another worker cannot be hired to do the job the current staff member should be doing.

What can be done about it? Sometimes, the employer can remove the individual by saying

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<sup>24</sup> T Worstall, [The Effect of the Minimum Wage on Youth Unemployment](#), 3 October 2011.

<sup>25</sup> *Daily Telegraph*, “[Minimum wage harming job opportunities for the young](#)”, 2 October 2011.

<sup>26</sup> For an exploration of the issue see Fraser Nelson, [Time to end the minimum wage?](#) Spectator Coffeehouse blog, 12 October 2011.

<sup>27</sup> By amending the Pensions Act 2008 and the Pension (Automatic Enrolment) Regulations 2009.

<sup>28</sup> There are slight caveats: the workers must be employed in the UK and earn over the minimum earnings threshold of around £7,500.

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<sup>29</sup> Department for Work and Pensions, [Impact Assessment of Pension \(Automatic Enrolment\) Regulations 2009](#), 12 March 2009, pp. 8-9. The government calculates small businesses face an administrative cost of £43 million in the first year of the scheme, and £28 million a year thereafter. Micro-businesses do worse: an initial cost of £69 million and £58 million a year after that.

<sup>30</sup> *Ibid.*

<sup>31</sup> The Institute of Directors make the case for this in [The Route Back to Growth](#), 2011, p. 7.

their job has become redundant, but this is often inappropriate.<sup>32</sup>

The Coalition is helping employers move underperforming workers on, by doubling the qualifying period before an employee can bring an unfair dismissal claim from one year to two.<sup>33</sup>

More radical change has been suggested. In a leaked report in October 2011, venture capitalist Adrian Beecroft called for the abolition of unfair dismissal and the introduction of “Compensated No Fault Dismissal”, where employers would be allowed to sack unproductive staff with basic redundancy pay and notice.

The theory is simple. If employers have clearer powers to dismiss underperforming or uncommitted workers, more of them would take a chance on hiring more staff. As Beecroft argues, the change would “lead to greater competitiveness, growth and employment”.<sup>34</sup> Employees would have the chance of a fresh start, without reputational damage. They would also benefit from the more flexible labour market that would result.

The Beecroft proposal was criticised from the outset. Business Secretary Vince Cable was unconvinced.<sup>35</sup> An unnamed senior Liberal Democrat said consumer confidence would suffer if people were concerned they could

lose their jobs at short notice – echoing the stance of the Trades Union Congress.<sup>36</sup>

Despite this, the problem is real. Beecroft's proposal was welcomed by business.<sup>37</sup> The public agrees. A 2010 poll found 57% of people thought “employment law provides too much protection to employees who perform or behave badly at work”.<sup>38</sup>

The *Financial Times* suggested a middle course, with a three-year period in which companies would not have to go to a tribunal to dismiss a worker. In the first year, the current rules would apply. In the subsequent two years, the Beecroft proposal would kick in.<sup>39</sup>

A better solution would be to run “no fault” dismissal in parallel with unfair dismissal, with both applying after a worker has been employed for two years. It should still be possible for an experienced employee to make a claim for being sacked unfairly. However, the definition of fair dismissal should be widened, for example, to encompass inadequate performance which falls short of the current standard of inherent inability or neglectful incompetence, to allow greater scope for “no fault” dismissal for underperforming employees.<sup>40</sup>

Introduced in this way, “no fault” dismissal would help employers get the best from their staff. Despite critics' protests, it would only affect the small minority who do not pull their weight. Few employers are interested in getting rid of good employees. If we want to

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<sup>32</sup> Not least because redundancy places restrictions on when an employer can hire a replacement.

<sup>33</sup> George Osborne, *Together we will ride out the storm*, speech to Conservative Party conference, 3 October 2011. The government expects this will lead to a reduction of between 3,700 and 4,700 unfair dismissal claims each year. See [BIS](#), p. 153.

<sup>34</sup> Leaked version of the Beecroft Report, *Daily Telegraph*, 25 October 2011.

<sup>35</sup> *Financial Times*, 27 October 2011.

