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## Foreword to this Special Edition of the EJICLS

Malcolm Sargeant \*

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In June 2016 the 5th International Conference on Precarious work and Vulnerable Workers took place at Middlesex University in London, UK. The conference was sponsored by Middlesex, ADAPT and the Auckland University of Technology.

It was a wonderful event with scholars from over 30 different countries and all the world's continents delivering papers on different aspects of this subject. Here we include some of the papers. Not all are here because they may have been works in progress or had been promised for publication elsewhere. The papers published here reflect both the high academic standards and the diversity in subject matter of the conference.

It begins with an introductory paper on what we might mean by the terms precariousness and vulnerability. Although not formally presented at the conference, it contains the themes set out in the introductory session with which I started the event. Thanks to all those who contribute here and all those who attended to make it a really interesting and stimulating conference.

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\* Full Professor of Labour Law at Middlesex University (UK). Email: [M.Sargeant@mdx.ac.uk](mailto:M.Sargeant@mdx.ac.uk). He was also the Convenor of the Conference this special edition of the EJICLS refers to.

# The Meaning of the Terms Precarious Work and Vulnerable Workers

Malcolm Sargeant \*

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**Abstract.** This paper is a work in progress. We are particularly interested in extending our research by developing an understanding of the relationship between the terms precariousness and vulnerability in the work context. Our research questions include the issue of whether the two terms are inextricably linked. Are those in precarious work more likely to be vulnerable workers? Are vulnerable workers more likely to be in precarious work than others? Are workers made vulnerable by being in precarious work? Our first step is clearly to understand what is meant by these two terms in the work context and perhaps to further refine any definitions.

**Keywords:** *Precarious work, Vulnerability, Vulnerable Workers, Precarious Workers*

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\* Full Professor of Labour Law at Middlesex University (UK). Email address: [m.sargeant@mdx.ac.uk](mailto:m.sargeant@mdx.ac.uk).



## Introduction

The terms vulnerability and precariousness have entered common usage in the vocabulary when considering those in work, especially those in ‘non-standard’ employment and those who belong to groups who might be considered more open to disadvantage and discrimination than others. The terms are often used interchangeably, so sometimes the term ‘vulnerable workers’ and sometimes ‘precarious workers’ are used but also ‘vulnerable work’ and ‘precarious work’ (TUC, 2010; Standing, 2011)<sup>1</sup>. Here, for our purposes, we try to distinguish between the two in order to assist our analysis.

## Precariousness

References to precarious working have been used quite regularly for many years and in many jurisdictions, so, for example, in the nineteenth century, there are references in the UK to the precarious nature of the employment of dockworkers who were employed on a casual daily basis and the seasonal nature of work endured by workers in the Australian agricultural sector (Quinlan, 2012)<sup>2</sup>. It can probably be said that precarious forms of work have almost always (if not always) been present in systems of wage employment (Rodgers, 1989: 1)<sup>3</sup>, during the last few decades, and especially in the wake of global economic crisis, discussion about the vulnerability and precariousness in employment has emerged again with high intensity.

To a large extent, it is explained by increasing concerns over rapid growth of those forms of employment which are deviated from so called ‘standard employment relationship’ generally associated with a full-time, long-term and socially secure job (Bosch, 2004: 618; Bercusson, 2009: 362; Davidov, 2016: 36, et al.)<sup>4</sup>. Developing in the post-World War II period, this pattern ‘incorporated

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<sup>1</sup> TUC Commission on Vulnerable Employment *Hard Work Hidden Lives* TUC (2009).

Standing, G. (2011) *The Precariat: The New Dangerous Class* Bloomsbury Publishing.

<sup>2</sup> Quinlan, M. (2012) *The Pre-Invention of Precarious Employment: The Changing World of Work in Context* *The Economic and Labour Relations Review* 23(4) 1-22.

<sup>3</sup> Rodgers G (1989) *Precarious Work in Western Europe: The State of the Debate*. In: Rodgers G and Rodgers J (eds.) *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe*. Geneva: International Institute for Labour Studies; Free University of Brussels.

<sup>4</sup> Bosch G (2004) *Towards a New Standard Employment Relationship in Western Europe*. *British Journal of Industrial Relations* 42 (4): 617-636.

Bercusson B (2009) *European Labour Law*. 2nd ed. New York: Cambridge University Press

a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability to underpin economic growth' (Rodgers, 1989: 1). Since all other forms of employment were viewed as mainly expressing employer demands and 'undermining the standards which the law provides for a typical employment relationship' (Kruppe T, Rogowski R, Schömann, 2013: 10)<sup>5</sup>.

Their growth started at the beginning of the 1970s and was initially seen as a negative process of gradual 'erosion' of the standard employment relationship. However, the traditional understanding of that standard employment relationship based on an increasingly unrealistic model of the male breadwinner/female caregiver gender contract (Rogowski, 2013: 91)<sup>6</sup> was widely replaced by a more pragmatic attitude towards non-standard or atypical forms of employment (Bosch, 1986: 163-176; Mückenberger, 2010: 399-401)<sup>7</sup> and flexibility associated with them. Thus, on the one hand, economic restructuring, through such forces as technological change and globalization, as well as restructuring of welfare and employment regulation, encourage an increase in 'labour market flexibility' where non-standard forms of employment are considered as one of the means to accelerate job creation that is especially important in the wake of crisis. On the other hand, the complex forces related to gendered transformations in paid employment call for 'worker-centered flexibility' (Vosko et al., 2009: 12)<sup>8</sup>. In other words, it is suggested, non-standard forms of employment are no longer only seen as being inspired exclusively by employer demands, but rather as an expression of general trends and cultural changes in lifestyles (Rogowski, 2013: 91).

However, taking for granted that in modern conditions non-standard forms of employment and their growth is inevitable, does not undermine the issue of

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Davidov G (2016) *A Purposive Approach to Labour Law*. Oxford: Oxford University Press. EHRC Pregnancy and Maternity-Related Discrimination and Disadvantage: Experiences of Mothers (2016).

<sup>5</sup> Kruppe T, Rogowski R, Schömann K (2013) *Labour Market Efficiency in the European Union: Employment Protection and Fixed Term Contracts*. London, New York: Routledge.

<sup>6</sup> Rogowski R (2013) *Reflexive Labour Law in the World Society*. Cheltenham, Northampton: Edward Elgar

<sup>7</sup> Bosch G. (1986) Hat das Normalarbeitsverhältnis eine Zukunft? WSI-Mitteilungen 3(90): 163-176

Mückenberger U (2010) 'Krise des Normalarbeitsverhältnisses' - nach 25 Jahren revisited Vorbemerkung. Zeitschrift für Sozialreform 56 (4): 399-401.

Ontario Law Commission *Vulnerable Workers and Precarious Work* (2012).

<sup>8</sup> Vosko L F, McDonald M, Campbell I (2009) Introduction: Gender and the Concept of Precarious Employment. In: Vosko L F, McDonald M, Campbell I (eds.) *Gender and the contours of precarious employment*. London; New York: Routledge.

the precariousness in employment. It 'places the discussion and measurement of precarious employment at the very heart of fundamental debates on the future of employment' (Vosko et al., 2009: 12). Quite surprisingly, even the meaning of the term 'precarious employment' is still open to debate. Initially, it originated in France where the term 'precariousness' has been widespread since the late 1970s, often linked to the discussion of social exclusion (Vosko et al., 2009: 5; Barbier, 2004: 718, 2005: 351-371)<sup>9</sup>. However, soon it came to be attached most strongly to the sphere of employment and is often directly identified with forms of employment that are outside of the standard employment relationship. At the end of 1980s the concept of 'precarious employment' appeared in the English-speaking literature (Rodgers and Rodgers, 1989; Gore et al., 1995: 15-

16)<sup>10</sup> where it has evolved in relation to a network of allied concepts, such as 'non-standard', 'atypical' and 'contingent'. Thus about one in five workers in the EU are employed on contracts that do not meet this criterion (Mckay et al, 2012).

Researchers have come up with a variety of 'non-standard' contractual relationships which can be described as being included in our understanding of precarious work. Anderson and Rogaly (2005) suggest short-term; temporary or casual contracts; working for an agency or third party rather than being a direct employee; providing a contracted-out service; and working for low wages that prevent the achievement of a decent standard of living are features. Others have suggested that the features of precarious or contingent work are that it is sometimes work for more than one employer and it is often not 'full-time' and is sometimes limited in duration (Feldman, 2006)<sup>11</sup>. Thus we have employment relationships that may be part time, fixed-term or temporary in nature (Sargeant and Ori, 2013)<sup>12</sup>. The characteristics of precarious work are likely to be 'job instability, lack of benefits, low wages and degree of control over the process' (Ontario Law Commission, 2012; 1). Each concept tends to emphasise different features of the work arrangements, and different terms

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<sup>9</sup> Barbier, J.-C. (2005) La précarité, une catégorie française à l'épreuve de la comparaison internationale. *Revue française de sociologie* 46-2: 351-371

<sup>10</sup> Gore C, Figueiredo J and Rodgers G (1995) Introduction: Markets, Citizenship and Social Exclusion. In: Rodgers G, Gore C and Figueiredo J (eds.) *Social Exclusion: Rhetoric, Reality, Responses*. Geneva: ILO Publications.

<sup>11</sup> Feldman, D. C. (2006) Towards a new taxonomy for understanding the nature and consequences of contingent employment *Career Development International* 11(1) 28-47. Fineman, M. *The Autonomy Myth: A Theory of Dependency* The New Press (2005) at 18-20. Fineman, M. *The Vulnerable Subject: Anchoring Equality in the Human Condition* Yale Journal of Law and Feminism (2008).

<sup>12</sup> Sargeant, M. and Ori, M. (eds) *Vulnerable Workers and Precarious Working* Cambridge Scholars Publishing (2013).

have greater currency in specific institutions and countries and at specific times. Thus, for example in Canada the term ‘nonstandard employment’ was initially a preferred one although then ‘vulnerable workers’ predominated. In the EU, ‘atypical’ or ‘nonstandard’ forms of employment have been the conventional nomenclature, although the term ‘precarious’ is increasingly prominent, whilst in the US the term ‘contingent work’ is preferred (Fudge, McCann, 2015: 16-17)<sup>13</sup>.

Although there is no doubt that there is an overlap between non-standard, atypical, contingent and precarious employment, it is hardly fair to connect all the forms of employment which differ from the standard employment relationship with precarious employment that is generally associated with the uncertainty, insecurity and instability (Kalleberg, 2009: 1-22 and 2012:427-448; Vosko, 2010; Standing, 2011)<sup>14</sup>. In earlier research, there was a tendency to regard regular, permanent wage work as secure and, consequently, to consider other forms of work which deviated from this norm as precarious. However, at present a multidimensional approach to precarious work is dominant in the literature. It was initiated at the end of 1980s by Gerry Rodgers who suggested identifying precarious jobs with four characteristics: 1) instability, i.e. short time horizon or when the risk of job loss is high; 2) insecurity, i.e. lack of control (individually or collectively) over working conditions, wage, or the pace of work; 3) lack of protection in employment and social security (stipulated either by law, collective organisation or customary practice); 4) social or economic vulnerability which is associated with low income entails poverty and insecure social insertion (Rodgers, 1989: 3). Subsequently, different components of precariousness were added by other researchers, e.g. ‘high risks of ill health’ was added by Leah Vosko (Vosko, 2006: 4)<sup>15</sup>. She has also integrated social context and social location into a multidimensional approach to precarious employment which she defines as ‘work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship

<sup>13</sup> Fudge J, McCann D (2015) *Unacceptable Forms of Work: A Global and Comparative Study*. Geneva: ILO

<sup>14</sup> Kalleberg A (2009) Precarious Work, Insecure Workers: Employment Relations in Transition. *American Sociological Review* 74 (1): 1-22.

Kalleberg A L (2012) Job Quality and Precarious Work: Clarifications, Controversies, and Challenges. *Work and Occupations* November 39 (4): 427-448.

Vosko L F (2010) *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment*. Oxford: Oxford University Press.

<sup>15</sup> Vosko L F (2006) Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity. In: Vosko L F (ed.) *Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity in Canada*. Montreal: McGill-Queen’s University Press

between employment status (i.e. self-employed or paid employment), form of employment (e.g. temporary or permanent, part-time or full-time) and dimensions of labour market insecurity, as well as social context (e.g. occupation, industry, and geography) and social location (or the interaction of social relations, such as gender, and legal and political categories, such as citizenship)' (Vosko, 2010: 2).

### Vulnerability

Vulnerability somehow seems an even more complex concept, both in terms of what it actually means and who it applies to. In answering the question: what is vulnerability, Mackenzie<sup>16</sup> et al (2014; 5) suggested that there are two responses. The first is 'to be vulnerable is to be fragile, to be susceptible to wounding and to suffering; this susceptibility is an ontological condition of our humanity'; the second is

that rather than understanding vulnerability as ontological it focusses on the contingent susceptibility of particular persons or groups to specific kinds of harm or threats. Vulnerability is essentially relational; one is particularly vulnerable to particular sorts of threats. People are especially vulnerable when they have a reduced capacity to protect themselves' (2014; 6).

