HUNGARIAN LABOUR LAW
E - J O U R N A L

'All in this together?'
UK Labour Market Reforms under the Coalition Government

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Introduction

Writing in a comparative work on the impact of the Global Financial Crisis on Labour Law in the United Kingdom several years ago, Nicola Countouris, Mark Freedland and I noted that neither the impact of the financial crisis nor the formation of a coalition government following the general election in May 2010 had led to drastic changes in employment law. Instead,

> the Coalition Government [had] thus far focused its political activities on public sector cuts and welfare reform rather than on labour law reform. In fact it is probably accurate to suggest that labour law reform has more frequently been the subject of speculation rather than policy […] whilst fearing that […] it is not unlikely that the Government will use the second half of its term to lay at least some labour law reforms before Parliament.[2]

As that work was about to be published, however, the tide began to turn – and drastically so, far beyond what we had been able to imagine. Within a short period

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[2] M. Freedland, N. Countouris and J. Prassl (2012): Royaume-Uni. In: M. Escande-Varniol, S. Laulom and E. Mazuyer (eds): Quel Droit Social Dans une Europe en Crise? Brussels, Larcier. The present article builds and expands upon this previous work at several points, though all responsibility rests with the present author alone.

and with little consultation, the Coalition government brought in a series of significant changes to United Kingdom Employment Law, [3] at a continuously accelerating pace. Indeed, even at the time of writing of the present piece, it is not yet possible to see an end in sight, with proposed changes announced on an on-going basis.[4]

This situation in flux is a challenge for the present paper, which hopes to set out and explain some of the Coalition Government's labour market reforms, as well as beginning to sketch out their broader implications: it is unclear to which extent the changes seen thus far fit into a broader theme; let alone to guess the way in which they relate to as of yet unannounced policy initiatives. There is nonetheless value in taking stock, even if only at a halfway point on the road.[5] An overview of recent changes allows reflection on the potential interrelationship between different, supposedly distinct and piece-meal reforms, and provides the necessary material to see whether any, and if so which, themes or patters emerge from the reform proposals to date. The Chancellor of the Exchequer famously remarked in his speech to the Conservative Party conference in 2009 (and on several occasions since) that 'we are all in this together'.[6] The present article hopes to demonstrate that the very opposite is in fact the case, as recent reforms lead to the rapid fragmentation of employment protection.

To this end, it is structured as follows. Part one provides examples of recently enacted reforms, both as regards procedural and substantive employment law, loosely clustering them together under the headings of changes to unfair dismissal law, the introduction of employment tribunal fees and changes in the tribunals' judicial composition, and the highly controversial 'shares for rights' scheme embodied in the new notion of employee shareholders. Part two then turns to an analysis (preliminary

[3] Whilst there are generally considerable differences between the different legal systems found within the United Kingdom, large parts of Employment or Labour law are an important exception to this rule, insofar as they apply across Great Britain. See A. Bradley and K. Ewing (2011): Constitutional and Administrative Law. 15th ed, Pearson, p. 40.; Trade Union and Labour Relations (Consolidation) Act 1992 (hereinafter, 'TULRCA') section 301(1). For present purposes, the two terms will therefore be used interchangeably.

[4] For the most recent example, see https://www.gov.uk/government/consultations/zero-hours-employment-contracts (last accessed 12 January 2014).

[5] For a first complete attempt, see B. Hepple (2013): Back to the Future: Employment Law under the Coalition Government. 42 ILJ p. 203.

[6] See eg http://news.bbc.co.uk/1/hi/uk_politics/8292680.stm (last accessed 1 January 2014).

by its very nature) of the coalition government's reforms to date, on the basis of the examples seen in part one. Two interdependent themes are explored in particular: first, the deep *flaws* apparent in the *motivations* which are said to lie behind the changes: it is difficult to see how, if at all, any of the developments outlined could be understood as contributing to the government's overarching aim of reducing the national deficit. The reforms are furthermore equally difficult to explain with alternative motivations that have been mooted, such as job creation, or easing the regulatory burden on employers. Indeed, if anything, the opposite impact can thus far be observed in all areas surveyed. A second theme then looks at the *flawed implementation* of policy changes in the three areas outlined. An overly hasty consultation process, conducted in the face of sometimes near-unanimous opposition from all sides has led to legislation that is difficult to square with existing frameworks of UK Employment Law (as well as other, related, areas such as Company Law). Several individual reforms will furthermore potentiate each other, leading to a stark shift of risk away from those parties best place to absorb it (employers) to individual workers.[7] A brief conclusion sets these domestic developments in the broader context of EU law, and queries the potential implications of Union involvement in the areas surveyed.

Labour Law Reforms

UK Employment Lawyers have been faced with a veritable patchwork of reforms over the past years, which makes the choice pertinent examples both in procedural and substantive law for subsequent analysis particularly challenging. The task is made more difficult than appears at first by the fact that most reforms have been enacted in a piece-meal way, through executive orders or as individual sections included in broader legislative enactments.[8] There is furthermore a growing list of reform suggestions contained in official consultations, government advisors' proposals, policy discussions and more informally mooted plans.[9] Instead of collating and presenting such a patchwork list, however, the focus of this first section will be on

[7] J. Hacker (2008): The Great Risk Shift: the New Economic Insecurity and the Decline of the American Dream. Oxford, OUP.
[8] The notion of the Employee Shareholder (section 1C, below), for example, can be found in section 31 of the Growth and Infrastructure Act 2013, following on from an enactments on the 'compilation of Welsh rating lists' (section 30).
[9] For an overview, see for example Hepple (n 4) op. cit.

succinctly setting out developments in arguably the three most high-profile areas in the period up until the late autumn of 2013: modifications of the law of unfair dismissal protection, significant changes in the system of employment dispute adjudication, and the introduction of a new employment 'status', *viz* the notion of the employee shareholder.

Before turning to that exposition and analysis, two important caveats should be made concerning the choice of material that will be surveyed. A first point arises as regards the relationship between common law developments and statutory reforms. The focus on legislative (statutory) provisions in subsequent discussions should not be taken as a suggestion that judicial pronouncements that make up the Common Law are somehow less relevant today – they are just as crucial. For present purposes, however, a focus on legislative materials is justified for two reasons. First, because they are the clearest and most direct expression of government policy towards labour market regulation – the concern which sits at the core of this article. Second, because beginning with statutory developments is often the only way to begin to make sense of broader themes in UK employment law. As Davies and Freedland have noted, that system might frequently appear to 'lack all coherence unless one ha[s] obtained a good grasp of the tumultuous history of […] legislation.'[10] Whilst the past might have been driven by a focus on the common law of the contract of employment[11] and an attitude of state restraint during periods of collective *laisser-faire*,[12] statutory intervention is today key to understanding many if not most areas of domestic employment law.