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<sup>36</sup> *Ibid.* For the comments made by Brendan Barber, see *Financial Times*, 26 October 2011.

<sup>37</sup> Including the [British Chambers of Commerce](#) and the [Institute of Directors](#).

<sup>38</sup> ComRes poll reported by the [BBC](#), 31 October 2010.

<sup>39</sup> Editorial in *Financial Times*, 27 October 2011.

<sup>40</sup> N Selwyn, *Selwyn's Law of Employment*, Oxford University Press – 16<sup>th</sup> edition [2011], chapter 17.

boost the overall number of jobs available, firms should be able to hire with greater confidence that they will not be burdened with incompetent or underperforming workers.

### **PROPOSAL 3: Amend the Employment Tribunal Rules of Procedure – filter out spurious claims**

Employers are being swamped by a tidal wave of allegations of unfair treatment. In 2009/10, employment tribunals received over 236,000 claims – an increase of 173% in five years.<sup>41</sup> This rise has been driven by a surge in weak and vexatious claims, as some employees – sometimes encouraged by unscrupulous lawyers – seek to take advantage of the system. It is a mark of how spurious many claims are that almost a third are withdrawn by the applicant, while of the claims that reach a hearing, employers are now six times more likely to win than lose.<sup>42</sup>

These figures might suggest employers are coping. But, this fails to take account of the time, money and stress it costs managers to handle these claims, particularly at smaller firms with limited resources. Each case costs the employer an average of £2,000 just to complete the tribunal form, and up to £4,210 for advice and representation after the claim has been submitted, according to the Advisory, Conciliation and Arbitration Service (Acas).<sup>43</sup> Many choose to settle out of court to avoid costs and the risk of arbitrary decisions against them. In 2011, two-fifths of cases were settled this way – despite a majority of the employers being advised that they would win at a hearing.<sup>44</sup>

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<sup>41</sup> CBI/Harvey Nash, [Employment Trends Survey 2011](#), June 2011, p. 24.

<sup>42</sup> Ibid., p. 24.

<sup>43</sup> [The Guardian](#), 27 March 2010.

<sup>44</sup> CBI/Harvey Nash, [op. cit.](#), p. 25.

Employers of all sizes will not be encouraged to hire so long as they face a system which is weighted against them. At the moment taking on new workers – and firing bad ones – is accompanied by disproportionate risk and uncertainty.

There are a number of changes that would help reduce the volume of abusive claims. These include strengthening the power of tribunals to strike out claims (or parts of claims) which have no reasonable prospect of success, and increasing the deposits required for weak claims. Currently, judges can require a party to pay up to £500 as a condition of being allowed to pursue all, or part, of their claim or response.<sup>45</sup> A reasonable option would be to increase the maximum level of this deposit to £1,000.<sup>46</sup> The Government could also introduce modest fees for taking a case to a tribunal, which litigants will get back if they win.<sup>47</sup>

It is vital the Coalition ends what the Chancellor has called “the one-way bet against small business”.<sup>48</sup> Access to justice is important, and any new system must be fair. However, it must also be imposed at a level which deters those who are currently seeking to bully employers into buying them off.

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<sup>45</sup> By making an order under Rule 20 of the Employment Tribunal Rules 2004.

<sup>46</sup> Department for Business, Innovation and Skills, [Resolving Workplace Disputes: a consultation](#), January 2011, pages 31-32.

<sup>47</sup> The government will launch a consultation on the introduction of fees in employment tribunals and the employment appeal tribunals later in the year. See [Hansard](#), 19 October 2011, column 286.

<sup>48</sup> George Osborne, [Together we will ride out the storm](#), speech to Conservative Party conference, 3 October 2011.

#### **PROPOSAL 4: Vet employment claims before they come to an Employment Tribunal – checks on spurious claims**

The rising number of employment claims should not only be tackled by making spurious claims less attractive. Procedurally, the process should also be streamlined to weed out manifestly unmeritorious cases before they can begin.