This idea of a reduced capacity to protect oneself appears to be important. It is concerned with the power relationship within the work place. The UK Health and Safety Executive define vulnerable workers as 'those who are at risk of having their workplace entitlements denied, or who lack the capacity or means to secure them' (HSE)<sup>17</sup>. The TUC Commission on Vulnerable Employment defined vulnerable work as 'insecure, low-paid and places workers at high risk of employment rights abuse. It holds very little chance of progression and few opportunities for collective action to improve conditions.' (TUC; 2009: 12).

It is not always clear whether the concept of vulnerability applies to individuals or groups, or whether it applies to the vulnerability created by precarious work, or, indeed, whether it is useful to apply the term to all those in employment. There are a number of levels of vulnerability which need to be taken into account.

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<sup>16</sup> MacKenzie, C. Rogers, W. and Dodds, S. What is Vulnerability, and Why Does it Matter for Moral Theory In Mackenzie, Catriona, Rogers, Wendy and Dodds, Susan (eds) 'Vulnerability: New Essays in Ethics and Feminist Philosophy' OUP (2014).

<sup>17</sup> HSE: Vulnerable workers <http://www.hse.gov.uk/vulnerable-workers/>

The first level is that of *group identity* where a group, or individuals within that group, have a particular characteristic which makes them more likely than other groups or individuals to be in precarious work situations and/or increases their vulnerability. Examples of this might include, for example, migrant workers (Sargeant and Tucker 2009)<sup>18</sup> and pregnant workers and those who have recently given birth (BIS 2015)<sup>19</sup>. The latter is a good example of an identity group who are discriminated against because they have a particular characteristic, i.e. that of being pregnant or having a young and dependent child. It is compounded by the fact that only women can give birth and the vast majority of care givers are female (Bisom-Rapp and Sargeant 2016)<sup>20</sup>. Thus there exists sex discrimination and pregnancy discrimination in this respect (EHRC 2016). Many women in this position opt for reduced hours and more flexible forms of working and are more likely to be in a vulnerable position with regard to careers and working. Clearly there are many other identity groups which could be taken as potentially vulnerable such as those with a disability. A person with a disability will have both an individual impairment and a group identity with others who have disabilities that result in discrimination and disadvantage (Aiden and McCarthy, 2014)<sup>21</sup>.

A second level of vulnerability might be termed *situational vulnerability*. There seems to be an issue about whether the term vulnerability applies to individuals or groups on the one hand or to the situation in which individuals or groups find themselves in as a result of being in precarious work. These two ideas sometimes merge. The Ontario Law Commission report *on Vulnerable Workers and Precarious Work* (2012; 1), for example, noted the distinction and stated that it was important to note that vulnerability did not refer to the workers themselves but the situation facing them because they were engaged in precarious work, as well as other disadvantages related to gender, racial status and other specific characteristics. This is the vulnerability created by precarious work. This level is context specific and ‘stresses the ways that inequalities of power, dependency, capacity, or need, render some agents vulnerable to harm or exploitation by others’ (Mackenzie et al 2014). This vulnerability is created

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<sup>18</sup> Sargeant, M. and Tucker, E. Health and safety of vulnerable workers: case studies from Canada and the UK Policy and Practice in Health and Safety (2009) 7(2) 51-73.

<sup>19</sup> BIS; Department for Business, Innovation and Skills Pregnancy and Maternity Related Discrimination and Disadvantage First findings: Surveys of Employers and Mothers (2015).

<sup>20</sup> Bisom-Rapp, S. and Sargeant, M. Lifetime Disadvantage, Discrimination and the Gendered Workforce Cambridge University Press (2016).

<sup>21</sup> Aiden, H. and McCarthy, A. (2014) Current Attitudes towards Disabled People Scope (2014). Anderson B. and Rogaly B. Forced Labour and Migration to the UK TUC (2005). Barbier J (2004) A Comparative Analysis of ‘Employment Precariousness’ in Europe. In: Latablier M (ed.) Learning from Employment and Welfare Policies in Europe, Cross-National Research Papers (7) 3: 7-18.

the development of an increasingly ‘flexible’ work force. One analysis identified 9 different forms of developing flexible working (Mandl et al 2015)<sup>22</sup>, including employee sharing, job sharing, casual work, mobile working and portfolio work. These types of employment may be long way from the standardised model of the employment relationship with its permanent open ended contractual connection to a single employer. Some of them will create vulnerable situations for those employed. This vulnerability is a result of the precarious nature of some work, especially that which is temporary or cyclical in nature.

The third and final level is that of *universal vulnerability* (Fineman 2008). Professor Fineman criticises the identity approach to equality because ‘it narrowly focuses equality claims and takes only a limited view of what should constitute governmental responsibility in regard to social justice issues’ (Fineman, 2010; 7)<sup>23</sup>. It is this emphasis on the role of the ‘responsive’ state and institutions and their responsibilities in relation to peoples’ vulnerabilities that distinguish the approach. Fineman is concerned with the limitations of an equality approach which focus on individual identities rather than considering the responsibilities of the state in protecting all citizens from a universal vulnerability. Her concern is that ‘vulnerability’ should be seen as a positive concept rather than its current association with negative characteristics. The analysis is useful in that it focuses on inequality as a universal detriment, but it is difficult to comprehend how it can replace a focus on individual groups who suffer both disadvantage and discrimination because of a personal characteristic. It is helpful in focussing on the state and its institutions as both the cause and the cure for vulnerability in populations. Here we propose to include it as the third source of vulnerability. This is a level at which we all share vulnerability just because we are human beings and have a level of dependence upon the state for our well-being. Its universality brings into focus the idea of the responsive state.

Thus we have three clear and distinct sources of vulnerability, all of which can require an answer from a ‘responsive state’. Firstly, there is individual and group vulnerability which requires the state to take action to tackle discrimination and disadvantage at an individual level or at a group level. Secondly, there is situational vulnerability which requires the responsive state to take actions to provide security and limit exploitation in the work environment. Finally, we can adopt the idea of universal vulnerability which

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<sup>22</sup> Mandl, I. Curtarelli, M. Riso, S. Vargas, O and Gerogiannis, W. New Forms of Employment Eurofound Publications Office of the European Union, Luxembourg (2015).

<sup>23</sup> Fineman, M. (2010) The Vulnerable Subject and the Responsive State Emory Public Law Research Paper No. 10-130, Emory Law Journal, Vol. 60.

requires a national approach to protecting and providing resilience, through asset accumulation, for individuals and groups.

All these levels of vulnerability are not, of course, exclusive and perhaps a full analysis requires all these levels to be taken into account. They do, however, imply a denial of the traditional view that an employee is an independent competent person able to negotiate with an employer on equal terms or able to navigate independently their position in the labour market. It is the idea of what Professor Martha Fineman (2005; 18-20) calls the ‘universal human subject defined in the liberal tradition’. This universal human subject is someone who is free and independent and able to make decisions about which relationships to enter into. Moves by the state to regulate these relationships are seen as limiting that freedom and the individual’s resilience (Coyle 2013)<sup>24</sup>. Those that support this idea are likely to oppose much legislation designed to protect individuals because it limits the opportunities that the individual has to create their own situation.

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<sup>24</sup> Coyle, Sean. Vulnerability and the Liberal Order in Martha Albertson Fineman and Anna Gear (eds) ‘Vulnerability: reflections on a new ethical foundation for law and politics’ Ashgate Farnham Surrey (2013) ch4.



# Occupational Health and Safety for Workers in Precarious Job Situations: Combating Inequalities in the Workplace

Sylvie Gravel and Jessica Dubé \*

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**Abstract.** This paper summarises the findings of a project comprising a research component and a component of social mobilisation on protecting the occupational health and safety (OHS) of workers in precarious job situations. Three worker categories were studied: workers hired through recruitment agencies, temporary foreign workers (TFW) and workers in small non-unionized businesses (SB). This article is comprised of three sections. The first section defines the theoretical framework of cumulative precariousness among workers, including immigrant workers. The second section summarises the main highlights of a review of the literature (> 200 documents) on the health of workers hired through recruitment agencies, temporary foreign workers (TFW) and workers in small non-unionized businesses (SB). The third section outlines the mobilisation capabilities of stakeholders (80 experts) in the areas of OHS, immigration and employability to transform preventive practices. We have observed that these three categories of workers cumulate the risks of exposure to work-related injuries, but that the preventive OHS practices in effect are inequitable and not adapted for these workers, who bear the brunt of the flexibility needs of the job market.

**Keywords:** *Precarious Employment, Occupational Health and Safety, Temporary Employment Agency Workers, Temporary Foreign Workers, Small Non-unionized Business Workers.*

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\* Sylvie Gravel (corresponding author) is Professor and Director of the Society and Health Institute, University of Quebec at Montreal (UQAM).email: [gravel.s@uqam.ca](mailto:gravel.s@uqam.ca). Jessica Dubé is a Doctoral Student at UQAM.

This project was conducted with the financial support of the Society and Health Institute, the Léa-Roback Research Centre on Social Inequalities in Health of Montreal and the Montreal Public Health Department.

## 1. Cumulative Precariousness among Immigrant Workers

Concern with precarious employment and its consequences on worker health is not new. Despite a certain consensus on the nature of precariousness, its definition varies from one author to another. For some, precariousness is linked to an absence of stable jobs and long-term contracts. Others point to insufficient, unfair or inequitable remuneration. Finally, other authors link precariousness to the social status of workers, to their rights as women, youths, immigrants or seniors. These definitions are wide-ranging, as is the analysis of their effects. Without undertaking an exhaustive review of these definitions, some authors are important to an understanding of the complexity of the concept.

In 1989, Rodgers and Rogers<sup>1</sup> defined four elements of precarious employment: a) job insecurity; b) low individual and collective control over working conditions, pay and hours worked; c) poor worker protection: social protection, unemployment insurance and protection against discrimination; d) insufficient income and the economic obligations of workers. Numerous studies have since used this definition of precarious employment in their study of worker health. Thus, in 2000, at the request of the European Union, Quinlan et al.<sup>2</sup> conducted a meta-analysis of the effects of the growth in precarious jobs and the globalisation of the labour market on the OHS of workers. These authors found that many studies reached the same conclusions<sup>3</sup>:

- there is a very strong correlation between precarious employment and OHS indicators;
- 90% of the studies in question drew a negative correlation between job insecurity and worker health;
- there is a very strong correlation between temporary workers and poor OHS practices;
- there is very strong evidence of a link between small businesses and poor OHS preventive practices;

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<sup>1</sup> G. Rodgers, J. Rodgers J. *Precarious Jobs in Labour Market Regulation : The Growth of Atypical Employment in Western Europe*. 1989. Brussels : International Institute of Labour Studies, Free University of Brussels

<sup>2</sup> M. Quinlan, J.M. Mayhew P.Bohle P. *Contingent work : health and safety perspectives or global expansion of precarious employment, work disorganisation and occupational health : a review of recent research*. Paper presented to the European Union Research Workshop, Dublin, May 22-23, 2000.

<sup>3</sup> B. Barrett, M. Sargeant. The Health, Safety and Well-being of Vulnerable Workers. In M. Sargeant, M.Giovanone. *Vulnerable Workers; Health Safety and Well-being*. Gower Applied Research; 2011, Chapter 1: 2-20.

- the link between part-time work and OHS practices is not as clear as in the above instances;
- women more often occupy precarious jobs and are especially vulnerable to the consequences of precariousness on their health.

The definition of Rogers et al. and the conclusions of Quinlan et al., and Lewchuk et al.<sup>4</sup> on the effects of precarious work on health were used by the Law Commission of Ontario, which stated that:

Precarious work is characterized by job instability, lack of benefits, low wages, and the extent of control over the situation. Such work is possibly subject to greater risk of injury and ill health [...].Therefore, vulnerability in this context refers not to the workers themselves but to the situation facing them, because they occupy a precarious job and due to disadvantages associated with gender, immigration, ethnicity and other characteristics. [...] Precarious work affects other aspects of their lives, which are not work-related. Precarious work leads to a greater risk of accidents and illness, stress and difficulties in obtaining medical treatment<sup>5</sup> (our translation).

As the LCO observes, vulnerability is not a characteristic that is intrinsic to individuals themselves, but to the compounding of disadvantageous or devastating circumstances. Yet the migratory experience and professional integration, themselves the source of numerous disadvantageous situations, all too often lead to cumulative precariousness, as several authors who link the job insecurity of immigrants with the global economic context have shown<sup>6,7,8,9</sup>. These authors hold that the 2008 economic crisis accelerated the deterioration of labour standards and their application and increased migratory movement. These favour job insecurity, as seen in a) the replacement of regular by temporary jobs, b) the outsourcing of jobs, c) work intensification and d) lower

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<sup>4</sup> W. Lewchuk, M. Clarke, A. Wolff A. *Working without Commitments; The Health Effects of Precarious Employment*. McGill-Queen's University, 2011..