The second limitation is primarily driven by considerations of space, and the fast-paced environment in which the reforms have been taking place: the present article does not claim to present a comprehensive overview over all areas of recent or proposed future reforms. Examples of excluded topics include 'passive action' or non-implementation of key provisions in existing laws,[13] an on-going 'Red Tape

[10] Cf. P. Davies and M. Freedland (1993): Labour Legislation and Public Policy. (Clarendon Series) Oxford, OUP, Preface.
[11] M. Freedland (1976): The Contract of Employment. Oxford, OUP.
[12] P. Davies and M. Freedland (eds.) (1983): Kahn-Freund's Labour and the Law. 3rd ed., London, Chapter VIII.
[13] Notably the Equality Act 2010.

Challenge' run at the highest level of government,[14] and a recently launched consultation on the regulation of so-called 'Zero-Hour Contracts'.[15] Instead, three examples have been chosen and will be sketched out, *pars pro toto*, in order to be able to develop and illustrate the analytical strands of the subsequent part. Whilst detailed guidance on individual points is not (yet) always available in leading reference works,[16] an increasing amount of pertinent commentary and analysis can be accessed online, notably through the Institute for Employment Right (IER)'s Coalition Timeline.[17]

Unfair Dismissal

The primary regulation of dismissal in the United Kingdom can be found in the statutory system of unfair dismissal, as opposed to contractual system of wrongful dismissal, heavily hampered in its development since the House of Lords' decision in *Johnson v Unisys*.[18] As protection is limited to the core group of workers, employees,[19] and only following an extended period of service, a large number of individuals are excluded from the provisions' scope. There are several categories of reasons for a dismissal; broadly speaking these are 'ordinary' Unfair Dismissal (where a potentially fair substantive reason is scrutinised by the tribunal in relation to a 'band of reasonable responses'[20]) and automatically Unfair Dismissal (where the ground of dismissal falls within a protected category). According to leading commentators, the system is thus already 'heavily weighted against the employee, in particular because the tribunal is not allowed to find a dismissal unfair simply because it considers it so to be;'[21] the coalition government has nonetheless introduced several key changes.[22]

[14] See the Cabinet Office's website at http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/ (last accessed 24 December 2013).
[15] See n 3, above.
[16] For notable exceptions, see the frequently updated versions of S. Deakin and G. Morris (2012): Labour Law. 6th ed., Hart.
[17] http://www.ier.org.uk/resources/coalition-timeline (last accessed 28 October 2013).
[18] *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL); *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.
[19] As defined in section 230(1) of the Employment Rights Act ('ERA') 1996.
[20] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17.
[21] K. Ewing and J. Hendy (2012): Unfair Dismissal Law Changes – Unfair? 41 ILJ pp. 115, 117.
[22] For a full overview, see ibid.

The first of these, an increase in the time threshold before an employee can avail herself of 'ordinary' Unfair Dismissal protection, was announced in George Osborne's speech at the Conservative (Tory) Party Conference in October 2011,[23] and writ into law not long thereafter through the The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.[24] The increase from a one-year to a two-year threshold made the UK qualification period the longest across the European Union,[25] and had an immediate, significant impact: more than 3 million employees in the second year of employment are set to loose their right to be protected against an unfair termination of their contract of service.[26]

Soon thereafter, a second change in the remedial dimension of the law of Unfair Dismissal lowered the statutory limit, or cap, on damages awarded to successful claimants. Section 15 of the Enterprise and Regulatory Reform Act 2013 gave the Secretary of State the power to amend section 124 of the Employment Rights Act 1996, which sets out the statutory limits on compensatory awards. The relevant changes were introduced soon thereafter, with limitations laid down in The Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013: employees' awards are now limited to the lower of £74,200 or 52 weeks' salary.[27] This cap is significant, insofar as it nearly impossible to outflank;[28] its employer-protective effect, on the other hand, is difficult to see, given that in reality the median unfair dismissal award is a sum just in excess of £4,500.[29]

By lifting the qualification threshold to two years and capping damages thus, the coalition government have made unfair dismissal protection available to even fewer employees, and sent out a strong signal that claimants, even if successful, are severely limited in what they can hope to achieve. The reforms should furthermore not be seen

[23] http://www.telegraph.co.uk/news/politics/georgeosborne/8804027/Conservative-Party-Conference-2011-George-Osborne-speech-in-full.html (last accessed 1 November 2013). The same speech was used to introduce some of the key changes discussed in the subsequent section, and will be analysed in more detail in part II of this paper). See also http://www.eurofound.europa.eu/eiro/2011/10/articles/uk1110019i.htm (last accessed January 1, 2014).
[24] Statutory Instrument SI 989/2012.
[25] Ibid section 3.
[26] Ewing and Hendy (n 20) op. cit. p. 116, citing BIS figures and TUC overlapping in this regard.
[27] Statutory Instrument SI 1949/2013. See also the ACAS information at http://www.acas.org.uk/index.aspx?articleid=4074 (last accessed 1 December 2013).
[28] *Johnson v Unisys; Edwards v Chesterfield* (n 17).
[29] Ewing and Hendy (n 20) op. cit. p. 117, drawing on statistic produced by the Ministry of Justice.

in isolation: as Hugh Collins has famously remarked, 'this tail wags the whole dog of the employment relation'.[30] The reforms also constitute a watershed insofar as 'the right not to be unfairly dismissed seems to have been thought to be too well entrenched to invite a frontal assault.'[31] They must, finally, be evaluated in the context of the employment tribunal proceeding reforms, which are about to be explored – in particular, the introduction of a compulsory role for ACAS (the Advisory, Conciliation and Arbitration Service).[32]

Employment Tribunal Reforms

The traditional UK approach to employment law adjudication, in place since 1964, tasks specialised Employment (historically Industrial) Tribunals with the resolution of the majority of employment law claims.[33] The basic idea behind their specialised jurisdiction is the provision of an easily accessible and inexpensive system for the resolution of workplace disputes.[34] They are thus different from the mainstream 'Common Law' courts; in particular, by having lay members from both employer and employee sides to assist the presiding judge:

> 'The Industrial Tribunal is an industrial jury which brings to its task a knowledge of industrial relations both from the view point of the employer and the employee […] in a field where conventions and practices are of the greatest importance.'[35]