More pre-vetting of claims has been called for by both the Institute of Directors and the Confederation of British Industry (CBI).<sup>49</sup> This could be achieved by installing a legally-qualified registrar to scrutinise employment claims before they ever come before a tribunal. Their task would not be to adjudicate the rights-and-wrongs of claims, but to screen their basic admissibility.

Critics will argue such a move would risk denying victims access to justice. But this ignores the fact that almost half of employers surveyed by the CBI say that, in their experience, the number of weak and vexatious claims has increased over the last 12 months.<sup>50</sup> When the number of trivial claims is growing, firms will be understandably reluctant to take entrepreneurial risk and expand their workforce.

The registrar service could also benefit employees with a genuine grievance. Most claimants enter litigation without formal representation. Government figures from 2008 reveal only a third of claimants nominated any form of professional representative on their

initial claim form. Fewer than one in six nominated a lawyer.<sup>51</sup>

In these circumstances, it is to be expected that a number of potentially meritorious claims suffer from poor drafting or presentation, and fail to deliver justice for the claimants. Whilst the registrar service would not offer formal legal advice, it could act as an information service, pointing claimants in the direction of bodies such as the Citizens Advice Bureau or other advisory services that may be able to assist or advise on a *pro bono* basis, such as LawWorks, The Cooperative Legal Services or the Bar Pro Bono Unit.

In this way, a pre-vetting service could help ensure not only that employers are spared the cost of defending the increasing number of unmeritorious cases choking enterprise, but also help those with a legitimate grievance to access the advice necessary to articulate it in as legally effective a way as possible. Overall, reducing the costs of litigation will free resources up to expand, creating new jobs.

#### **PROPOSAL 5: Make compromise agreements easier to use – promote alternative dispute resolution**

Reforming the employment claims process is important. However, it is also desirable to discourage valid claims from going to an employment tribunal unnecessarily – which is rarely in the interests of either party.

Compromise agreements involve an employer making a payment to an employee in return for the employee agreeing not to pursue any claim they may have to an employment tribunal. They are an increasingly popular means of conflict resolution – 52% of

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<sup>49</sup> Institute of Directors, [The Route Back to Growth](#), 2011, p. 7 and CBI, [Making Britain the place to work](#), June 2010, p. 12. The CBI calls for more use of pre-hearing reviews.

<sup>50</sup> CBI/Harvey Nash, [Employment Trends Survey](#) 2011, June 2011, p. 26.

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<sup>51</sup> Department for Business, Innovation and Skills, [Survey of Employment Tribunal Applications 2008](#), March 2010, pp 45 and 148.

respondents to a recent employers' survey said their use had increased in the last two years, while only 6% thought they had become less common.<sup>52</sup>

Both employer and employee can gain from a swift compromise resolution to a dispute. If a compromise can be achieved, it will often be preferable to the uncertainty and the extra legal costs likely to be associated with taking a case to a tribunal. The employee is also spared the ordeal of litigation.

However, at present compromise agreements cannot be used in various matters involving the Equality Act, TUPE regulations<sup>53</sup> and the Agency Workers Regulations.<sup>54</sup> It appears that this is not an intentional exclusion, but the result of poorly-drafted legislation.<sup>55</sup>

The Government should make the necessary amendments and allow employers and employees to reach effective agreements wherever possible.<sup>56</sup> The resources saved by employers could be far better spent growing businesses and hiring new staff.

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<sup>52</sup> Chartered Institute for Personnel and Development, [Conflict Management](#), March 2011, p. 10.

<sup>53</sup> See recommendation 8, below.

<sup>54</sup> See recommendation 9, below.

<sup>55</sup> CBI, *Settling the Matter*, April 2011, p. 6. Accessed 11 August 2011. Link no longer available.

<sup>56</sup> Amend section 147 of the Equality Act 2010. Introduce the necessary provision to the Agency Workers Regulations 2010 (such a provision is currently absent). Amend the TUPE Regulations 2006 by expanding Regulation 16 to create a stand-alone ability to compromise.