<sup>5</sup> Law Commission of Ontario /Commission du droit de l'Ontario. 2012. *Travailleurs vulnérables et travail précaire* (p.1). <http://www.lco-cdo.org>. accessed 16-06-2016.

<sup>6</sup> P. James, D. Walters. Supply Chains and the Protection of Vulnerable Workers. In Sargeant M, Giovannone M. *Vulnerable Workers; Health Safety and Well-being*. Gower Applied Research; 2011, Chapter 3: 57-74.

<sup>7</sup> E. Q. Ahonen, F.G. Benavides, J. Benach. Immigrant populations, work and health - a systematic literature review. *Scandinavian Journal of Work, Environment and Health*. 33, n.º2, 2007, 96-104.

<sup>8</sup> J. Benach, C. Muntaner, H. Chung, F.G. Benavides. Immigration, Employment Relations, and Health: Developing a Research Agenda. *American Journal of Industrial Medicine*, n.º.53, 2010, 338-343.

<sup>9</sup> EU-OSHA. *Literature Study on Migrant Workers*. Bilbao: European Agency for Safety and Health at Work (EASHW), European Risk Observatory. 2006.

wages. The impact of these changes has been largely born by the immigrant workforce.

According to the OECD<sup>10, 11</sup>, the effects of job precariousness are first seen in the income gap between the wealthiest populations and the precarious situation of workers due to wage disparities. For example, in Canada, pay differentials between a temporary employee and a regular employee for a 40-hour workweek in 2014 was around \$12,000 CDN per year<sup>12</sup>. Job uncertainty impoverishes workers, and like the other Canadian provinces, Québec is not exempt from such job insecurity<sup>13</sup>.

Some authors looked beyond the precariousness of employment, income and social status to examine precarious labour relations and worker health. According to Lewchuck et al.<sup>14</sup>, there are statistically significant links between job insecurity and stress due to unstable relationships, excessive efforts, ambiguous or inadequate supervision and the lack of support from coworkers or bosses. Those who must exert the greatest effort at establishing relations are usually subject to racial discrimination<sup>15</sup>.

Employment precariousness comports a range of different economic, social and legal components. Drawing on the work of all these authors, including<sup>16,17,18,19,20,21</sup>, we have based our model on the concept of cumulative

<sup>10</sup> Organisation de coopération et de développement économique (OCDE). *Toujours plus d'inégalités : pourquoi les écarts de revenus se creusent*. 2011. <http://www.oecd.org/els/social/inegalite>.

<sup>11</sup> OECD. Overview of Inequality Trends, Key Findings and Policy Directions. In *It Together: Why Less Inequality Benefits All*. 2015. OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264235120-en>.

<sup>12</sup> B.DePratto, R. Bartlett. La précarité de l'emploi au Canada : au-delà de l'anecdote, des faits avérés? *Étude spéciale. Services économiques Banque Toronto-Dominion*, 2015, 25<sup>th</sup> march. [http://www.td.com/francais/document/PDF/economics/special/PrecariousEmployment\\_fr.pdf](http://www.td.com/francais/document/PDF/economics/special/PrecariousEmployment_fr.pdf).

<sup>13</sup> M. Vézina, E. Cloutier, S. Stock, K. Lippel and al. *Enquête québécoise sur des conditions de travail, d'emploi et de santé et de sécurité du travail (EQCOTESST)*. Québec, Institut de recherche Robert-Sauvé en santé et sécurité du travail — Institut national de santé publique du Québec et Institut de la statistique du Québec, 2012, 59 à 158.

<sup>14</sup> *Ibidem* 5.

<sup>15</sup> *Ibidem* 5.

<sup>16</sup> *Ibidem* 2

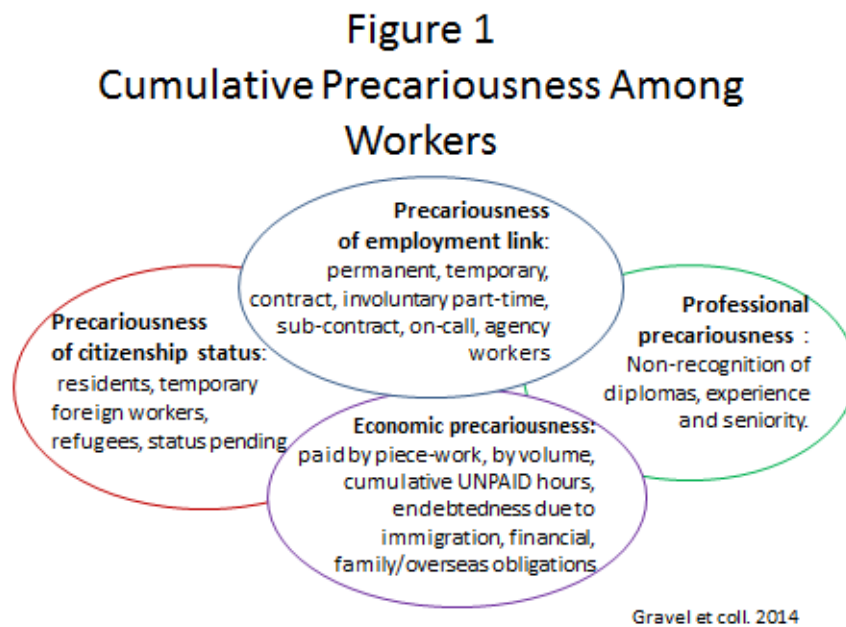
<sup>17</sup> T. Basok. *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada*. McGill-Queen's University Press, 2012.

<sup>18</sup> M. Sargeant, E. Tucker. Layers of Vulnerability in Occupation Health and Safety for Migrant Workers: Case Studies from Canada and the United Kingdom. *Comparative Research in Law & Political Economy, Research*, 2009. Paper no 8, 51.

<sup>19</sup> A. Kosny, M. Lifshen, E. Maceachen, P. Smith, G.J. Jafri, C. Neilson, D. Pugliese, J. Shield. *Delicate Dances: Immigrant Workers' Experiences of Injury Reporting and Claim Filing*. 2011. Institute for Work and Health, Study Report; 38. [www.iwh.on.ca/system/files/documents/immigrant\\_workers\\_experiences\\_of\\_injury\\_reportin\\_g\\_and\\_claim\\_filing\\_2011.pdf](http://www.iwh.on.ca/system/files/documents/immigrant_workers_experiences_of_injury_reportin_g_and_claim_filing_2011.pdf). accessed 16-06-2016.

precariousness among immigrant workers. This concept covers four areas of precariousness: 1) job insecurity; 2) financial insecurity; 3) non-recognition of professional qualifications; 4) precarious citizenship status (see figure 1). Taking a different approach from several authors, we have recast these elements from the workers' viewpoint, according to their ability to determine the gap between their working conditions and those of regular workers, those they work alongside in the companies that hire them directly or through an intermediary.

Figure 1. Cumulative Precariousness among Workers



If we refer to the definition given by Rogers et al.<sup>22</sup> employment precariousness refers to high uncertainty regarding the length of the job and the lack of job security provided to workers by those who hire and pay them. Professional precariousness refers to poor worker protection (social, unemployment insurance and protection against discrimination) in Rogers et al.<sup>23</sup>, which is viewed by workers as non-recognition of their qualifications. Economic

<sup>20</sup> *Ibidem* 3.

<sup>21</sup> *Ibidem* 6.

<sup>22</sup> *Ibidem* 3.

<sup>23</sup> *Ibidem* 3.

precariousness is linked to low individual and collective control over working conditions, pay and hours worked, and to low wages and economic vulnerabilities in Rogers et al., which workers experience as the disparity between their wages and their financial obligations. In our model, we include the integration of immigrant workers into the labour market and specifically ethnic or racial job discrimination, in concurrence with the findings of the LCO<sup>24</sup>.

The modest contribution of this model is to show that these elements combine to create a circular effect that renders workers, and in this case immigrant workers, invisible. While in this model, precariousness of status is closely linked to the context of migration, it could easily apply to the context of social insertion into the labour market. Likewise, women, young people, physically or mentally handicapped people and those reintegrating society following extended absence due to health, family problems or imprisonment could just as easily experience precariousness of social status due to some form of discrimination.

## **2. Highlights on the Health of Workers Hired Through Recruitment Agencies, Temporary Foreign Workers (TFW) and Workers in Small Non-Unionized Businesses (SB)**

In 2014-2015, a review of the literature on work-related health inequalities was conducted with funding from the Léa-Roback Research Centre on Social Inequalities in Health of Montreal. Our working premise was based on the following paradox. In view of the numerous scientific advances in OHS, we wanted to understand why a) the frequency and the gravity of injuries among workers in precarious job situations remain so high, and b) workers in precarious job situations also have such a hard time claiming compensation and obtaining rehabilitation when they are victims of occupational injuries. This failure led to the formulation of three questions that oriented the review of the scientific literature and the mobilisation of stakeholders.

- What are the mechanisms by which workers in precarious jobs are marginalized from OHS practices?
- How can these mechanisms be countered and adapted to the OHS conditions found in different kinds of precarious jobs?

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<sup>24</sup> *Ibidem* 6.

- Which stakeholders can adapt the OHS practices and conditions found in different kinds of precarious jobs?

The objectives of the review of scientific literature were to:

- determine the production of job-related health inequalities<sup>25</sup> for three categories of workers having cumulative insecurities
- temporary employment agency workers
- temporary foreign low-skilled farm workers
- small non-unionized business (SB) workers (< 50 workers);
- identify recommendations for correcting these situations by improving or changing OHS practices and the application of OHS legislation;
- validate the pertinence and the feasibility of these recommendations.

A number of OHS and immigration search engines were used to review scientific papers, research reports and other legal documents based on keywords relative to the three categories of workers in question. More than two hundred scientific papers published between 2000 and 2014 were consulted. Eleven OHS experts on the pertinence and the feasibility of a series of recommendations found in the literature were invited to debate changing practices.

### ***2.1. Highlights on the Health of Workers Hired Through Recruitment Agencies, Temporary Foreign Workers (TFW) and Workers in Small Non-Unionized Businesses (SB)***

Five observations can be made from the review of the literature on the three profiles of workers in question: temporary employment agency workers, TFW and non-unionized SB workers.

1) It is impossible in Canada to draw up an accurate health portrait of these three profiles of workers from public compensation or health records, because current methods of epidemiologic monitoring do not specify the employment or origins of these workers. A large number of exploratory studies have shown that temporary foreign workers, recruitment agency workers, sub-contract

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<sup>25</sup> G. Baril-Gingras, S. Montreuil, P.S. Fournier. 2013. *La santé et la sécurité au travail, au cœur du travail et de l'emploi : un modèle intégrateur*, Presses de l'Université Laval, p. 1 to 8 in S. Montreuil et coll. 2013. *L'intervention en santé et en sécurité du travail : pour agir en prévention dans les milieux de travail*. Presses de l'Université Laval, 495 p.

workers and on-call workers are highly exposed to workplace injuries due to their job conditions.

2) Where it is not possible to locate and identify these workers inside companies, physicians, nurses, industrial hygienists, audiologists and other OHS professionals cannot accord them any special attention. Even worse, in some cases, they are excluded from monitoring under the pretext that they are merely transitory workers.

3) Nothing in the existing OHS legislation excludes these three categories of workers. But these workers, mainly employed in non-priority sectors of activity (manufacturing, agriculture, services, hotels, etc.) in terms of OHS monitoring, are indirectly excluded from prevention activities. In Québec, there are four distinct prevention mechanisms under the Act Respecting Occupational Health and Safety (OHSA): a) form a health and safety committee; b) designate safety representatives; mandatory measures only for establishments having economic activities under categories<sup>26</sup> 1 and 2; c) establish an internal health program; d) implement a prevention program; mandatory measures only for categories 1, 2 and 3. These are sectors that hire very few workers having these profiles.

4) The shared trait of these three worker categories is that they meet the requirements for high flexibility of businesses looking for ways to cut production costs.

5) Temporary employment agency workers and non-unionized SB workers come from an immigrant background, as do temporary foreign workers. The first two profiles are workers who seek to integrate the Canadian job market, which in fact discriminates against them.

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<sup>26</sup> Group 1: building and public works, chemical industry, logging and sawmills, mines, quarries and oil wells, metal fabrication. Group 2: timber industry (except sawmills), rubber and plastics industry, transportation equipment manufacturing, primary metal manufacturing, fabrication of non metallic mineral products. Group 3: trade, leather industry, machinery manufacturing (except electric), tobacco industry, textile industry. Group 4: other business and personal services, communications, energy transport and other public services, printing, publishing and allied sectors, petroleum and coal products manufacturing, electrical products manufacturing. Group 5: agriculture, hosiery and clothing, education and related services, finances, insurance and real estate, medical and social services, hunting and fishing, other manufacturing industries, un-codified cases. "Twenty years after the adoption of the law [in 1979], the regulations on the joint committee and safety representative still were not enacted for all these groups. Moreover, 86.4% of workers are not covered under these provisions of the law." <http://santeseurite.ftq.qc.ca/les-groupes-prioritaires-cest-quoi>.