In a 2011 consultation document, the government set out its plans to 'achieve more early resolution of workplace disputes so that parties can resolve their own problems […] without having to go to an employment tribunal' and 'ensure that, where parties do need to come to an employment tribunal, the process is as swift, user-friendly and effective as possible'.[36] These changes were soon brought into force, through an already-familiar pattern: Part II of the Enterprise and Regulatory Reform Act 2013 set

[30] H. Collins (1992): Justice in Dismissal. Oxford, OUP, p. 270.
[31] Davies and Freedland (n 9) op. cit. p. 200.
[32] See http://www.acas.org.uk/index.aspx?articleid=1342 (last accessed 13 January 2014).
[33] For a fuller introduction, see H. Collins, K. Ewing and A. McColgan (2012): Labour Law. CUP, pp. 28ff.
[34] Report of the Royal Commission on Trade Unions and Employers' Associations (1968, Cmnd 3623) Chapter X.
[35] *Williams v Compair Maxam Ltd* [1982] ICR 156 (EAT) (Browne-Wilkinson J).
[36] BIS & HM Tribunal Service: Resolving workplace disputes: A consultation. London, January 2011.

up the relevant statutory footing, subsequently to be fleshed out in a series of statutory instruments.[37] Three such changes are particularly salient for present purposes.[38]

The first is the introduction of fees for tribunal users. With the coming in force of *The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013* in the summer of 2013, claimants are now expected to pay up to £250 plus £950 to issue a claim and have it heard at first instance.[39] Appeals are even more expensive, costing £400 for the notice to appeal and £1200 for the hearing before an Employment Appeal Tribunal (EAT). [40] Once taken in combination with the claimant's representation cost,[41] and the potential of cost orders against unsuccessful claimants, 'there is clear potential for the entirety of costs consideration to create a "chilling-effect" dissuading those who may have claims to make.'[42]

A second important reform came as regards the composition of employment tribunals hearing particular claims, in particular those for allegedly unfair dismissal. Recent reforms have *de facto* abolished the presence of an 'Industrial Jury',[43] by making it possible to hear claims without the presence of lay members drawn from either side unless the presiding judge decides to the contrary.[44] The government's guidance notes accompanying the change suggest that 'it considers that this change would help the tribunals manage its caseload [sic] in the most efficient manner'. [45]

[37] Employment Tribunals (Constitution and Rules of Procedrue) Regulations 2013, Statutory SI No 1237/2013.
[38] For a complete overview, see D. Mangan (2013): Employment Tribunal Reforms to Boost the Economy. 42 ILJ p. 409. The official government position was first set out in the Department for Business, Innovation and Skills report, 'Resolving Workplace Disputes: Government Response to Consultation' (November 2011), available at https://www.gov.uk/government/consultations/resolving-workplace-disputes-public-consultation (last accessed 1 January 2014). An earlier House of Commons Library Research Note also sets out helpful detail: J Parker, 'Employment Tribunal Reform – Introduction of Fees and New Rules of Procedure' (HC Standard Note, SN6407, August 2012).
[39] SI No 1893/2013, part II.
[40] Ibid, part III.
[41] Though volunteer representation services exist: see eg the Free Representation Unit (FRU), at http://www.thefru.org.uk (last accessed 1 January 2014).
[42] Mangan (n 37) op. cit. p. 415.
[43] Hepple (n 4) op. cit. p. 212.
[44] Employment Tribunals Act 1996 (Tribunal Composition) Order 2012, SI 2012/988. This reform came into force in April 2012. For EATs, see ERRA 2013, section 12.
[45] Explanatory Note to Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 [7.5].

A final change comes in the form of compulsory ACAS involvement in Employment Tribunal proceedings.[46] A modified section 18A of the Employment Tribunals Act 1996 specifies that workers' claims are first to undergo a period of early conciliation at ACAS, before they can be submitted to employment tribunal. As David Mangan notes, this is particularly problematic given the service's on-going funding crisis, and the fact that 'claimant's attitudes are clearly targeted by this measure. It appears that [ACAS]' filtering role will entail putting the realities of claims success to the individuals.'[47]

Employee Shareholders

In his 2012 speech to the Conservative Party Conference, Chancellor George Osborne promised to introduce a 'radical change to employment law'[48] through the creation of a new employment 'status', the employee shareholder. Extensive work on this 'shares for rights' scheme by the present author can be found elsewhere;[49] subsequent paragraphs focus on a succinct presentation of the most important aspects of the reform – introduced despite a near-unanimous consensus that it was unnecessary to encourage the growth of employee ownership, may be harmful to the interests of businesses and their workers, and in the face of repeated government defeats in the House of Lords. The status was enacted via section 31 of the *Growth and Infrastructure Act 2013*, which received Royal Assent on April 25, 2013,[50] and came into force by order of the Secretary of State on September 1, 2013.[51] An extensive set of guidance notes was published online on the same day.[52]

[46] ERRA, section 7.
[47] Mangan (n 37) op. cit. pp. 413–414.
[48] G. Osborne (2013): Party Speech 2012. http://www.conservatives.com/News/Speeches/2012/10/George_Osborne_Conference_2012.aspx (last accessed 3 May 2013).
[49] 'Employee-Shareholder 'Status' (2013): Dismantling the Contract of Employment. 42 ILJ p. 307; J. Prassl (2013): Third Time Lucky? 1 SJ p. 9.
[50] BIS, Enterprise and Regulatory Reform Bill Receives Royal Assent (Press Release, London 25 April 2013).
[51] Growth and Infrastructure Act 2013, s 35(1). As originally announced in HM Treasury, *Budget 2013* (London, March 2013) 1.133.
[52] https://www.gov.uk/employee-shareholders (last accessed 11 September 2013) ('BIS Guidance')

The New Scheme in Outline

A newly inserted section 205A of the *Employment Rights Act 1996* sets out the features of 'Employee Shareholder Status'. Individuals who agree to become employee shareholders are to receive shares in their employing company (or its parent undertaking) with a value of no less than £2,000.[53] In return for the issue of these (capital gains tax-exempt) shares, employees no longer have recourse to the following employment rights set out in the *Employment Rights Act 1996*:[54]

- The right not to be unfairly dismissed
  (This is referred to as 'ordinary' unfair dismissal, as employees remain protected against automatically unfair dismissals,[55] and termination in contravention of the Equality Act 2010)
- The right to statutory redundancy pay[56]
- The right to request flexible working[57]
- The right to request to undertake study or training[58]
- Employee shareholders are furthermore subject to longer notice periods before returning from maternity, paternity or adoption leave (up from six or eight weeks' notice to sixteen weeks)[59]