## **PROPOSAL 6: Manage the end of the Default Retirement Age – promote flexible working for senior employees**

George Gibbs is 83. This summer, he started work as a van driver for a plumbing firm in south London. After a lifetime in employment, he insists, “as long as I’ve got something to do, that’s all I ever wanted”.<sup>57</sup>

Mr Gibbs is typical of the growing number of older people in the workforce. Older employees can be a huge asset, often combining experience and reliability. Increasingly, people want to work beyond the traditional retirement age. A recent survey revealed 42% plan to work past 65 – rising to 54% among those over 55.<sup>58</sup>

In April 2011, the Coalition abolished the Default Retirement Age (DRA) of 65. This poses new challenges for business and workers alike.

The typical career path is changing. In the past, people would expect to take on more responsibility over time. Many career trajectories will now curve instead, with employees staying in work as they enter their seventies, but in roles that may become less intense or demanding.

The unresolved question is how employers manage this process. Two-thirds of employers are concerned about how line managers will deal with declining performance among older employees. Half expect more age-related employment tribunal claims.<sup>59</sup> It is easy to imagine some older workers soldiering on in roles which are no longer suitable, and

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<sup>57</sup> [Kent Messenger](#), 31 August 2011.

<sup>58</sup> Chartered Institute for Personnel and Development, [Focus on the ageing workforce](#), October 2010, p. 2.

<sup>59</sup> CBI/Harvey Nash, [Employment Trends Survey 2011](#), June 2011, p. 28.

managers refraining from discussing alternative positions for fear of being labelled discriminatory.

Employers should therefore be able to have an annual “protected conversation” with employees aged over 65, which could not constitute the basis for a legal claim.<sup>60</sup> This discussion, which could also be initiated at any time by the employee, would cover hours, duties, pay and thoughts about ultimate retirement. The Deputy Prime Minister hinted at this in a recent speech calling for employers to be able to have “frank discussions” with older staff.<sup>61</sup> The Government should make this a priority.

Employers would benefit from greater certainty about managing their workforce, both in terms of allocating work and knowing when they need to find a replacement. A protected conversation would also help reduce the risk of litigation arising from an employee developing a medical problem from continuing in a job, or part of a job, that they are no longer able to perform.

Some critics will say this is about easing older staff out of the workplace. But, employees will benefit from better performance management too. It is neither realistic nor fair to expect older workers to perform like they did when they were 20 years younger. Furthermore, giving employers confidence that they can manage the situation will boost older people’s job prospects. If the risk of having to employ ageing staff indefinitely is seen as too great, employers may quietly back away from hiring them.

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<sup>60</sup> The conversation would need to be exempt under the age discrimination provisions of the Equality Act and explicitly permitted in law.

<sup>61</sup> [Daily Telegraph](#), 25 October 2011.

The advantage of ending the DRA is that it increases the labour supply for business.<sup>62</sup> The protected conversation would ensure that those benefits are realised – without deterring employers from hiring older staff, or creating legal uncertainty about line management beyond 65.

### **PROPOSAL 7: Raise the bar for strike action – safeguards to protect the hard-working majority**

In autumn 2010, the RMT union held four days of tube strikes in London, with 32% support from its membership.<sup>63</sup> It was protesting against plans to cut 800 staff, mainly from ticket offices. The rationale for change was clear: customers are increasingly buying tickets online or at self-service machines. London Underground’s plan involved no compulsory redundancies, and all stations would still be manned. However, Bob Crow insisted the reforms would turn the tube into a “death trap”.<sup>64</sup>

Trade unions might seem a diminishing threat to business. Their membership has halved since 1979, and today only 15% of private sector employees belong to one.<sup>65</sup> But this underestimates the extent of strike action in the public sector, where union membership is concentrated. The consequences spill over into the wider economy. According to the London Chamber of Commerce, each day of

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<sup>62</sup> Department for Business, Innovation and Skills, [Phasing out the default retirement age: a consultation](#), July 2010, p. 44.

<sup>63</sup> There was a 75% vote in favour of industrial action, on a turnout of 43%. 32% of those balloted therefore voted in favour of strike action. Figures obtained from Transport for London, April 2011.