## 2.2. Overexposure and Under-reporting to Occupational Injury Risks

Two elements stand out concerning these three worker categories: overexposure to occupational injury risks and under-reporting of such risks. These were documented in exploratory studies in the absence of a clear portrait based on public OHS records<sup>27</sup>. In Quebec, the Institut de recherche Robert-Sauvé en santé et en sécurité du travail (IRSST) has shown that between 1995 and 1997, the occupational injury rate among temporary employment agency workers was 81.5% of equivalent full-time workers, a higher rate than that of the metal products manufacturing industry (44%, 2<sup>nd</sup> rank) and truck and bus bodywork (40%, 3<sup>rd</sup> rank)<sup>28</sup>. The manual workers hired by temporary employment agencies have an occupational injury rate that “is comparable to or even exceeds in some cases those in construction, lumbering and mines”<sup>29</sup>. Other studies conducted in the United States, Italy and France report similar findings. Temporary or transient workers have a higher occupational injury rate than their counterparts who have permanent jobs<sup>30,31,32</sup>. As is the case for temporary employment agency workers, analysis of the exposure of TFW to occupational injuries is difficult to document. It is based on exploratory studies or data from medical consultations. An injured TFW would have a slim chance of being rehired the following year, a context that too often leads to under-reporting of injuries<sup>33,34,35,36</sup>. However, the mobile health clinics

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<sup>27</sup> P. Prud'homme, M.A. Busque, P. Duguay, D. Côté. *Travailleurs immigrants et SST au Québec — État des connaissances statistiques et recension des sources de données*. Rapport R-890, 2015, 121 p. <http://www.irsst.qc.ca/media/documents/PubIRSST/R-890.pdf>. accessed 16-06-2016.

<sup>28</sup> F. Hébert, P. Duguay, P. Massicotte. *Les indicateurs de lésions indemnisées en santé et en sécurité du travail au Québec : analyse par secteur d'activité économique en 1995-1997*. Études et recherches, Rapport R-333, Montréal, IRSST, 2003, 229 p.

<sup>29</sup> P. Duguay, P. Massicotte, P. Prud'homme. *Lésions professionnelles indemnisées au Québec en 2000-2002; II - Tableaux de classement par activité économique*. Études et recherches, Rapport R-548, Montréal, IRSST, 2008, 23-23. <http://www.irsst.qc.ca/media/documents/PubIRSST/R-548.pdf>. accessed 16-06-2016.

<sup>30</sup> C. Smith, B. Silverstein, D.K. Bonauto, D. Adams, Z.J. Fan. Temporary Workers in Washington State. *American Journal of Industrial Medicine*, 2010, 53: 135-145.

<sup>31</sup> B. Fabiano, F. Curro, A.D. Reverberi, R. Pastorino. A Statistical Study on Temporary Work and Occupational Accidents: Specific Risk Factors and Risk Management Strategies. *Safety Science*, n.°44, 2008, 535-544.

<sup>32</sup> C. Grusenmeyer. *Les accidents liés à la sous-traitance : exploitation de la base de données Épicéa*. Note scientifique et technique. 2007. NS 266, INRS, 121 p. <http://www.inrs.fr/inrs/recherche/etudes-publications-communications/doc/publication.html?refINRS=NOETUDE%2F4653%2FNFS%2026>.

<sup>33</sup> S. Gravel, F. Villanueva, S. Bernstein, J. Hanley. Les mesures de santé et sécurité au travail auprès des travailleurs étrangers temporaires dans les entreprises saisonnières. *Revue PISTES*, 2 n.° 16, 2014, 1-22.

in rural Ontario have shown that TFW mainly consult for musculoskeletal problems, some injuries caused by handling pesticides (eye problems, skin reactions, respiratory and gastrointestinal disorders), thermal reactions due to heatstroke in summer and frostbite early and late in the season, and psychological distress due to being separated from their families<sup>37,38,39</sup>. Even if all TFW were to report their injuries, these findings cannot be confirmed through a systematic analysis of occupational injuries among TFW, because the TFW are not identified as such in the public records.

The workers hired by SB, like temporary employment agency workers and TFW, are exposed to the risks of occupational injuries because they are assigned to arduous tasks. According to some authors, only serious injuries are reported by SB. Employers would rather offer workers temporary leave for minor injuries and assume the costs of an absence<sup>40,41,42</sup>. This would explain the differences between the frequency and gravity rates between injuries observed

<sup>34</sup> J. Hennebry. Not Just a Few Bad Apples: Vulnerability, Health and Temporary Migration in Canada. *Canadian Issues /Thèmes canadiens*, Spring/printemps. 2010, 73-77.[http://www.edsc.gc.ca/fra/emplois/travailleurs\\_etrangers/reform/Reform\\_PTET.pdf](http://www.edsc.gc.ca/fra/emplois/travailleurs_etrangers/reform/Reform_PTET.pdf). accessed 16-06-2016.

<sup>35</sup> M. Amar, G. Roberge, A. LaRue, L. Gélinau, Y. Leanza Y. *Les travailleurs agricoles migrants mexicains et guatémaltèques de l'Île-d'Orléans*. CSSS de la Vieille-Capitale/Centre affilié universitaire, 2009. 80 p. <http://www.csssvc.qc.ca/telechargement.php?id=655>.

<sup>36</sup> J. Hanley, S. Gravel, K. Lippel, J. Koo. Pathways to Healthcare for Migrant Workers: How Can Health Entitlement Influence Occupational Health Trajectories? *Revue PISTES*, 2 n.°16, 2014, 1-18.

<sup>37</sup> M. Pysklywec, J. McLaughlin, M. Tew, T. Haines. 2011. Practice—Doctors Within Borders: Meeting the Health Care Needs of Migrant Farm Workers in Canada. *CMAJ*, 2011. p. 1 à 5.<http://www.cmaj.ca/content/183/9/1039?related-urls=yes&legid=cmaj;183/9/1039>. accessed 16-06-2016.

<sup>38</sup> *Ibidem* 34.

<sup>39</sup> J. McLaughlin. Migration and Health: Implications for Development—A Case Study of Mexican and Jamaican Migrants in Canada's Seasonal Agricultural Workers Program, *Policy Paper*, October 2009, 1-16.

<sup>40</sup> D. Champoux, R. Baril, A. Beauvais, J.P. Brun. L'environnement des petites entreprises en santé et en sécurité du travail : tour d'horizon des résultats de la recherche et des enjeux particuliers en contexte québécois. *L'intervention en santé et en sécurité du travail : pour agir en prévention dans les milieux de travail*. Montreuil, Fournier, Baril-Gingras (éds.), Québec, Presses de l'Université Laval, 2013, 14-27.

<sup>41</sup> D. Champoux, J.P. Brun. OSH Practices and Interventions in Small Businesses: Global Issues in the Québec Context. *Policy and Practice in Health and Safety*, n.° 1, 2015, 47-64.

<sup>42</sup> S. Gravel, D. Vergara, J. Dubé, J.F. Ducharme-Varin, G. Legendre, K. Lippel. *Santé et sécurité des travailleurs qui cumulent des précarités : la lutte aux inégalités de santé attribuables au travail*. Rapport de recherche, Centre Léa-Roback sur les inégalités sociales de santé de Montréal, 2016. <https://iss.uqam.ca/upload/files/05-04-2016-Rapport-SGravel.pdf>.

in SB and major companies. According to Duguay et al.<sup>43</sup>, average compensation for injury lasts 116 days in SB and 64 days in medium to large businesses.

Under-reporting of injuries among these three worker categories is so widespread as to raise serious criticisms of the fair application of OHS standards. This is even more troubling in light of the increased popularity of using agencies and TFW to meet manpower requirements. In the province of Québec, according to the authors, there are an estimated 1,200 agencies of all types<sup>44,45,46</sup>. In Ontario, there are over 1,300 agencies employing close to 700,000 workers<sup>47</sup>. The same applies to TFW, from 2002 to 2013, hiring of these workers increased 264%, to the point where temporary immigration, primarily of unskilled workers, exceeded permanent immigration<sup>48,49,50</sup>.

### **2.3. Inequitable Preventive OHS Practices**

For each of these three worker profiles, preventive OHS practices are inadequate for different reasons. Temporary employment agency workers in Québec have a three-way relationship involving the agency, the client company and the worker, which leads to confusion concerning OHS accountability.

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<sup>43</sup> P. Duguay, A. Boucher, M.A. Busque P. Prud'homme, D. Vergara. *Les indicateurs de lésions professionnelles indemnisées : analyse par industrie et catégorie professionnelle, Québec, 2005-2007*. Études et recherches, Rapport R-749, Montréal, IRSST, 2012. <http://www.irsst.qc.ca/media/documents/PubIRSST/R-749.pdf>. accessed 16-06-2016.

<sup>44</sup> J. Bernier. *L'industrie des agences de travail temporaire : Avis sur une proposition d'encadrement, Cahier de transfert CT-2011-001*, ARUC, Université Laval.

<sup>45</sup> Centre des travailleurs et travailleuses immigrants. *Le lancement l'Association des travailleurs et travailleuses temporaires d'agence*. 2011. <http://iwc-cti.ca/fr/launch-of-the-temporary-agency-worker-association>.

<sup>46</sup> Direction de la santé publique de Montréal. *Traitement spécial des données du fichier du Réseau de santé et sécurité au travail de l'île de Montréal sur le nombre d'établissements étant des bureaux de placement de personnel et des services de location de personnel et le nombre de travailleurs déclarés à la CSST*. 2015.

<sup>47</sup> Ministry of Labour Ontario. *A consultation paper on work through temporary help agencies*. The association of management, administrative and professional crown employees of Ontario, 2008.

<sup>48</sup> Citizenship and Immigration Canada / Citoyenneté et immigration Canada (CIC). *Faits et chiffres 2012 — Aperçu de l'immigration : résidents temporaires*. 2012. <http://www.cic.gc.ca/francais/ressources/statistiques/faits2012-preliminaire/04.asp>. accessed 16-06-2016.

<sup>49</sup> Statistique Canada. *Bulletin de service - Services d'emploi 2011*. 2012, No 63-252-X. <http://www.statcan.gc.ca/pub/63-252-x/63-252-x2013001-fra.pdf>.

<sup>50</sup> Government of Canada /Gouvernement du Canada. *Réforme globale du programme des travailleurs étrangers temporaires : Les Canadiens d'abord*. Canada. 2014. WP-191-06-14F.

According to the 40 agency workers in Québec canvassed by Dubé et al.<sup>51</sup> (2014), most of the basic preventive OHS practices, such as task initiation, training on risks, emergency measures and the use of individual protection equipment, are largely unknown or unavailable. Few agency workers had been advised of their rights (right of refusal, to compensation, etc.) and of the risks they were exposed to in the client business. Supervisors seldom went to the client company. Only specialised services agencies, such as nursing care, security officers or truck drivers conducted a prior risk characterisation for the client company.

The same goes for TFW; they don't clearly understand their rights or hesitate to exercise them, and are not very familiar with preventive practices<sup>52,53,54</sup>. Farms and other seasonal enterprises are not included in the priority sectors that are monitored by public health departments. They receive little support or guidance in adapting preventive practices to the cultural and linguistic reality of these workers, originating primarily from Central and South America<sup>55,56</sup>. This is even more disturbing given that hiring TFW continues to increase, as mentioned above<sup>57, 58,59</sup>.

Unlike temporary employment agencies, accountability for preventive OHS practices in non-unionized SB is not ambiguous. But, interventions are much longer and difficult because SB seldom have the means to put preventive OHS practices in place<sup>60</sup>. The costs are too high, the SB lack time, knowledge and adequate OHS management skills<sup>61</sup>. According to several authors, the solution

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<sup>51</sup> D. Dubé, S. Gravel. Les pratiques préventives auprès des travailleurs d'agences de location de personnel temporaire ou permanent : comparaison entre les travailleurs immigrants et non immigrants. *Revue PISTES*, no spécial : Travailleurs immigrants et santé et sécurité du travail, n.° 14, 2014, 16-2. <http://pistes.revues.org/3631>.

<sup>52</sup> S. Gravel, J. Rhéaume, G. Legendre. Faible participation des travailleurs immigrants aux mesures de santé et de sécurité au travail dans les petites entreprises. *Alterstice — Revue Internationale de la Recherche Interculturelle*, 2 n.° 2, 2012 : 63-78.

<sup>53</sup> *Ibidem* 35.

<sup>54</sup> *Ibidem* 40.

<sup>55</sup> S. Gravel, S. Bernstein, F. Villanueva, J. Hanley, D. Crespo, E. Ostiguy E. 2014. Cohabitation résidentielle et des métiers des travailleurs étrangers temporaires avec les travailleurs locaux dans les communautés rurales du Québec, le point de vue des employeurs. *Diversité Urbaine*, INRS-Culture. *Diversité urbaine*, 14 n.° 2, 2014, 97-122.