These substantive reforms are accompanied by a series of procedural safeguards, introduced as a result of several rounds of 'Parliamentary Ping-Pong' in the spring of 2013. Section 205A decrees that prospective Employee Shareholders need to be issued with a detailed statement of particulars, including the terms at which shares will be issued, as well as a list of rights denied.[60] Following receipt of this statement, the worker is entitled to independent advice (at the employer's expense and

[53] ERA 1996, s 205A(1)(a) and (b). The Secretary of State may by order increase this amount: ibid s 205A(11).
[54] ERA 1996, s 205A(2) (a) – (d). Note the exception in s 205A(8).
[55] Such as, for example, being a trade unionist (ERA 1996, s 103) or whistleblowing (ERA 1996, s 103A).
[56] ERA 1996, s 135.
[57] ERA 1996, s 80F.
[58] ERA 1996, s 63D.
[59] Maternity and Parental Leave etc Regulation 1999 (SI 3312/99) reg 11; Paternity and Adoption Leave Regulations 2002 (SI 2788/02) reg 25; Additional Paternity Leave Regulations 2010 (SI 1055/10) reg 30.
[60] ERA 1996, s 205A (1)(c).

irrespective of the employee's eventual decision to become an employee shareholder or not);[61] the offer can only validly be accepted following such advice and after a seven-day cooling-off period.[62]

Provisions have furthermore been made to protect existing employees from suffering detriment in employment and/or unfair dismissal as a result of a refusal to become an employee shareholder. [63] The government has also given an undertaking that jobseekers could not be forced to accept employment as employee-shareholders at pains of losing their entitlement to receive jobseekers' allowance. [64] Whilst take-up was initially surprisingly slow,[65] the present author is increasingly becoming aware of interest in the practical uses of the scheme – most importantly in the Private Equity industry.

Conclusion

Section 1 has thus laid out the recent developments in three key areas, demonstrating the increasing difficulty of bringing unfair dismissal claims given the higher threshold and cap on eventual damages; the hurdles put in claimants' paths through the introduction of mandatory recourse to ACAS and employment tribunal fees as well as changes in tribunal composition, and the introduction of a new employment 'status' which permits employers, in essence, to buy out employees' key rights. In concluding, it should briefly be recalled that, as noted at the outset, this list is far from comprehensive. Notable reforms that have not been covered include the stymying of the Equality Act of 2010 implementation,[66] for example as regards a novel duty on public authorities to take into account socio-economic disadvantages when designing and adopting specific policies, or the new 'dual-discrimination' provision. [67] The Government has officially announced that neither will be brought forward in

[61] ERA 1996, s 205A (7).
[62] ERA 1996, s 205A(6)(b).
[63] By inserting a new s 47G and s 104G respectively into the ERA 1996.
[64] The BIS guidance document (n 33) notes that 'If you are a Jobseeker's Allowance claimant and do not want to apply for an employee shareholder job, you do not have to.'
[65] J. Winch and R. Burn-Callander (2013): No take-Up on "Rights for Shares". The Daily Telegraph, 31 August 2013.
[66] Discrimination Law Review (2007): A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain. HM Government Consultation Paper, London; see B. Hepple (2010): The New Single Equality Act in Britain. 5 Equal Rights Review p. 11.
[67] Equality Act 2010, sections 1 and 14 respectively.

secondary legislation, driven by a desire to protect businesses,[68] 'as part of the Government's drive to reduce the costs of regulation on all businesses in order to create the right conditions for increased competition, job creation and sustainable growth. It will save businesses an estimated £3 million each year'.[69] Other recent changes include modifications of the domestic implementing measures of the Acquired Rights Directive,[70] the Transfer of Undertaking (Protection of Employment) Regulations ('TUPE'),[71] and the already-discussed consultation on Zero-Hours Contracts.

Assessing the Reforms – All in It together?

Having thus seen an outline of recent reforms, discussion now turns to a thematic evaluation, in an attempt to place these changes in their larger context. Given the caveats already outlined, this can be little more than a first sketch, without the benefit of temporal distance or evidence as to the reforms' actual impact: the materials analysed represent developments which are still very much in progress. An additional challenge in identifying themes in this state of flux is the absence of overarching official policy statements, or even a clear roadmap beyond a three to six month horizon.

Two important points can nonetheless be made: it is, first, unclear what precisely motivates the current flurry of reforms. There is no explicit plan beyond vague suggestions of helping with GDP deficit reduction through cuts in expenditure and the support of economic growth more broadly. But as even a cursory analysis of the materials surveyed in the previous section will show, this is not a claim which stands up to scrutiny: indeed, the various proposed reforms may very well have the opposite impact. The same is true for more indirect justifications, such as reducing the

[68] Government Equalities Office (2011): The Public Sector Equality Duty: reducing bureaucracy. Policy Review Paper, London, March 2011.
[69] http://www.equalities.gov.uk/equality_act_2010/faqs_on_the_equality_act_2010/dual_discrimination.aspx (last accessed 1 October 2013).
[70] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ [2001] L82/16.
[71] https://www.gov.uk/government/news/changes-to-tupe-rules-cut-red-tape-for-business (last accessed 1 November 2013). See for fuller information https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254738/bis-13-1272-draft-tupe-regulations-2013.pdf (last accessed 1 January 2014).

regulatory burden on employers or the creation of employment. This flawed motivation, second, translates directly into the operation of the actual schemes proposed. They are flawed in their origins and their design, with deeply problematic consequences for employers and employees alike – up to and including a drastic 'Risk Shift' to the detriment of individual workers.

Flawed Motivations

As has already been suggested, 'the Coalition Programme lacks a comprehensive plan for labour law reform':[72] there is overarching goal or direction, there are no coherent policy underpinnings.[73] Nor is there a clear economic case that could be made out; 'arguments for deregulation are [therefore] not based on hard evidence but are mainly ideological supported by the subjective perceptions of some employers'.[74]

The Absence of Policy Guidance

Whereas previous governments had traditionally presented elaborate policy documents or 'White Papers' on employment law,[75] such discussions were notably absent in the run-up to the last general election. None of the three major parties' electoral manifestos placed a considerable emphasis on labour law reform, either in a re-regulatory or de-regulatory direction,[76] and striving for fairness, gender equality and non-discrimination were all important pre-electoral pledges from across the political spectrum. Even following the election, an official Coalition Statement provided only few hints of what was to come, promising merely that the government was going to undertake a full

[72] Freedland, Countouris and Prassl (n 1) op. cit.
[73] Hepple (n 4) op. cit. pp. 205ff; suggests that the review is facing in two directions, both as regards some higher worker protection, and abolishing specific employment rights, and traces it back to ideological tensions within the coalition government (ibid pp. 208ff).
[74] Hepple (n 4) op. cit. p. 203.
[75] See, most famously, DTI (1998): Fairness at Work. London; available at http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file24436.pdf (last accessed 13 January 2014).
[76] Liberal Democrat Manifesto 2010. Liberal Democrats, London, 2010; Invitation to Join the Government of Britain: The Conservative Manifesto 2010. The Conservative Party, London, 2010; A Future Fair for All: The Labour Party Manifesto 2010. Labour, London, 2010.