<sup>64</sup> [Evening Standard](#), 27 April 2010.

<sup>65</sup> Policy Exchange, [Modernising Industrial Relations](#), September 2010, pages 4 and 10.

tube closures costs the capital's economy £48 million.<sup>66</sup> Similarly, if schools are shut, working parents may struggle to find childcare.

Minority strikes are increasingly common in the public sector. In June 2011, none of the four teaching and civil service unions which walked out had the support of a majority of their membership.<sup>67</sup> In November, Unison achieved just 22% backing for a strike over pensions.<sup>68</sup> In many cases, union bosses will pressurise all members to back a strike – and lose pay – even if they did not vote for strike action.<sup>69</sup>

Why should the hard-working majority who want to work be stopped from doing so? Why should British business be damaged by a militant minority who cannot even convince their own members to support industrial action?

Currently, unions only need the support of a majority of those voting in a ballot to call industrial action. The abstention of those who decline to vote is taken as tacit endorsement. A modest change would be to require a majority of support from all balloted members before a strike can proceed – targeted at the emergency services and transport sector,

where the scope for disruption to the wider public is so high.<sup>70</sup>

The unions complain that this is too high a bar.<sup>71</sup> But, unions expect all their members to observe a strike – so it is only fair to expect a majority of them to agree to it. Critics respond that MPs don't need 50% support to win election.<sup>72</sup> But no-one, least of all MPs, has the power to paralyse vital industries, with legal immunity from being sued, in the way union bosses currently do.

Several EU countries already have voting thresholds, including Denmark, the Czech Republic, Poland and Slovakia. Proposals for a voting threshold are backed by the Mayor of London<sup>73</sup> and the CBI.<sup>74</sup> The Prime Minister has told Parliament he is happy to consider the argument.<sup>75</sup> Polling has shown 58% support for a threshold of 50% or higher, to combat minority strikes.<sup>76</sup>

Reforming strike laws should be a priority for the Coalition. At a time when Britain needs to encourage enterprise and get people into work, a militant minority must not hold the country to ransom. Time and money lost as a result of strike action could be better spent by business to fund new jobs and growth.

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<sup>66</sup> [London Chamber of Commerce and Industry](#), 24 August 2010.

<sup>67</sup> The National Union of Teachers had 37% support from its members. The Association of Teachers and Lecturers had 29% support. The Universities and Colleges Union (UCU) had 23% support. The Public and Commercial Services Union had 20% support. Based on figures released by those unions.

<sup>68</sup> [Unison](#), 3 November 2011. 245,358 members voted for strike action out of 1,100,000 balloted.

<sup>69</sup> See for example the [RMT's instructions to its members](#) in August 2010, or the [UCU's instructions to its membership](#) in 2011.

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<sup>70</sup> This would be achieved by amending section 226 of the Trade Union and Labour Relations (Consolidation) Act 1992.

<sup>71</sup> See for example the views of TUC General Secretary Brendan Barber, [BBC](#), 12 January 2011.

<sup>72</sup> See for example the views of Keith Ewing, [The Guardian](#), 26 April 2011.

<sup>73</sup> [Daily Telegraph](#), 4 October 2010.

<sup>74</sup> CBI, [Making Britain the place to work](#), June 2010, p. 9.

<sup>75</sup> [Hansard](#), 12 January 2011, column 287.

<sup>76</sup> YouGov for [The Sun](#), 27-28 June 2011.

## REFORM AND THE EUROPEAN UNION

In October 2011, there were calls for a referendum on Britain's future in the European Union.<sup>77</sup> The Government insisted it was not the right time for a poll on whether the UK should withdraw.

The Prime Minister did however commit to reclaiming powers from the EU. He said:<sup>78</sup>

***“This is the right time to sort out the Eurozone’s problems, defend your national interest and look to the opportunities there may be in the future to repatriate powers back to Britain. Obviously the idea of some limited treaty change in the future might give us that opportunity.”***

This opportunity should be seized, and used to remove some of the obstacles to British business. It is estimated that cutting the cost of EU social regulations by 50% could result in a boost to economic output equivalent to the creation of 140,000 new jobs in the UK.<sup>79</sup>

Any treaty renegotiation process would take time. However, certain powers could be returned to national competence more swiftly, or provision made for national opt-outs. Repatriation of powers in the following areas should top any list of priorities.