<sup>56</sup> *Ibidem* 49.

<sup>57</sup> *Ibidem* 49.

<sup>58</sup> *Ibidem* 50.

<sup>59</sup> *Ibidem* 51.

<sup>60</sup> *Ibidem* 26.

<sup>61</sup> R. Lancaster, R. Ward, P. Talbot, A. Brazier A. *Costs of Compliance with Health and Safety Regulations*. Entec UK Limited for the Health and Safety Executive, Rapport 174, 2003. <http://www.hse.gov.uk/research/rrpdf/rr174.pdf>. accessed 16-06-2016.

would be to closely work with the SB during the first years of implementation, at a time when the company is more concerned with its commercial viability<sup>62,63</sup>.

In short, preventive OHS measures are not adapted to these three worker categories, even though they occupy a growing place in the labour market.

#### ***2.4. Indirect Exclusion by OHS Regulations and Orientations Concerning Prevention***

The three worker categories under study derive little benefit from preventive measures, even though none of the provisions of the OHS Act Respecting Industrial Accidents and Occupational Diseases (IAODA) prescribe any form of exclusion. It is the interpretations of these laws and their application by the administrative offices of health departments that lead to this form of indirect exclusion<sup>64</sup>. Current OHS measures are no longer adapted to today's job market; employers are looking not for a stable workforce, but for one that meets their criteria for flexibility in terms of size, scheduling, wages and versatility<sup>65, 66</sup>. Back in 2004, Lippel et al.<sup>67</sup> held that, as concerns self-employed workers, OHS legislation should be revised in light of the evolving labour market, and that the ways these workers are excluded from the overall system should be examined.

Employers that use the services of one of these three profiles of workers: temporary employment agency workers and their clients, seasonal enterprises (agricultural, horticultural or other) and SB, generally avoid application of one or another of the legal OHS requirements because of their small size (< 50

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<sup>62</sup> S. Mélançon, M. Alarie. *Taux de survie des entreprises au Québec et taux de passage*. Québec, ministère de l'Industrie et du Commerce, Direction générale de la planification, Direction de l'analyse économique. 2001. <http://collections.banq.qc.ca/ark:/52327/bs59128>. accessed 16-06-2016.

<sup>63</sup> *Ibidem* 41.

<sup>64</sup> L.F. Vosko. Less than Adequate: Regulating Temporary Agency Work in the EU in the Face of an Internal Market in Services. *Cambridge Journal of Regions, Economy and Society*, 2 n.º 3, 2009, 395-411.

<sup>65</sup> *Ibidem* 7.

<sup>66</sup> D. Mercure, M. Vultur. *La signification du travail. Nouveau modèle productif et ethos du travail au Québec*. Presses de l'Université Laval, 2010, EAN : 9782763790916.

<sup>67</sup> K. Lippel, S. Bernstein, K. Messing. *Travail atypique : protection légale des conditions minimales d'emploi et de la santé*. Université du Québec à Montréal, Rapport final soumis au FQRSC dans le cadre du programme d'Actions concertées — Le travail atypique, la mutualisation du risque, la protection sociale et les lois du travail. march 31, 2004. [http://www.crimt.org/Publications/Rapport\\_Lippel\\_Bernstein.pdf](http://www.crimt.org/Publications/Rapport_Lippel_Bernstein.pdf).

workers), which exempts them from the obligations to form a health and safety committee, name security representatives and implement a general and specific health program. They are required to comply with preventive measures when an emergency occurs, a context in which a reactive approach to accidents and illnesses prevails to the detriment of a preventive approach<sup>68</sup>.

For some people, changing practices means changing the paradigm of prevention, while for others, certain legislative modifications would serve the purpose, some raised the penalty for non-reporting or incitement to non-reporting from \$100,000 to \$500,000<sup>69,70</sup>. In Québec, unlike the other Canadian provinces, an employer is not required to report an occupational injury to authorities unless the accident is especially severe (death, amputation, an accident involving more than one worker or an accident causing damages exceeding \$150,000, article 62 of the OHSA). In Québec today, this kind of financial incentive is still not enough to adapt preventive practices to the reality of a job market, at a time when companies are increasingly turning to temporary hires rather than a stable workforce.

### **2.5. Anonymous Workers within Companies**

In Québec, it is impossible to document the scope of the trend toward multiple hires from statistical data: permanent workers, workers from recruitment agencies, FTW, subcontract and on-call workers. Within the same company several groups of workers work side by side without necessarily belonging to the same unit, although they work at similar jobs, the OHS conditions are always distinct<sup>71</sup>.

Industrial health teams (IHT) attempt to identify the compound composition of the workforce within companies, but have no systematic information on job status. Some IHT professionals justify this situation by the approach adopted

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<sup>68</sup> *Ibidem* 41.

<sup>69</sup> Legislative Assembly of Ontario /Assemblée législative de l'Ontario. *Projet de loi 109, Loi de 2015 modifiant des lois en ce qui concerne l'emploi et les relations de travail*. 2015. [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=3402](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3402). accessed 16-06-2016.

<sup>70</sup> K. Lippel, E. MacEachen, R. Saunders, N. Werhun, A. Kosny, L. Mansfield, C. Carrasco, D. Pugliese. Legal Protections Governing Occupational Health and Safety and Workers' Compensation of Temporary Employment Agency Workers in Canada: Reflections on Regulatory Effectiveness. *Policy and Practice in Health and Safety*, 9 n.º2, 201, 69-90.

<sup>71</sup> S. Gravel, M. Lortie, H. Bilodeau, J. Dubé. *Interaction Between Human Resources Management and OHS - Preparing Future Managers*. Studies and Research Projects / Report R-788, Montréal, IRSST, 2013. <http://www.irsst.qc.ca/media/documents/PubIRSST/R-788.pdf>. accessed 16-06-2016.

by public OHS authorities, which encourages them to focus on workstation-related risks, regardless of who is doing the job<sup>72</sup>. For example, workers from recruitment agencies are rarely included in workstation analyses, even though they have been working for the client company for six months. When they are, they are systematically absent from feedback on corrections made to the workstations in the months that follow. This is a situation that calls into question the efficacy of OHS interventions in companies that use such worker groups and of the means available for developing equitable approaches for workers who are all too often relegated to the shadows.

### ***2.6 Workers in the Shadows, Immigrant workers***

Studies conducted by various authors confirm that workers in precarious situations are mainly immigrants. At the height of the season, their presence reaches a significant demographic ceiling in small rural communities and TFW are isolated because of the distance between farms<sup>73</sup>. The other two profiles, recruitment agency and non-unionized SB workers, are also immigrants seeking experience in the Canadian job market<sup>74,75</sup>. On the one hand, it is impossible to systematically document the origins of workers based on claims for work injuries, and on the other hand, it is impossible to document the origins of workers hired based on the size of the company<sup>76</sup>. These two preventive approaches, one based on the frequency and severity of injuries and the other on the size of the company, are not effective in the case of these workers in the shadows.

The three worker categories are subject to cumulative precariousness in terms of jobs, income, recognition of skills and immigration status. On the one hand, they bear the brunt of the ever-growing demands of businesses for flexibility and are also subject to job discrimination. On the other hand, they are unduly exposed to the risk of occupational injuries and excluded from preventive

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<sup>72</sup> J. Dubé, S. Gravel S. Les pratiques préventives auprès les travailleurs d'agence de location de personnel: discours des professionnels de la santé au travail. (In preparation).

<sup>73</sup> *Ibidem* 56.

<sup>74</sup> S. Gravel, S. Premji S. Travailleurs migrants : une histoire sans fin de cumul des précarités de statut, d'emploi et de conditions de santé et de sécurité au travail. *Revue PISTES*, no spécial : Travailleurs immigrants et santé et sécurité du travail, 16 n.º 2, 2014. <http://pistes.revues.org/3631>.

<sup>75</sup> M. Vultur, Y. Provencher. Les logiques de recours aux agences de travail temporaire et leurs pratiques de recrutement et de sélection de la main-d'œuvre, dans Bernier, J., Vultur, M. *Les agences de travail temporaire; leur rôle et leur fonctionnement comme intermédiaire du marché du travail*, Presses de l'Université de Laval, chap. 2, 2014 : 39-65.

<sup>76</sup> *Ibidem* 43.

measures, even though nothing in the OHS legislation specifically excludes them. Another paradox has arisen: how can OHS professionals and departments, in light of their moral and ethical responsibilities toward all workers regardless of their job, their status, problems with professional recognition and manner of remuneration, assume their role under current preventive approaches?

### 3. Mobilising Stakeholders to Change Practices

Having reviewed the literature, the *OHS-Immigration and Employability Roundtable*, the *Institut santé et société de l'Université du Québec à Montréal* and the *Institut de recherche Robert-Sauvé en santé et sécurité du travail (IRSST)* backed this initiative in the form of a *Grand Debate* on the issues involved in changing OHS practices for workers who are subject to cumulative precariousness<sup>77</sup>. Aimed at mobilising OHS stakeholders into addressing the issue of job precariousness and worker vulnerability, the analytical framework for this mobilisation was based on the works of Quinlan<sup>78</sup>, Boocock et al,<sup>79</sup> and others.

According to Quinlan, adapting OHS practices to the social and economic context of today's labour market is a constantly evolving process. Quinlan conducted an historic analysis of the 19<sup>th</sup> and 20<sup>th</sup> centuries, paying particular attention to the mobilisation of stakeholders to counteract the adverse effects of job precariousness. Child labour, women, and workers in the mining and merchant marine sectors were pinpointed as historic examples of such mobilisation. The conclusions are striking: history repeats itself. Quinlan found that the mobilisation of stakeholders to change OHS practices revolves around certain key moments that can be summed up in seven major phases:

- 1) *Denounce, through a credible group, the poor conditions of vulnerable workers.* Depending on the period, this credible group could be the church, labour unions, women's or civil rights groups. Not being linked to the governing party, this group is sufficiently tolerated to be heard, and to influence public opinion regarding the vulnerable workers in question.

<sup>77</sup> *Ibidem* 43.

<sup>78</sup> M. Quinlan. We've Been Down this Road Before : Vulnerable Work and Occupational Health in Historical Perspective. In Sargeant M, Giovannone M. *Vulnerable Workers; Health Safety and Well-being*. Gower Applied Research; Chapter 2, 2011, 21-55.

<sup>79</sup> M. Boocock Z. Hannif, S. Jamieson, J.R. Lamare, F. Lamm, C. Martin, N. McDonnell, Robertson, P. Schweder, S. Boaz. Occupational Health and Safety of Migrant Workers : An International Concern. In Sargeant M, Giovannone M. *Vulnerable Workers; Health Safety and Well-being*. Gower Applied Research, Chapter 6, 2011, 121-144.



- 2) *Show that the deprivation (financial, legal and social justice) in the community of workers targeted is such that the intervention of a third party to denounce the situation is justified.* These groups are too often threatened with losing their jobs, their income or their advantages to defend their cause themselves. They are often poorly equipped to assert or claim a right whose existence they could ignore or poorly understand.
- 3) *Determine the contexts giving rise to such deprivation and identify the stakeholders who have contributed directly or indirectly to this situation.* The authors point to the economic pressures on companies facing international competition in the 21st century, such as cutting manpower costs, requiring a highly-flexible workforce and other strategies that create job precariousness.
- 4) *Look for alternative OHS management practices to allow vulnerable workers to receive fair and equitable treatment.* As was the case with the arrival of women in the job market and the special measures needed for the protection of pregnant workers, management of OHS prevention is barely keeping up with today's changes in the labour market.
- 5) *Review the worker health surveillance system in light of emerging characteristics of vulnerability.* As in the past, those responsible for monitoring OHS have added to the list of information gathered from workers and companies: age to identify workers under the age of 14, gender to identify women, and the sector of economic activity to identify the jobs most at risk.
- 6) *Take steps to document the frequency and the severity of injuries in the group of workers targeted as vulnerable.* To adjust prevention targets and take effective action, it is important to know in which kind of companies the greatest number of vulnerable workers are found.
- 7) *Simultaneously mobilise those stakeholders who can help change OHS practices.* Each has a separate role to play in the coordination of these transformations for them to be real and significant.

This process of changing OHS practises is logical. However, it is not easy to mobilise stakeholders for workers in precarious situations, especially immigrant workers, because few countries collect data on the worker's country of origin<sup>80</sup>. Despite our efforts, the under-reporting of injuries is recurrent, along with immigrant workers<sup>81,82,83</sup>. According to Boocok et al<sup>84</sup>, we must raise the

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<sup>80</sup> *Ibidem* 80.

<sup>81</sup> *Ibidem* 20, 34, 35, 36, 41, 53.

<sup>82</sup> E. MacEachen K. Lippel, R. Saunders, A. Kosny, L. Mansfield, C. Carrasco, D. Pugliese. Workers' Compensation Experience-Rating Rules and the Danger to Workers' Safety in the Temporary Work Agency Sector. *Policy and Practice in Health and Safety*, 10 n.º 1, 2012, 77-95.