> 'review [of] employment and workplace laws, for employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive'[77]

This and other similar statements fell far short of an overall coherent strategy, let alone a fully-fledged White Paper. The closest the Coalition Government has come to any definitive overarching policy statement on employment law to date is a comprehensive report on employment law reform, commissioned by Prime Minister David Cameron from former Venture Capitalist and major Conservative party donor Adrian Beecroft. A first draft of this document was leaked in October 2011 to the Daily Telegraph newspaper;[78] amongst its most controversial proposals was the introduction of 'compensated no fault dismissal' in order to 'give certainty to the employer that an employee can be dismissed within a relatively short period at a known cost and with no fear of a referral to a tribunal'.[79] The potential consequences of such a scheme were clearly acknowledged in the report: 'some people would be dismissed simply because their employer did not like them. Whilst this is sad […] it is a price worth paying for all the benefits that would result from the change.'[80]

An official government version of the report was published May 2012;[81] its language significantly toned down from the initial text.[82] Vince Cable, the Business Secretary,

[77] HM Government (2010): The Coalition: Our Programme for Government. London, p. 10.
[78] C. Hope and R. Winnett (2011): Give firms freedom to sack unproductive workers, leaked Downing Street report advises. Daily Telegraph, 25 October 2011 http://www.telegraph.co.uk/finance/jobs/8849420/Give-firms-freedom-to-sack-unproductive-workers-leaked-Downing-Street-report-advises.html (last accessed 1 August 2013)
[79] A. Beecroft (2011): Report on Employment Law – Draft, 12 October 2011, p. 4. Full copy available at http://s.telegraph.co.uk/graphics/viewer.html?doc=357771-employmentlaw (last accessed 1 August 2013). For a detailed discussion of these proposals (and its parallel developments in Australia), see J. Howe (2013): Poles Apart? The Contestation between the Ideas of No Fault Dismissal and Unfair Dismissal for Protecting Job Security. 42 ILJ p. 122.
[80] Beecroft (n 78) op. cit. p. 4.
[81] A. Beecroft (2011): Report on Employment Law – 24 October 2011; available at http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/12-825-report-on-employment-law-beecroft.pdf (last accessed 1 August 2013).
[82] R. Winnett and C. Hope (2012): Controversial Beecroft report on employment reform 'doctored' by No 10. Daily Telegraph, 21 May 2012 http://www.telegraph.co.uk/news/politics/9281161/Controversial-Beecroft-report-on-employment-reform-doctored-by-No-10.html (last accessed 1 August 2013).

nonetheless issued an immediate denial that the proposals would be implemented,[83] noting that in 'difficult economic conditions it would almost certainly be counterproductive to increase [workers'] fear of dismissal.'[84] This view was echoed by social partner representatives, including a clear 'majority of businesses [which did] not support' the introduction of compensated no-fault dismissal regime, as a September 2012 follow-up report by BIS, the government department in charge of implementing employment law reforms, drily notes.[85]

This dearth of evidence as to specific motivations requires us to cast the net increasingly wider in search for potential motives, up to and including the very broad-brush strokes of government policy – built first and foremost on the reduction of budgetary deficits.

Deficit reduction?

Upon its formation in the early summer of 2010, the Coalition government immediately set out on an aggressive path to reduce the UK's public deficit. On June 23, 2010, George Osborne, the new Chancellor of the Exchequer, presented an emergency budget to the House.[86] Its themes were major public sector cuts, including at least £11bn from a welfare budget (then) totalling £192bn. The budget received a mixed welcome, with leading financial commentators fearing considerable extra impact on poorer families.[87]

A spending review was concluded on November 22, 2010, with further public sector budget reductions announced the same day.[88] George Osborne's first full budget of 23 March 2011[89] showed the Coalitions determination to stick with this course, and led

[83] Vince Cable calls sacking plans in Beecroft report "the wrong approach". BBC News 21 May 2012 http://www.bbc.co.uk/news/uk-politics-18142544 (last accessed 1 August 2013).
[84] Announcement: Beecroft Report on Employment Law. https://www.gov.uk/government/news/beecroft-report-on-employment-law (last accessed 1 August 2013).
[85] Department for Business, Innovation and Skills (2012): Analysis of measures delivered in comparison with Adrian Beecroft report September 2011. London, September 2012, p. 2.
[86] Budget (2010) London, HM Treasury.
[87] George Parker, Chris Giles and Nicholas Timmins (2010): Osborne signals fresh welfare cuts. London, FT, June 23 2010.
[88] HM Treasury: Spending Review 2010. Cm 7942, London, October 2010.
[89] Budget (2011) London, HM Treasury.

to renewed fears of a particularly harsh impact on the economically vulnerable.[90] This was the case in particular because social law and employment have become increasingly important as (in-?) direct responses to the financial crisis fallout, as part of the government's larger aggressive deficit reduction programme. Recent official pronouncements make it clear that the present path of reform and continuing austerity is set to continue for several years to come.[91]

Upon further reflection, however, this strategy of linking employment law reforms to budgetary deficits is difficult to explain: could a direct causal link be identified? As Simon Deakin has noted,

> 'Today's fiscal deficits are not the consequence of excessive welfare state spending or of over-regulation of the labour market within the member states most affected by the crisis. They are the combined result of global economic recession triggered by the financial crisis, which began in the USA and Britain in the autumn of 2009, and of the assumption by governments of liabilities first incurred in the private sector through excessive lending and poor risk management by banks and financial institutions.' [...][92]

Indeed, as Aristea Koukiadaki and Lefteris Kretsos have argued,[93] 'since excessive labour law regulation was not responsible for the crisis […] deregulation will do nothing to alleviate it, and is most likely making matters worse'.[94]

This statement raises two very important points: the reforms are highly unlikely to lead to GDP growth, or fix existing budget deficits in other ways, as leading commentators have repeatedly confirmed. David Mangan, for example, has criticised the notion of '(vexatious) claims as a hindrance to economic growth',[95] often