## PROPOSAL 8: TUPE reform: encourage business rescues

When one business is sold to another, the TUPE regulations<sup>80</sup> promote continuity by stipulating employees should transfer with it. Perversely, the way TUPE works can have negative consequences for jobs.

### (a) Rescue Culture

If a struggling business has entered administration, it is often vital to find a purchaser to rescue it. However, it is likely TUPE will apply in these circumstances to transfer staff to the purchaser – together with potential liabilities.<sup>81</sup>

Potential buyers have to take on all the staff of a failing business, or risk claims for unfair dismissal. This can deter them from trying to turn a firm around. This is bad news for employees: keeping the company alive ensures some jobs can be preserved, as opposed to all jobs being lost if no buyer is found. Over time, if the company recovers and grows, it can also create new jobs.

Some provisions exist under TUPE to make purchases more likely in these circumstances.<sup>82</sup> However, legal experts say these do not work effectively in practice.<sup>83</sup> It

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<sup>77</sup> See the Parliamentary debate of 24 October 2011, [Hansard](#), 24 October 2011, column 46.

<sup>78</sup> [Daily Telegraph](#), 23 October 2011. See also the Prime Minister's answers to questions from Mark Pritchard MP and Andrew Rosindell MP at Prime Ministers Questions on 19 October 2011, [Hansard](#), 19 October 2011, columns 895 and 898.

<sup>79</sup> Open Europe, *Repatriating EU social policy: the best choice for jobs and growth?* Press note issued on 7 November 2011.

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<sup>80</sup> [Transfer of Undertakings \(Protection of Employment\) Regulations](#) 2006.

<sup>81</sup> A Kastrinou, N Shah and O Gough, “Corporate rescue in the UK and the effect of the TUPE”, *Company Lawyer*, 2011, 32(5), p. 131-137.

<sup>82</sup> TUPE Regulations 8(5), 8(7) and 9.

<sup>83</sup> The author consulted with leading employment law practitioners during the summer and autumn of 2011. An opportunity for change was rejected in 2009 when the Employment Appeals Tribunal ruling in *Oakland v Wellswood (Yorkshire) Limited [2008] UKEAT 0395 08 0511* was reversed by the Court of Appeal. See Kastrinou, Shah and Gough in *Company Lawyer*, op. cit., for a description of the case.

would help to encourage a more effective rescue culture if TUPE was excluded in this situation – as it already is with liquidations. This would require renegotiation at EU level.<sup>84</sup>

#### **(b) Promoting successful business models**

TUPE prevents employers from harmonising the terms and conditions of a newly acquired business with those of their existing staff. Firms can make changes to reflect market conditions or a restructuring of jobs, but not to bring new staff into line with their current workforce.<sup>85</sup>

This is bad for business: successful companies should be free to extend their more competitive business model to new acquisitions. By doing so they will be better able to grow their business, and generate jobs. The Government should push for a change to the Directive at the EU level.

### **PROPOSAL 9: Abolish the Agency Workers Regulations 2010 – promote jobs and respect worker choice**

Steven Clarke is an IT contractor – and an agency worker. He chooses this way of

working because of the higher pay it can deliver.

Jan Aldred is also an agency worker. She works in social care, and prizes the flexibility temporary jobs give her, allowing her to balance work with her children.<sup>86</sup>

Steven and Jan are some of the 1.3 million agency workers in Britain, who have made temping a professional choice – either for higher pay or greater flexibility.