<sup>83</sup> S. Premji, P. Duguay, K. Messing, K. Lippel. Are Immigrants, Ethnic and Linguistic Minorities Over-Represented in Jobs with a High Level of Compensated Risk? Results from a

visibility of workers in precarious situations, regardless of the angle of approach. For example, Lamare<sup>85</sup> documented the invisibility of workers in precarious situations by measuring the income gap found in the activities declared by independent subcontracting companies in the State of New York. For James et al.<sup>86</sup> and Weil<sup>87</sup>, the multiplication of intermediaries carrying out a task or a mandate renders workers invisible in the chain of employers. In this case, OHS practices must innovate and adjust to the phenomenon of the multiplication of chains of intermediaries and the outsourcing of the most risky production activities<sup>88</sup>.

Given the growing complexity of the composition of the workforce within a single company, the OHS-Immigration and Employability Roundtable and the Society and Health Institute of the University of Quebec at Montreal took the initiative of bringing OHS, immigration and employability stakeholders together for a grand debate on the question of changing OHS practices as concerns workers cumulating precariousness.

#### **4. Highlights of the Mobilisation of OHS, Immigration and Employability Stakeholders**

Briefly, the objectives of this *Grand Debate*<sup>89</sup> were to:

- identify the disparities and the barriers to the protection of the health and safety of workers who are subject to cumulative precariousness, including immigrant workers;
- report on the changes in OHS practices to provide workers all the protection to which they are entitled;
- explore the developments needed to adapt public policies and OHS practices to the conditions of workers in precarious situations, including immigrant workers.

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Montréal, Canada Study Using Census and Workers' Compensation Data. *American Journal of Industrial Medicine*, 53 n.º 9, 2010, 875-885.

<sup>84</sup> *Ibidem* 83.

<sup>85</sup> J.R. Lamare. Employees Without Protections : The Misclassification onf Vulnerable Workers in New York. In Sargeant M, Giovannone M. *Vulnerable Workers; Health Safety and Well-bewing*. Gower Apllied Research; Chapter 9, 2011, 189- 210.

<sup>86</sup> *Ibidem* 57.

<sup>87</sup> D. Weil. *The Subcontracted Workplace. The Fissured Workplace: Why Work Became So Bad for so Many and What Can Be Done to Improve it*. Harvard University Press, chap. 5, 2014, 99-121.

<sup>88</sup> *Ibidem* 57.

<sup>89</sup> The Grand Debate was held on April 8, 1 2016.

The *OHS-Immigration and Employability Roundtable* invited partners in areas of OHS, public health, job integration and the integration of immigrants from the public sector, unions and community services. Each member organisation was asked to bring eight to ten of their people to the debate. There were 80 participants registered for the event, and all took part. Four participants who had to decline at the last minute were replaced so that their organisation could take part in the *Grand Debate*. Among the participants were some ten directors of OHS and public health departments. The debate covered two major topics: a) the state of current and past work in the area; b) the stakes and perspectives involved in changing practices.

#### ***4.1. Issues Involved in Modifying OHS Practices for Workers who are Subject to Cumulative Precariousness***

Nine actions, training, mobilisation and communications projects gave a brief overview of the outcomes and the difficulties encountered over the course of the project. After three years of operations, with some twenty partner organisations diligently attending the dozen meetings held, the *OHS-Immigration and Employability Roundtable* gave a positive assessment of its activities. New and sometimes unorthodox partnerships between the *Commission des normes, de l'équité et de la santé et de la sécurité au travail* (CNESST) and organisations responsible for the integration of immigrants were forged. Four projects had been conducted over the past two years, creating opportunities to exchange and share knowledge. Despite the positive outcomes, it must be noted that modifying practices presents significant challenges. On the one hand, immigrant workers often fall outside regular worker groups, either because they are not recorded since they hold temporary jobs in the company or because their conditions are not specifically monitored. On the other hand, modifying OHS practices for immigrant workers involves targeting workers based on job precariousness, and identifying the sectors of activity and the companies that hire them. And finally, to maximise the potential for modifying practices, OHS interventions need to be developed for each phase in the integration of immigrants or any other workers in a precarious job situation into the labour market.

Each project reported on the obstacles encountered and the possibilities for modifying OHS practices in their respective area of expertise: communications, training, rehabilitation and demographic analysis.

##### *Communications*

The communications project consisted of revising and adapting the communication plan of the *Commission des normes, de l'équité et de la santé et de la sécurité au travail* (CNESST), a plan intended for immigrant workers and employers who hire them<sup>90</sup>. The revision was largely facilitated by taking into account all of the comments from the working group. Even though the CNESST was open to adjusting its communication strategies, certain issues remain to be addressed. Efforts must be made periodically to raise the awareness of employers regarding the specific OHS situation of immigrant workers and to remind them of their obligations to initiate and train their employees as they are hired, and to closely supervise them. As the profile of immigrant workers evolves along with migratory movements (political refugees, family reunification, etc.); actions must be adapted to the types of new arrivals to the job market. We must adapt linguistically and culturally, and take into account the qualifications gap between the jobs held and the skills acquired in the country of origin. However, the message to recent immigrants must remain the same: encourage them to exercise their rights, remind them of the obligations of employers and workers, and above all inform them of the CNESST's services and mandate.

### *Training*

Two training projects were featured at the grand debate. One was intended for cultural integration officers and other for OHS professionals. The first project consisted of developing an OHS training program for cultural integration officers. This project was led by a non-profit organisation working toward integrating refugees and immigrants, a project funded by the CNESST, an unusual partnership, but one that was a great success<sup>91</sup>. In fact, the CNESST kept a portion of the material produced for its website. In spite of the project's success, issues remain. On the one hand, immigrants hesitate to speak about their experience of job injuries, fearing a backlash that could make it hard to get hired. On the other hand, it is difficult to train integration officers on so many OHS situations (exposure, reporting, claims, rehabilitation). The content is too broad for all the issues to be covered in a single training program. For prevention paradigms to evolve, we must consolidate the community approach aimed at assisting immigrants as they progress in their integration of the job market.

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<sup>90</sup> See the website: <http://www.csst.qc.ca/prevention/theme/immigration/pages/travailleurs-immigrants.aspx>. And the paper: <http://iss.uqam.ca/upload/files/3.%20Trudel%20Serge%20-%20Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf>.

<sup>91</sup> See the paper: <http://iss.uqam.ca/upload/files/4.Rosini-%20TCRI%20-%20%20Grands%20d%C3%A9bats%20Immigration%20et%20SST.pdf>.

The second project was also a training project on the situation of immigrant workers, this time intended for occupational health and safety professionals, a project conducted by an intercultural relations research and training centre<sup>92</sup>, another unusual partnership for OHS services. This training program did not obtain the desired response from public OHS monitoring services because the network is undergoing major restructuring and organisational changes, including the merger of institutions. Their training needs in the area of intercultural relations are not currently a priority. Nevertheless, several partners, including the inspectorate, compensation and rehabilitation departments showed an interest for a training program on intercultural encounters adapted to their respective mandates and needs.

### *Rehabilitation*

Two projects involved the rehabilitation of immigrant workers who were victims of work-related injuries. One focused on the difficulties of rehabilitation, including that of immigrant workers who are overqualified<sup>93</sup>, and the other concerned the barriers to returning to work encountered by workers who do not master either of the two official languages<sup>94</sup>. In both cases, the conclusions sparked discussions on equitability<sup>95,96</sup>. Simply adopting an equitable approach is not enough to improve the rehabilitation process for immigrant workers. An equitable approach must be developed that can counteract injustices that immigrants are victims of, such as hiring discrimination. Such services could include language upgrading for workers who have poor or no mastery of the official languages so they can find work outside immigrant job ghettos.

### *Demographic analysis:*

The demographic analysis project synthesised the known variables for the situation of immigrant workers. The conclusion of this project showed that it is

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<sup>92</sup> See the paper: <http://iss.uqam.ca/upload/files/4.Rosini-%20TCRI%20-%20Grands%20d%C3%A9bats%20Immigration%20et%20SST.pdf>. accessed 16-06-2016.

<sup>93</sup> See the paper: [http://iss.uqam.ca/upload/files/8.%20C%C3%94T%C3%A9-ISS\\_Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf](http://iss.uqam.ca/upload/files/8.%20C%C3%94T%C3%A9-ISS_Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf). accessed 16-06-2016.

<sup>94</sup> See the paper: [http://iss.uqam.ca/upload/files/9.%20Premji\\_Stephanie-Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf](http://iss.uqam.ca/upload/files/9.%20Premji_Stephanie-Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf). accessed 16-06-2016.

<sup>95</sup> D. Côté, S. Gravel, J. Dubé, D. Gratton, B.W. White. Identifying Key Moments in the Process of Work Rehabilitation: practitioners' experiences among culturally diverse clientele in Montréal (Québec, Canada). *Ethnicity and Health* (Submitted 2016-09)

<sup>96</sup> S. Premji. Barriers to Return-to-Work for Linguistic Minorities in Ontario: An Analysis of Narratives from Appeal Decisions. *Journal of Occupational Rehabilitation*, 25 n.º2, 2015, 357-367.

impossible to draw up a clear picture, even by cross-referencing such large databases as the Canadian census and Citizenship and Immigration Canada with data on occupational injuries<sup>97</sup>. While this is technically possible, it is extremely difficult to accomplish. Without reliable and recurrent statistics, it is impossible to monitor the health of immigrant workers and of workers in precarious situations in general. In order to document the health of these workers and better target prevention efforts, public OHS services must invest in the inclusion of variables such as length of residence, immigrant status, profession, sector of economic activity and the kind of job occupied. At the same time, further exploratory and qualitative studies are needed to enrich our understanding of those aspects that are difficult to measure with statistical data (compensation, training and initiation, etc.), such as the effects of over qualification on the physical and mental health of immigrant workers. By the end of this presentation, all participants agreed that there was a genuine desire to create partnerships, even if unlikely, in order to develop expertise appropriate for immigrant workers and for all workers in a situation of precariousness.

#### ***4.2. Potential for Modifying OHS Practices for Immigrant Workers***

To debate the stakes and perspectives involved in changing practices, eight panellists were asked to speak on the possibilities of adapting practices in their respective fields in the interests of workers who are subject to cumulative precariousness. Among these panellists, some held high positions in the development of OHS research and policies, while others were public health directors of worker health monitoring.

##### *Legal action*

The first panellist, head of the Canada Research Chair in Occupational Health and Safety Law<sup>98</sup>, held that while the protection of immigrant workers could be improved without changing the laws, during the next reform of the OHS Act it

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<sup>97</sup> See the paper: [http://iss.uqam.ca/upload/files/7.%20Prud'homme\\_Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf](http://iss.uqam.ca/upload/files/7.%20Prud'homme_Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf). See the article: Prud'homme P, Busque MA, Duguay P, Côté D. 2015. Travailleurs immigrants et SST au Québec — État des connaissances statistiques et recension des sources de données. Rapport R-890, 121 p. <http://www.irsst.qc.ca/media/documents/PubIRSST/R-890.pdf>. accessed 16-06-2016.

<sup>98</sup> <http://iss.uqam.ca/upload/files/10.%20Lippel-Gravel-Grand%20d%C3%A9bat%20Immigration%20et%20SST.pdf>. accessed 16-06-2016.

would be timely to promote effective interventions in the interest of providing fair treatment for workers having a precarious status such as sub-contract and recruitment agency workers<sup>99</sup>.

#### *Scientific action*

The scientific head of the Institut de recherche Robert-Sauvé en santé et en sécurité du travail (IRSST) announced the inclusion in its master plan of a line of research on immigrant workers. It came out in favour of supporting projects aimed at documenting knowledge on the frequency and gravity of injuries among workers in a situation of precariousness.

#### *Public health action*

The Montreal Public Health Directorate announced that it was considering the inclusion of variables on the employment status and origins of workers in files used for characterisation of the enterprises it serves. The PHD-Mtl therefore intends to support special projects on emerging issues, such as prevention for recruitment agency workers. This could mean modifying the company characterisation grid to include variables on the type of job that workers hold. This would make it possible to identify temporary workers (agency, subcontract, temporary foreign, on call) within the companies who are often anonymous or excluded from the picture of the labour force. This data would be of use to regional public health departments, such as rural areas where the great majority of temporary foreign workers are found. This approach would make it possible to draw up a frame of reference on monitoring practices for workers in cumulative precariousness situations.

#### *Union action*

The two major unions in attendance agreed to document and take actions to protect various labour collectives inside companies, even those that are not members of the union, such as recruitment agency workers. These labour unions proposed training union reps in intercultural communications and intend to strengthen their commitment to expose the situation of immigrant workers and of all workers in precarious situations.

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<sup>99</sup> Ibidem 71 and K. Lippel K. Precarious Employment and Occupational Health and Safety Regulation in Quebec, dans L. F. Vosko (dir.), *Precarious Employment, Montréal et Kingston*, McGill-Queen's University Press, 2006, 241-255.