[90] N. Timmins (2011): Cuts have barely begun to bite. London, FT, March 23 2011.
[91] See eg http://www.theguardian.com/politics/2014/jan/06/george-osborne-britain-cuts-austerity (last accessed 7 January 2014).
[92] S. Deakin (2012): Editorial: The Sovereign Debt Crisis and European Labour Law. 41 ILJ p. 251.
[93] A. Koukiadaki and L. Kretsos (2012): Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece. 41 ILJ p. 276.
[94] Deakin (n 91) op. cit. p. 252.
[95] Mangan (n 37) op. cit. pp. 417–418.

presented as an explanation for recent reforms to unfair dismissal laws and tribunal structures, even though it is very difficult, if not impossible, to find concrete evidence on point. The same is true for the oft-mooted creation of jobs as a result of labour market de-regulation. Whilst the 'thesis that the right not to be unfairly dismissed is a cause of unemployment [might have] attained mythical status',[96] the OECD has repeatedly noted that the UK is already 'one of the most lightly-regulated labour markets in the world';[97] it is therefore hard to see how de-regulation through the dismantling of what little

Indeed, even in the area where recent reforms have created direct sources of governmental income (Employment Tribunal Fees), these are only expected to cover a third of tribunals' costs.[98] Other schemes will even come at significant direct cost to the taxpayer, including most notably the much-vaunted tax relief on Employee Shareholder shares. Senior Managers stand to benefit significantly from the capital gains tax exemption on Employee Shareholder equity. Whilst a small shareholding of £2,000 would have to rise in value by 530% before any impact of the tax relief was felt,[99] the numbers look significantly different with large blocks of shares. It is not surprising, then, that the Office of Budget responsibility estimates that at least 25% of the budgetary cost of the new status, set to rise towards £1bn (sic) by the end of the current forecasting period, will be due to their use in aggressive tax planning.[100]

Protecting Employers and Creating Jobs?

In the absence of tangible budgetary implications, the question thus arises as to other potential motivations. The protection of employers and creation of jobs more broadly have frequently been alluded to as a major concern of the coalition government.[101] As the Chancellor has pointed out:

[96] Ewing and Hendy (n 20) op. cit. fn 3.
[97] Jo Swinson MP (2013): Employment Law 2013: Progress on reform. BIS, March 2013. Foreword (as cited by Hepple (n 4) op. cit. p. 204).
[98] Employment Tribunal and Employment Appeal Tribunal Fees Stakeholder factsheet http://www.justice.gov.uk/downloads/tribunals/employment/et-fees-factsheet.pdf (last accessed 24 December 2013).
[99] Emp. L.B. 2013, 113(Feb) 1, 3: tax-free allowance of £10,600.
[100] Budget 2013 (n 32) Policy Costings [9]. The exclusion of individuals with a 'material interest' in the company might help to reduce tax avoidance.
[101] A concern Bob Hepple (n 4) traces back to the 1980s, citing eg *Lifting the Burden* (DTI, 1985) Cmnd 9751.

> 'We respect the right of those who have spent their whole lives building a small business not to see that achievement destroyed by a vexatious appeal to an employment tribunal. So we're now going to make it much less risky for businesses to hire people. We will double to two years the amount of time you can employ someone before the risk of an unfair dismissal claim. And I can tell you today we are going to introduce for the first time ever a fee for taking a case to a tribunal that litigants only get back if they win. We're ending the one-way bet against small business.' [102]

Whilst some recent studies do confirm certain concerns and fears about excessive employment law 'burdens', [103] a recent study of employment law reforms commissioned by the Confederation of British Industry suggests that it is change as such, rather than individual norms, that is the biggest concern: even minor legislative developments could lead to additional compliance burdens and an increased risk of tribunal claims as a result of the ensuing complexity.[104] It is therefore unsurprising that respondents to a recent government consultation noted that 'there [was already] a sense among business associations and employers that employment statuses are too complex and numerous in the current system. […] any new employment status would be likely to confuse matters for employers'.[105]

Fears specifically linked to vexatious claims in employment tribunals are furthermore objectively unfounded. Looking at the relevant statistics, Keith Ewing and John Hendy point out that in practice there is very little for Employers to worry about. This

[102] http://www.telegraph.co.uk/news/politics/georgeosborne/8804027/Conservative-Party-Conference-2011-George-Osborne-speech-in-full.html (last accessed 13 January 2014). This was soon enough reflected in official policy documents promising 'changes to employment law that will give business the confidence to take on staff. We are proposing to increase the qualifying period for employees to be able to bring a claim for unfair dismissal from one to two years and we will be introducing fees for lodging employment tribunal claims to transfer the cost burden from tax payers to the users of the system.' HM Government, One-in, One-out: Second Statement of New Regulation. London, September 2011, p. 14.

[103] E. Jordan, A. Thomas, J. Kitching, R. Backburn (2003): Employment Regulation. Employer Perceptions and the Impact of Employment Regulation. BIS, Research Series 123/2003.

[104] CBI / Harvey Nash (2012): Facing the Future: Employment Trends Survey. London, p. 35 (in the specific context of the Agency Workers Regulations 2011).

[105] BIS: Implementing Employee Owner Status: Government Response to Consultation. London, December 2012 ('Consultation Response'), p. 8.

can be illustrated, for example, by the fact that the unfair dismissal reforms set out above will only remove a handful of comparatively low-value claims every year, which is in no proportion to their significant chilling effect on workers: 'to remove the right to unfair dismissal protection from some three million workers in order to deny entitlement of just over 100 of them to compensation of what [in] most cases is likely to be around £4,500 must surely be considered disproportionate.'[106]

The changes will also have no genuine effect on unemployment levels. Indeed, as Simon Deakin has noted, unfair dismissal laws 'encourage workers to make a more serious commitment to the firm', and provide the latter with a 'strong incentive to treat the skills of their workers as a resource to be developed, rather than an asset to be disposed of at will.'[107] Regulation of dismissal has furthermore been shown to have 'a consistently positive and significant impact on innovation,'[108] and is thus in fact an important driver of economic growth. Ewing and Hendy are thus entirely correct in their conclusion that 'if it is genuinely the case that employers are concerned about unfair dismissal law as a barrier to recruitment, Messrs Osborne and Cable would have been better advised to distribute copies of the [employment tribunal success] statistics to would-be claimants rather than to change the law.'[109]

In conclusion, then, it is difficult to discern any coherent motivation or strategy underpinning the various reforms outlined: it is unlikely that they will contribute to deficit reduction, either directly through a lowering of expenditure (if anything, a negative impact on governmental income is more likely) or more indirectly by encouraging GDP growth. The overall position is perhaps best summarised by Sir Bob Hepple's suggestion that

[106] Ewing and Hendy (n 20) op. cit. p. 118.
[107] S. Deakin (2013): Shares for Rights – Why Entrepreneurial Firms Need Employment Law Too. Financial Times, 11 Feburary 2013; http://blogs.ft.com/economistsforum/2013/02/shares-for-rights-why-entrepreneurial-firms-need-employment-law-too/ (last accessed 1 August 2013).
[108] V. Acharya, R. Baghai and K. Subramanian (2010): Labor Laws and Innovation. NBER Working Paper No. 16484 4, p. 23.
[109] Ewing and Hendy (n 20) op. cit. p. 119.