This choice is threatened by the Agency Workers Regulations, which entered into force in October 2011 – reflecting a change to EU law.<sup>87</sup> The Regulations give agency workers the right to the same basic employment and working conditions as full-time staff, once they complete a 12-week qualifying period.<sup>88</sup>

Employers have expressed concern. Almost two-thirds fear the Regulations will bring extra costs and a reduction in flexibility.<sup>89</sup> The Government's own figures suggest the annual cost to employers will be in the region of £1.8 to £1.9 billion.<sup>90</sup>

The logic is simple – the Regulations increase the cost of hiring. Accordingly, firms will think twice before employing agency workers. A 2008 survey warned that the Regulations mean 73% of firms will either stop using agency

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<sup>84</sup> TUPE gives effect to [EU Directive 2001/23/EC](#), – the consolidated version of the EU Acquired Rights Directive of 1977.

<sup>85</sup> TUPE Regulations 4(4) and 4(5). This rule has been interpreted very narrowly by both the UK and EU courts: see *Berriman v Delabole Slate Limited* [1985] IRLR 305 and *Martin and others v South Bank University* [2004] ICR 1234, ECJ. Income Data Services, *Employment Law Handbook on Transfer of Undertakings*, March 2011, states (at p. 362) that the last Government “reluctantly concluded that, in view of the relevant case law, there was a very serious risk that widening the ability of the parties to agree to vary contracts for the express purpose of harmonisation would be incompatible with the Directive as currently drafted. For that reason, it decided not to include a provision in the 2006 Regulations permitting post-transfer harmonisation”.

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<sup>86</sup> [Guardian](#), 16 September 2011.

<sup>87</sup> [EU Temporary and Agency Workers Directive, no. 2008/104/EC](#).

<sup>88</sup> Department for Business, Innovation and Skills, [Agency Workers Regulations: Guidance](#), May 2011, p. 3.

<sup>89</sup> Department for Business, Innovation and Skills, [Consultation on draft Agency Workers Regulations](#), October 2009, p. 137. The statistics come from a CBI Employment Trends Survey in 2007.

<sup>90</sup> *Ibid.*, p. 111.

workers entirely or reduce their use.<sup>91</sup> Robin Chater, Secretary-General of the Federation of European Employers, forecasts agency use will be halved, calling the Regulations “the straw that could break the camel’s back”.<sup>92</sup>

It is ironic that legislation designed to protect workers will, in reality, cost jobs. The Government should seek an exemption for the UK from the EU Directive, and scrap the Regulations.<sup>93</sup> They undermine freedom of choice: individuals should be able to negotiate contracts to suit their personal priorities. Even more importantly, the Regulations threaten jobs at a time when we need to be creating them.

### **PROPOSAL 10 Abolish the Working Time Regulations 1998<sup>94</sup> – respect employees’ freedom to work**

Alan Gallagher is a hotel supervisor in Fort William in Scotland. Working in the hospitality industry, he needs flexible working hours – working long days at the height of the season, and less in quiet times.<sup>95</sup>

Alan is one of three million people in Britain who work more than 48 hours a week.<sup>96</sup> Their right to do so is vital for the economy.

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<sup>91</sup> Ibid, p. 137, citing polling by REC in 2008.

<sup>92</sup> [Guardian](#), 16 September 2011.

<sup>93</sup> The best mechanism for this would be an exemption from Article 153 of the EC Treaty (as amended by the Lisbon Treaty), which is the foundation for some of the most far-reaching regulations affecting UK employers and workers. See Open Europe, [Repatriation of EU Social Policy: the right focus for a Conservative Government](#), November 2009, p. 4.

<sup>94</sup> Together with the Amendment Regulations of 1999, 2001, 2003, 2006, 2007 and 2009.

<sup>95</sup> Open Europe, [Time’s Up! The case against the EU’s 48 hour working week](#), March 2009, p. 7.

<sup>96</sup> Ibid., p. 3.