*Employer action*

The OHS directors for the provincial Chamber of Commerce and the Conseil Patronal agreed to examine questions of employer accountability toward various labour collectives found in companies. They would like to see the employer mentoring program to be extended to administrative regions across the province to support the sponsorship of immigrant workers and their socio-occupational integration, while reducing the risks of job injuries.

*Surveillance*

And finally, the Montreal Area OHS Inspectorat confirmed that it would make every effort to refine its investigative methods in accidents involving workers having a precarious employment status, such as recruitment agency workers, regardless of the origins of these workers. To this end, inspectors will investigate not only the client company where the injury occurred, but the agency as well. To justify their new investigative practices and in particular to raise employer awareness of the importance of prevention, inspectors refer them to article 51.1 of the OHS Act, which stipulates that “A person who, although not an employer, retains the services of a worker for the purposes of his establishment must fulfill the obligations imposed on an employer by this Act”.

To everyone's great relief, participants were clearly motivated to adapt OHS practices for workers who are subject to cumulative precariousness. Some services, for policy reasons, were more comfortable with workers in precarious job situations, while others had no ethical problem dealing with immigrant workers. For the researchers and militants who were long-standing supporters of fair and equitable practices for anonymous workers such as women, young people and other marginalised groups<sup>100</sup>, this favourable turnaround was astonishing. Why were all these services now ready to become involved? Nevertheless, one clear point seemed to emerge from this reversal of position: it is possible to change preventive OHS practices without embarking in legal procedures. Participants appeared to be confident that they could adapt their practices to the realities of today's job market and revise those approaches that were pertinent 30-40 years ago, but have been outdated for many years, without risk of professional misconduct. In fact, many participants were relieved to learn that nothing in the law excluded workers having a precarious

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<sup>100</sup> K. Messing, S. Boutin. Les conditions difficiles dans les emplois des femmes et les instances gouvernementales en santé et en sécurité du travail. *Relations industrielles/Industrial Relations*, , 52 n.° 2, 1997, 333- 362.



status and that on the contrary, an approach adapted to current job market demands could bring renewed coherency to their work and to the mission of their establishment.

## 5. Positions to Take to Change OHS Practices for Immigrant Workers

It is true that public OHS services cannot be expected to rectify the perverse effects of excessive flexibility in the job market and in competitiveness. Nor should they be asked to compensate for failed integration policies for immigrants, young and marginalised people in the job market. However, public OHS services could review their prevention paradigms for equitable practice. This involves revising the definition of a worker at risk and rendering workers in cumulative precariousness situations visible. The grand debate on "Immigration and OHS: workers the shadows" reached its objective of mobilising a wide range of stakeholders toward changing practices. If we were able look ahead four years and report on the actions taken, we would have a better idea of the outcomes of this mobilisation. Note that most of the conditions favourable for the mobilisation of stakeholders suggested by Quinlan<sup>101</sup> had been brought together.

### 5.1. Revise the Definition of High-risk Jobs

These are not incompetent workers who have no knowledge of protection methods. They are in a situation of cumulative job insecurities, which prevents them from exercising their rights. With this in mind, we suggest taking another look at the definition of precarious work set out by the Law Commission of Ontario<sup>102</sup> given in the first section of this article:

Precarious work is characterized by job instability, lack of benefits, low wages, and the extent of control over the situation. Such work is possibly subject to greater risk of injury and ill health [...]. Therefore, vulnerability in this context refers not to the workers themselves but to the situation facing them, because they occupy a precarious job and due to disadvantages associated with gender, immigration, ethnicity and other characteristics. [...] Precarious work affects other aspects of their lives, which are not work-related. Precarious work leads to a greater risk of accidents and illness, stress and difficulties in obtaining medical treatment (our translation).

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<sup>101</sup> *Ibidem* 79.

<sup>102</sup> *Ibidem* 6.

This definition should serve as a basis for suggesting ways to render analyses of precariousness operational in accordance with the mission of institutions and departments in charge of data on workers. This is a clearly enounced definition from a credible organisation, the Law Commission of Ontario, an independent body that leaders listen to.

### *5.2. Render Workers in Precarious Situations Visible*

The context of job insecurity at the outset of the 21<sup>st</sup> century is very clearly delineated. Workers in precarious situations are subject to the combined effects of the economic crisis, the search for highly flexible manpower and the growth in migratory movements. Public OHS services need to introduce variables on the origins of workers, length of stay in the host country, and the kind of job occupied (temporary, foreign/seasonal worker, etc.).

On the provincial level, a file or a means of cross-referencing data from the various public files is needed to answer the following questions: What is the extent of job insecurity in Québec compared to stable jobs? How has the situation evolved over time? Which companies make use of workers in precarious situations to meet their manpower needs? What OHS practices apply to workers who occupy unstable jobs? These data would be very useful to redefine intervention goals based on concentrations of precarious jobs by sector of activity, company size or their region of operations.

On the regional level, public OHS services should also include variables in their files that allow them to characterize the needs of immigrant workers according to the role of their organisation or their service. For example, worker health surveillance services, which do screening tests and medical follow-up, should be able to characterize the composition of the workforce of the companies they visit in terms of origin, length of stay in Canada, verbal mastery of official languages and the kind of job held in the company where they actually work and where they are exposed to risks. These services need a complex data set to make sure that they have enough information to give workers their medical surveillance results so that they can understand and receive medical follow-up for their health condition, regardless of their job status or origins. This also goes for rehabilitation services which, in the interest of efficiency, need a certain amount of data to help immigrant workers return to work.

However, ethical questions could be raised against making changes to monitoring and assistance practices aimed at immigrant workers. Obviously, organisations must guard against anything that could lead to discrimination.

Yet it's possible to consult such data so as to give fair treatment to vulnerable workers without referring, in the media or elsewhere, to workers' ethno cultural or religious characteristics. There is a difference between collecting and processing sensitive information and disseminating it<sup>103</sup>.

### *5.3. Intervene Primarily in Companies that Have Multiple Groups of Workers*

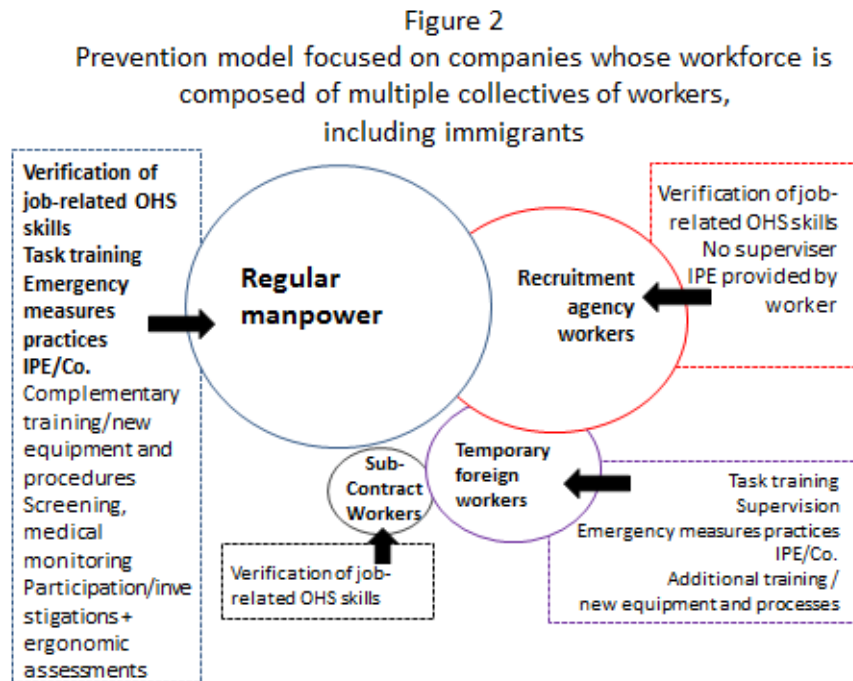
The multiplication of groups of workers within a single company makes it possible to maximize the flexibility of its workforce at all levels and renders those workers most at risk anonymous. Public OHS services and professionals should be able to draw up an accurate picture of the companies they deal with by configuring the place that each group of workers occupies and the OHS protection that they receive. To do so, we suggest working from the following model<sup>104</sup>:

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<sup>103</sup> S. Gravel, A. Germain, E. Leclerc.. Les données ethniques dans les services publics : dilemmes de gestion de la diversité et protection de la vie privée dans Barth I, Falcoz C. 2010. *Nouvelles perspectives en management de la diversité: égalité, discrimination et diversité dans l'emploi*. Collection gestion en liberté, EMS, Paris, chap. 6, 2010, 119-137.

<sup>104</sup> See the paper: [http://iss.uqam.ca/upload/files/2.%20Gravel%20Sylvie Grand débat Immigration%20et%20OSSI.pdf](http://iss.uqam.ca/upload/files/2.%20Gravel%20Sylvie%20Grand%20d%C3%A9bat%20Immigration%20et%20OSSI.pdf). accessed 16-06-2016.

Figure 2. Prevention Model focused on companies whose workforce is composed of multiple collectives of workers, including immigrants



#### 5.4. Mobilise Stakeholders in Unorthodox Partnerships

This fourth and final position is similar to the 7<sup>th</sup> key phase in Quinlan's historic analysis model<sup>105</sup>. To maximise the effectiveness of this initiative to change OHS practices for immigrant workers, each and every organisation must deploy their efforts simultaneously. Although community organisations responsible for the social and professional integration of immigrants are not OHS experts, they have a great deal of expertise in barriers to inclusion. Likewise, employability departments are not rehabilitation specialists, but rather, networks of companies that make use of employability programs for workers excluded from the job market. Each, according to their area of expertise, should contribute to the redefining of OHS practices, policies and regulations so that immigrant workers, at every step of the integration process, are no longer unfairly denied the OHS protection that they are entitled to.

<sup>105</sup> *Ibidem* 79.

## **6. Conclusion**

It is possible, through concerted action, to build our respective capabilities to assist and support immigrant workers, who are too often subject to various forms of precariousness. In this second decade of the 21<sup>st</sup> century, we need to focus on immigrant workers, but 20 or 30 years from now, who will the workers be who pay the price of an evolving labour market? For our interventions to be effective, it is imperative that we have the means to characterize workers and the companies that employ them.

# Supply Chains and the Manufacture of Precarious Work: The Safety Implications of Outsourcing/ Offshoring Heavy Aircraft Maintenance

Michael Quinlan, Sarah Gregson, Ian Hampson,  
Anne Junor and Tanya Carney \*

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**Abstract.** There is now a substantial body of global research pointing to the adverse occupational health and safety (OHS) effects of precarious work. Nonetheless there is still limited research into the link between supply chains and OHS and how these changes impact on non-precarious workers. This study of the outsourcing/off-shoring of heavy aircraft maintenance addresses this gap. Focusing on Australia it shows that the growth of maintenance supply chains has impacted on the OHS and other working conditions, not only of outsourced maintenance workers, but also of those continuing to work in-house for major airlines. In essence, cost pressures and competition have led to work intensification that has affected the latter and undermined their independence in terms of safety decision-making. The paper points to the importance of recognising inter-linkages between public and work safety and that the business practices encouraging precarious work affect all workers in an industry, not simply those deemed as precarious.

**Keywords:** *Precarious work, outsourcing/offshoring, aircraft maintenance, health and safety*

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\* School of Management and Industrial Relations Research Centre, University of New South Wales. Corresponding author: Michael Quinlan (m.quinlan@unsw.edu.au).

## Introduction

A substantial body of international research now points to the adverse occupational health and safety (OHS) outcomes associated with the growth of precarious and informal work. There has been less consideration of the mechanisms driving these changes, nor their wider public health and safety implications. One area that has attracted increased interest in this regard is national and global supply chains – essentially a sequential network of contractual arrangements increasingly used by large corporations to obtain goods and services in preference to in-house production. The global aviation industry is no exception to this trend. The bulk of heavy aircraft maintenance for airlines in North America, Europe, and Australasia is now performed, not in-house, but by specialist maintenance and repair organisations or MROs. Increasingly, these are located, not in the country where the airline is based, but off-shore, in countries in Asia and Central America, and the Baltic States, where wages are lower, other labour standards are less strict, and aviation regulators are often less interventionist.

Unlike many other industries, aviation (including safety aspects) is subject to international agreement based on the 1944 Chicago Convention, which set up the International Civil Aviation Organisation (ICAO). ICAO sets out procedures, binding on the 192 member states, which govern the certification of MROs by national aviation safety regulators. Further, there are bilateral agreements among regulators in different countries as well as a degree of regional oversight by such regulators as the US Federal Aviation Administration (FAA), and the European Aviation Safety Agency or (EASA), which maintain inspectors in a number of countries to monitor the effectiveness of national regulators and the safety performance of certified MROs. Nonetheless, aviation is not immune to the adverse safety effects linked to subcontracting and supply chains in other industries – particularly when layers of subcontracting escape regulatory oversight and inspection. Offshoring can be particularly problematic where regulatory regimes are weak and subject to potential corruption, or where there is little union presence and governance is poor.