> 'Marx said that history repeats itself, the first time as a tragedy, the second as farce.[110] Cameron and Clegg in place of Thatcher, Beecroft in place of Hayek.'[111]

Flawed Implementation

On September 28, 2011 a document outlining the progress of the new government's regulatory agenda appeared on the website of the Department for Business, Innovation and Skills.[112] It listed key achievements related to the 'one-in, one-out' regulatory agenda (where each new regulation impacting on business cost must be offset with deregulation of a comparative size), and set out an agenda for the 'near future', including an increase in the unfair qualifying dismissal period from one year to two years, the introduction of fees in the Employment Tribunal system, and a consultation on removing Equality Act provisions imposing liability on employers for third party harassment which they had not taken reasonable steps to prevent.[113]

The Department soon thereafter issued a statement blaming a drafting error for at least some of these statements, and insisted that no final decisions had yet been taken, at least as regards an increase of the unfair dismissal thresholds.[114] In retrospect, it is increasingly becoming clear that this inadvertent leak was perhaps not a one-off blunder, but rather an incident indicative of a larger pattern of deeply flawed implementation processes for the various reforms surveyed – reflecting, not least, the unclear or lacking overall strategy identified in the previous sub-section. The present sub-sections offers three examples of flawed implementation, in the sequence of the usual policy cycle:[115] given deep flaws in consultation and legislative design, recent changes have been marred by technical problems, and will lead to a range of unintended consequences.

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[110] K. Marx: The Eighteenth Brumaire of Louis Bonaparte. In: D. Fernbach (ed., 1973): Surveys from Exile. Penguin, p. 146.
[111] Hepple (n 4) op. cit. p. 221.
[112] HM Government, One-in, One-out: Second Statement of New Regulation. London, September 2011.
[113] D. Barnett (2011): Government Proposals for Employment Law Reform. Employment Law Bulletin (electronic publication, 28 September 2011).
[114] D. Barnett (2011, UPDATE): Government Proposals for Employment Law Reform. Employment Law Bulletin (electronic publication, 28 September 2011).
[115] For a full overview, see eg http://www.parliament.uk/topics/Legislative-process.htm (last accessed 1 January 2014).

Consultation Process Flawed

The problems outlined begin at the very origins of legislative proposals, the pre-drafting consultation stage. The time available to respondents has been drastically reduced, and stakeholder input frequently goes ignored. Osborne's announcement of the new employee shareholder status provides a good case study in this regard: a BIS press release of the same day immediately set out the contours of the new status,[116] initial reactions to which ranged from the overwhelmingly hostile to, at best, a cautious welcome.[117] The government nonetheless set about implementing the new status, at hitherto unknown speed. The duration of a public consultation launched in November 2012 was reduced to a mere three weeks from the usual period of three months.[118] Despite this extremely short timeframe, over 200 submissions were received from a broad range of employers, employees, their representatives and external advisors.[119] The responses were overwhelmingly negative: more than half of those consulted classified the impact of the new status as negative or mixed,[120] and only 'a very small number of responses welcomed the scheme and suggested that they would be interested in taking it up';[121] the government nonetheless proceeded to introduce the scheme as part of the Infrastructure and Growth Act 2013.

Legislative Design Flawed

The results of such hurried implementation are not difficult to predict. In the words of a conservative Peer, 'the scheme [was so] ill thought through, confused and muddled [… that it has] the trappings of something that was thought up by someone in the bath'.[122] Problems manifest themselves in particular through a series of difficulties in the new status' interaction with existing regimes. This is unsurprising, given that

[116] BIS, Press Release http://news.bis.gov.uk/Press-Releases/No-capital-gains-tax-on-employee-share-ownership-for-new-employee-owners-68152.aspx (last accessed 1 August 2013).
[117] http://www.britishchambers.org.uk/press-office/press-releases/bcc-comments-on-osborne's-speech.html#.UYaNmJWbJD9; http://www.cbi.org.uk/media-centre/press-releases/2012/10/cbi-responds-to-george-osbornes-speech-to-conservative-party-conference/ (last accessed 1 August 2013).
[118] BIS (2012): Consultation on Implementing Employee Owner Status. London, October 2012.
[119] See, eg, TUC: Trading Rights for Shares. London, TUC; N. Countouris, M. Freedland and J. Prassl (2012): Implementing Employee Owner Status. London, IER.
[120] Consultation Response (n 104) op. cit. p. 34.
[121] Ibid p. 4.
[122] Lord Forsyth, House of Lords, 20 March 2013; Vol. 744, c. 597; c. 614.

English Law's complex interrelating web of layers of regulation was completely disregarded. [123]

Problems with the employee shareholder status include, but are by no means limited to, a difficult relationship with statutory provisions in the collective sphere, such as trade union recognition, collective bargaining and employer consultation, and industrial action.[124] The Common Law position is equally difficult to ascertain, for example as regards changes in the interaction of the regime for breach of contract (Wrongful Dismissal) and the statutory Unfair Dismissal provisions following a series of House of Lords and Supreme Court decisions alluded to earlier.[125] The design problems, finally, extend well beyond employment law to include areas such as company law, where they have thrown up questions as regards the status' place in the provisions of the Companies Act of 2006, as well as its impact on pre-existing regimes of Employee Share Ownership.[126]

(Un-?) Intended Consequences

The final set of concerns might be the least immediately obvious, even though they could turn out to have the most problematic impact in the longer run: the effect of seemingly small-scale reforms such as the changes to employment tribunal composition discussed earlier could have deeply problematic unintended consequences – notably in the law of unfair dismissal. As Corby and Latreille have noted, there is a significant danger that the employment tribunals are in the process of beginning to resemble traditional common law courts ever more closely.[127] Hepple explains the problem behind this:

[123] For a detailed overview of the latter concept, see M. Freedland and N. Kountouris (2011): The Legal Construction of Personal Work Relations. Oxford, OUP, pp. 96ff; A. Burrows (2012): The Relationship between Common law and Statute in the Law of Obligations. 128 LQR p. 232.
[124] Most importantly the series of collective rights found in the Trade Union and Labour Relations Consolidation Act 1992.
[125] *Johnson v Unisys Ltd*; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* (n 17). See C. Barnard and L. Merrett (2013): Winners and Losers: *Edwards* and the Unfair Law of Dismissal. 72 CLJ p. 313.
[126] G. Nuttall, Sharing Success (2012): The Nuttall Review of Employee Ownership. London, BIS.
[127] S. Corby and P. Latreille (2012): Employment Tribunals and the Civil Courts: Isomorphism Exemplified. 41 ILJ p. 387. See also by the same authors (2012): Tripartite Adjudication – An Endangered Species. 43 IRJ p. 94.