In order to work more than 48 hours a week, British workers have to volunteer to opt out of the Working Time Regulations, which were imposed by the EU in 1993.<sup>97</sup>

It is estimated that the impact of the presumption of a 48 hour week under the Regulations costs the UK economy more than £3.6 billion every year.<sup>98</sup> In addition, the scope of the Regulations has gradually been widened by a series of court cases, as well as legislative amendments – there were no fewer than eight between 1998 and 2009. These included some extending the Regulations to groups such as junior doctors. The British Medical Association has calculated that the effect of a single 2003 ruling by the European Court of Justice was equivalent to losing between 4,300 and 9,900 junior doctors by 2009.<sup>99</sup>

By limiting flexibility and adding to employers’ costs, the Regulations impede job creation. Critics say repealing them would leave workers

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<sup>97</sup> The Working Time Regulations transpose the EU Working Time Directive into UK law. Despite the UK’s protests, the Working Time Directive was introduced as a Health and Safety measure rather than as employment legislation (which the UK can opt out of since the Maastricht Treaty). The UK also argued that the Working Time Directive was introduced under the wrong Treaty base. It was introduced under Article 118A (which allowed qualified majority voting) instead of Article 100 (which required unanimity). The UK eventually abstained from the vote which introduced the Directive in 1993. Practical Law, [The Working Time Directive: UK loses the battle](#), 1 December 1996.

<sup>98</sup> Open Europe, [Repatriation of EU Social Policy: the right focus for a Conservative Government](#), November 2009, p. 7.

<sup>99</sup> [Case C-151/02](#). For full background to the ruling and the BMA’s estimate, see Open Europe, [Time’s Up! The case against the EU’s 48 hour working week](#), March 2009, pages 24-25.

at the mercy of unscrupulous bosses.<sup>100</sup> But, the Regulations are ineffective as a social protection measure. The Chartered Institute for Personnel and Development believes the Regulations “have negligible value in limiting unhealthy workplace behaviour”, and has called for them to be abolished.<sup>101</sup>

Finally, Britain’s right to allow its workers to opt out of the 48 hour week under the Regulations is subject to qualified majority – as opposed to unanimous – voting in the EU. This means the UK could be outvoted on the issue at any time. In 2009, this was only narrowly avoided, after MEPs voted to scrap the opt-out in the European Parliament.<sup>102</sup>

Britain should secure a total opt-out from the Working Time Directive and scrap the UK Regulations, ensuring that this costly, anti-jobs legislation cannot cause further damage to the economy.<sup>103</sup>

## CONCLUSION

When it took office last year, the Coalition’s economic inheritance could not have been worse. In 2008 and 2009, the UK economy shrank for six consecutive quarters – the longest recession since quarterly records began in 1955.<sup>104</sup> The economies of our main export markets – particularly in the EU – are rapidly deteriorating. And the Governor of the Bank of England, Mervyn King, warned in

October that “this is the most serious financial crisis at least since the 1930s, if not ever”.<sup>105</sup>

Set against this, the Coalition’s economic achievements are substantial. In March, the Office for Budget Responsibility announced the Government is on course to eliminate the deficit by 2015.<sup>106</sup> In October, the rating agency Standard & Poor’s confirmed the UK’s AAA rating is secure, emphasising the importance of the deficit reduction plan.<sup>107</sup>

But UK growth remains sluggish. If we are to meet the Chancellor’s aspiration of clearing every obstacle to growth, then the Coalition must urgently reduce the burdens of employment regulations.

And the political message should be clear: this package of measures will increase UK economic competitiveness and deliver greater social justice by focusing on creating new jobs for the economically most vulnerable section of our society: the unemployed.

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<sup>100</sup> See for example Brendan Barber of the TUC, quoted in the [Evening Standard](#), 24 May 2010.

<sup>101</sup> [Personnel Today](#), “Working Time Regulations should be scrapped, urges CIPD”, 24 May 2010.

<sup>102</sup> Open Europe, [Repatriation of EU Social Policy: the right focus for a Conservative Government](#), November 2009, p. 9.

<sup>103</sup> As with the Agency Workers Regulations, a British opt-out from Article 153 of the EU Treaty would deliver this.

<sup>104</sup> [BBC](#), 27 January 2010.

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<sup>105</sup> [The Guardian](#), 6 October 2011.

<sup>106</sup> Office for Budget Responsibility (OBR), [Economic and Fiscal Outlook](#), March 2011, p. 11.

<sup>107</sup> [BBC](#), 3 October 2011.



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