> 'Tripartism in specialist labour courts arrived relatively late in Brtain (1964) and was particularly significant because of the long-standing perception of the common law courts as being hostile to the interests of workers. This led scholars like Kahn-Freund and Wedderburn to argue that it was essential to secure the autonomy of labour law from the general law and to entrusts adjudication of disputes to specialist labour courts with judges who understand industrial custom and practice.'[128]

With judges increasingly sitting by themselves, the disappearance of industrial expertise will soon be felt in employment law cases across the board – though it will perhaps have the strongest impact in the field of unfair dismissal law, given the 'band of reasonable (employer) responses' test.[129] This test already shows significant deference to employers' decisions, and given the lack of an 'industrial jury', is only likely to become even more deferent.[130] The changes thus compound themselves: even once ne an eligible employee has managed to pay for a claim, go through the ACAS procedure and arrive at a hearing (upon payment of a further fee), she will now be faced with a judicial system unable comprehensively to scrutinise the employer's termination decision.

In conclusion, then, it has been seen that recent reforms are marked by deep flaws throughout, harbouring additionally the potential to lead to a series of unexpected negative consequences for individual workers. The only small positive perspective that can be noted as a result is the fact that the flaws thus identified might make certain aspects of the reforms open to judicial scrutiny, whether domestically or at the European Union (EU) level. As regards the latter, for example, discrimination law has on at least one occasion in the past been deployed successfully to defeat an increased unfair dismissal threshold, given its potentially disparate impact on women.[131] Whilst a subsequent case allowed the government's justification in that particular context,[132] a potential avenue in challenging recent reforms might be their disparate impact on

[128] Hepple (n 4) op. cit. p. 212 (citations omitted).
[129] *Iceland* (n 19).
[130] *R (ex parte Prolife Alliance) v British Broadcasting Corporation* [2003] UKHL 23 (*per* L. Hoffman).
[131] *R (ex parte Equal Opportunities Commission) v Secretary of State for Employment* [1994] UKHL 2.
[132] *R (ex parte Seymour-Smith) v Secretary of State for Employment (no 2)* [2000] ICR 244.

young workers.[133] In domestic law, judicial review proceedings against the introduction of employment tribunal fees are still pending at the time of writing.[134]

Even if these challenges were to be successful, however, they would do little against the broader trend of a significant 'Risk Shift', where increasingly less employment-related risk remains with the employer, despite its enjoyment of the continuing benefits of extensive control over workers. Indeed, the government is actively aiming further to reduce employers' perceived risk,[135] whilst each of the measures surveyed shifts risk directly onto workers – and sometimes drastically so. Employee Shareholders, for example, are arguably in a worse risk position than even those whose employment rights are simply bought out for cash consideration under a complete freedom of contract model.[136] By owning shares in their employing entity, workers are unable to protect themselves through portfolio diversification: their entire equity stake is concentrated in a single investment.[137]

Conclusion

The developments surveyed constitute thus nothing less than a fundamental 'transformation of the bargain that once governed [workers and employers'] mutually beneficial but inherently uneasy relationship' where 'workers and employers [share] the risk of uncertainty in the market as well as the gains of productivity from skills and innovation':[138] quite the opposite of George Osborne's frequently rehearsed suggestion of 'owners, workers, and the taxman, all in it together.'[139]

[133] A. Palmer (2010): Opinion – Unfair Dismissal Claims. The Lawyer 4 October 2010. For fuller discussion, see Ewing and Hendy (n 20) op. cit. p. 119.
[134] See, eg *R (on the application of UNISON) v Lord Chancellor* QBD (29 July 2013) unreported; and the discussion at Mangan (n 37) op. cit. p. 415.
[135] See eg Department for Business, Innovation & Skills (2011): The Employer's Charter. London.
[136] HL Deb 20 March 2013, col 617 *per* Lord O'Donnell: 'We know that in the old days the price of slavery was 20 or 30 pieces of silver – is it now £2,000?'
[137] H. Markowitz: Portfolio Selection. J. Finance 1952 (7) p. 77; H. Markowitz (1991): Portfolio selection: efficient diversification of investments. 2nd ed., Oxford, Blackwell.
[138] Hacker (n 6) op. cit. p. 66.
[139] G. Osborne: Party Speech 2012. http://www.conservatives.com/News/Speeches/2012/10/George_Osborne_Conference_2012.aspx (last accessed 3 May 2013) *Emphasis Supplied*. For a full timeline of the proposals, including press reaction, see L. Anstis: Employee Shareholders – from speech to legislation. Work/Life/Law blog, 25 April 2013. http://worklifelaw.co.uk/2013/04/employee-shareholders-from-speech-to-legislation/ (last accessed 1 August 2013).

In concluding, two final points remain to be raised. First, a note of caution as regards the permanence of the reforms discussed, which might only be seen as contingent, *viz* existing only in response to and during times of crisis. All measures under scrutiny have been designed and enacted in such a way as to become permanent features of UK Labour Law, and could thus prove rather difficult to reverse. Second, as regards the role of European Union law in the setting and application of domestic labour law standards. As I have noted elsewhere, once upon a time, EU law might have been seen by UK labour lawyers as a white knight of sorts, operating as the 'main countervailing force' to ensure the protection of basic labour standards.[140] That tide has now firmly turned: even if the reforms had not been carefully designed to avoid a collision with EU law, the traditional view can no longer be maintained in the face of recent legislative developments and CJEU decisions such as *Alemo-Herron*.[141] As Simon Deakin has reminded us, the 'EU institutions have yet to move beyond the view, which has become commonplace during the crisis, that labour law acts as a distorting factor in the operation of the single market and currency union.'[142]

[140] Davies and Freedland (n 9) op. cit. p. 576.
[141] Case C-426/11 *Alemo-Herron and others v Parkwood Leisure Ltd* [2013] ECR I-00000. See J. Prassl (2013): Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law. 31 ILJ p. 434.
[142] Deakin (n 91) op. cit. p. 253.