This paper examines the implications of the trend to heavy aircraft maintenance outsourcing/offshoring. It uses examples from the major airlines based, or with a significant presence, in Australia and makes reference to the experience, particularly of the USA. It draws on documentary analysis together with extensive interviews conducted with industry, government and union representatives as well as a survey of aircraft maintenance engineers and maintenance employers. The paper highlights the regulatory challenges posed by the outsourcing of maintenance and argues that, both in the home country

and off-shore, the use of maintenance supply chains make work more precarious, including for groups that are both skilled and highly unionised. The ‘whip-sawing’ of successive heavy maintenance contracts between MROs in countries with different wage structures, regulatory and labour standards appears to promote employment insecurity everywhere. In addition, a ‘race to the bottom’ in cost-minimisation, in part based on sub-contracting, is putting pressure on working hours and safety standards, as well as wages. The study provides evidence suggesting that supply chains and the growth of precarious work not only weakens OHS, but potentially compromises public safety, and, by reducing the supply of maintenance apprentices in industrially-regulated nations such as Australia, has a tendency to exacerbate the emerging global shortfall of highly-skilled maintenance engineers.

### Supply Chains, Precarious Work and Safety

Over the past three decades a substantial body of research has examined the occupational health and safety effects of global changes in work organisation, particularly the job insecurity associated with repeated waves of downsizing/restructuring in the private and public sector and the increased use of part-time, temporary and other contingent forms of work, like franchising and self-employed subcontractors.<sup>1</sup> Researchers have also turned their attention to the implications of these changes for work organisation and regulatory regimes governing OHS and other labour standards.<sup>2</sup> More recent studies have examined the underlying drivers of these changes, including outsourcing/privatisation and supply chains and their implications for OHS.<sup>3</sup> While not new, elaborate supply chains are becoming a ubiquitous feature of the provision of goods and services globally. Supply chains are a sequential arrangement of contracts between different parties for the provision of goods (like clothing or food) or services (say a call centre for answering customer queries, transporting products or providing home-based support services).

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<sup>1</sup> See for example M. Quinlan, C. Mayhew & P. Bohle, *The Global Expansion of Precarious Employment, Work Disorganisation and Occupational Health: A Review of Recent Research*, *International Journal of Health Services*, 2001, 31(2):335-414; M. Virtanen, M. Kivimäki, M. Joensuu, P. Virtanen, M. Elovainio & J. Vahtera, *Temporary employment and health: a review*, *International Journal of Epidemiology*, 2005, doi:10.1093/ije/dyi024; and M. Quinlan & P. Bohle, *Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work*, *International Journal of Health Services*, 2008, 38(3): 489-525.

<sup>2</sup> R. Johnstone, M. Quinlan & C. Mayhew *Outsourcing Risk? The regulation of OHS where contractors are employed*, *Comparative Labor Law and Policy Journal*, 2001, 22(2&3): 351-93.

<sup>3</sup> P. James, R. Johnstone, M. Quinlan, & D. Walters, *Regulating supply chains for safety and health*, *Industrial Law Journal*, 2007 36(2): 163-187.



Typically, the supply chain is a pyramid subcontracting arrangement where a number of parties at the bottom provide the good or service through a series of intermediaries to the final buyer – commonly a large corporation, like a retailer. While research evidence is limited it appears that supply chains can have effects on OHS analogous to those commonly found with regard to pyramid subcontracting.<sup>4</sup>

There is also evidence that the outsourcing of tasks may also have adverse health and safety effects on the wider community. Examples of this include hygiene breakdowns in the supply of food-products and threats to other road users arising from competitive pressures/outsourcing in the road freight industry.<sup>5</sup> In aviation there is growing evidence that outsourcing can compromise both public (air travellers) and worker (flight and cabin crew) safety. In aviation as in other industries competitive pressures (especially the emergence of low-cost carriers) has led to a number of changes in business and work arrangements, including the leasing of aircraft, use of older aircraft and the outsourcing of maintenance activities to repair and maintenance providers in-country and increasingly offshore.

In the USA the safety implications of outsourcing/off-shoring heavy aircraft maintenance has been the subject of public debate for over 20 years. This debate coincided with changes to regulation that permitted the emergence of low-cost carriers relying on cost minimisation strategies including the outsourcing of maintenance, leasing of aircraft, use of older aircraft and lower wages paid to flight and cabin crew. Competition from low-cost carriers put cost pressure on older 'legacy' airlines so that by 2007 over 70% of heavy aircraft maintenance was being outsourced, with offshore maintenance firms accounting for 35% of heavy aircraft maintenance by 2006.<sup>6</sup> Safety concerns about outsourced maintenance were raised at the time of the shift (ie from the late 1980s) and by the 1990s evidence supporting these concerns began to emerge. Flaws in outsourced/offshored maintenance have been linked to six serious aircraft incidents in the USA, including three multiple fatality crashes - the best known being the crash of ValuJet Flight 592 killing all 110 aboard in

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<sup>4</sup> M. Quinlan, *Supply Chains and Networks*, Safework Australia, 2013, Canberra. <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/752/Supply-chains-networks-July-2011-Michael-Quinlan.pdf>.

<sup>5</sup> C. Mayhew & M. Quinlan, *Economic pressure, multi-tiered subcontracting and occupational health and safety in the Australian long haul trucking industry*, *Employee Relations*, 2006, 28(3): 212-229 and M. Quinlan, R. Johnstone & C. Mayhew, *Trucking Tragedies: The Hidden Disaster of Mass Death in the Long Haul Road Transport Industry* in Eric Tucker ed. *Working Disasters*, 2006, Baywood, New York, 19-64.

<sup>6</sup> M. Quinlan, I. Hampson, & S. Gregson, *Outsourcing and offshoring aircraft maintenance in the US: Implications for safety*, *Safety Science*, 2013, 57:283-292.

1996. ValuJet was a pioneer of the new budget airline model. Ignoring numerous minor issues in the year previous to the crash the airline had experienced two incidents with other planes sufficiently serious to warrant a formal investigation by the National Transportation Safety Board. Such investigations are reserved for the most serious incidents and a review of the airlines operations was being planned by the regulator, the FAA, at the time of the fatal crash. As has occurred in other industries, both the airline and the repair agency (Sabre Tech) ceased operations soon after the incident, meaning there was little scope for organisational learning. Nor did the incident have sufficient deterrent effect on other operators with subsequent incidents including a fatal crash involving Air Midwest Flight 5481 in 2003 (killing all 21 aboard) and a near miss incident involving US Airways Flight 518 in 2009 (due to an error in maintenance on the main cabin door).

A review of these incidents identified three contributory factors. First, there were economic and reward pressures, including cost-cutting relating to the conditions of maintenance staff, time pressures and the like. Second, there was a level of disorganisation, including gaps in staff training and safety systems as well as communication problems due to for example staff turnover. Third, regulatory failure comprised under-resourced or poorly targeted inspections of aircraft and airline safety systems as well as inadequate enforcement of breaches of laws, especially those of a systemic nature.<sup>7</sup> A follow-up paper examined the response of the US regulatory apparatus to evidence of shortcomings in regulatory oversight. It noted the slow response of the Federal Aviation Administration to evidence of shortcomings in their oversight of maintenance outsourcing. Over far more than a decade these deficiencies were identified in a series of reports by the US Government Accountability Office, audits by the Office of Inspector General of the US Department of Transportation and hearings before US House of Representative and Senate Committees overseeing transport safety. It was not until 2012 that a number of decisive steps were taken to address the issue.<sup>8</sup>

Outsourcing and offshoring of heavy aircraft maintenance has been a global trend so the problems just identified were not confined to the USA. Similar safety concerns have been raised or identified in other countries, including Brazil and Australia. In Australia, a study found that incident reports of the Australian Transport Safety Bureau (the equivalent of the NTSB in the USA) were not adequate to identify issues related to outsourced/offshored

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<sup>7</sup> M. Quinlan, I. Hampson, & S. Gregson, *Outsourcing and offshoring aircraft maintenance in the US: Implications for safety*, *Safety Science*, 2013, 57:283-292.

<sup>8</sup> M. Quinlan, I. Hampson & S. Gregson, *Slow to learn: regulatory oversight of outsourced aircraft maintenance in the USA*, *Policy and Practice in Health and Safety*, 2014, 12(1):71-90

maintenance. However, responses in a survey of aircraft maintenance engineers (both those working in-house and in repair organisations) identified problems that were entirely consistent with the US experience and where similar causal factors – economic pressures, disorganisation and regulatory failure – seemed to play a pivotal role (Gregson et al 2015).<sup>9</sup> A study which surveyed maintenance workers in Brazil reached similar findings.<sup>10</sup> Given the global nature of the industry this is hardly surprising.

Despite the well-documented (and readily accessible) US experience it is by no means clear that the issue has received sufficient attention by other regulators or that the implications of current trends in regulation relating to the licensing of aircraft maintenance engineers or outsourced maintenance more generally have received adequate consideration. In order to explore this point the next section provides a brief critical overview of the global regulation of aviation safety, particularly pertaining to aircraft maintenance.

### **Regulation of Aviation Safety – Adequate or Fracturing?**

This section explores how supply chains in aircraft maintenance create vulnerabilities that have arguably gone beyond the capacity of the existing international regulatory system to remedy. The international regulatory system that arose at the end of WW2 always had limitations arising from tensions between safety regulatory systems within nation states and the need for a transnational authority that could enforce standards, which the former might resist for domestic policy reasons.<sup>11</sup> These weaknesses became more evident following deregulation of the aviation industry, beginning with the US in 1978. Intensified competitive pressures drove prices down making passenger transport more widely accessible than it had ever been, and sparked the latter's rapid expansion. Airlines sought competitive advantage through a number of strategies. Among these was outsourcing and offshoring of heavy aircraft maintenance.

During heavy aircraft maintenance, which takes place on a typical airliner approximately every five to seven years, the interior is removed and the plane

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<sup>9</sup> S. Gregson, I. Hampson, A. Junor, D. Fraser, M. Quinlan & A. Williamson, *Supply chains, maintenance and safety in the Australian airline industry*, *Journal of Industrial Relations*, 2015, 57(4):604-623.

<sup>10</sup> M. Cardoso Machado, M. Gomes Eller, A. L. Soto Urbina, & F. Macau, *A qualitative study of outsourced aeronautical maintenance: The case of Brazilian organizations*, *Journal of Air Transport Management*, 2016, 55:176-184

<sup>11</sup> J. Huang, *Aviation Safety, ICAO and Obligations Erga Omnes*, *Chinese Journal of International Law*, 2009, 8(1): 63-79.

stripped back to the hull, which is inspected for cracks and corrosion. Certain large airliners, like the B747 (now being phased out in Australia), require approximately 75000 person hours, or up to 3 months, for what is called a ‘D’ check. This work is a natural contender for offshoring to countries with lower wages, although a mix of labour is required. Much of the work is not especially skilled, although it does require careful adherence to procedures. Moreover, there is a possibility that poorly executed work may lead to catastrophe, sometimes months or even years after the faulty work was performed. The work of inspection and repair, however, is highly skilled, and many offshoring airlines have sent their own inspectors to make sure maintenance tasks are done properly. However, such decisions are made by the airlines and the offshoring process makes it far more challenging for regulators based in the airline’s home-base to maintain effective regulatory oversight.

Table 1. Main Operators of Wide-bodied and Large Aircraft (over 100,000kg MTOW), by Maintenance Strategy, Australia, 2015

Operator	Aircraft	Comment
Airline (International & domestic main route RPT)	Airbus A380-842	20-year lease on hangar at LAX for layover maintenance; Australian staff? Maintenance off-shored: Base maintenance contract with Lufthansa Technik Philippines to 2023
	Airbus A330-202/203	Heavy maintenance conducted in new Brisbane facility since 2010
	Airbus A330-303	
	Boeing B767-338/381F	Heavy maintenance upgrading work on the fleet on-shore in 2012; due to be retired except 2 assigned to Express Freighters
	Boeing B747-48E/438	To be phased out; heavy maintenance withdrawn from Avalon to off-shore locations 2014, following heavy reliance on a labour hire company
Airline Low-cost carrier subsidiary	Airbus A330-202	Currently maintained in Singapore
	Boeing B787-8	Order for 14 larger 787-9, delayed option for 50 now proceeding; impact on heavy maintenance yet unknown — elements of full-scale D-checks likely to be redistributed over shorter maintenance cycles and full checks likely to be at longer intervals
Airline	B Airbus	A330- Withdrawn from large on-shore outsourced operator

(International & domestic main route RPT)	243 Boeing 3ZGER	B777-	(which collapsed with heavy job losses) 2008–2013 contract with a Singapore airline’s engineering facility for B777heavy maintenance; use of an Australian-based subsidiary located in Australia
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MTOW= Maximum takeoff weight  
 RPT – Regular Passenger Transport  
 SIA Singapore international Airlines Engineering Company

Source: I. Hampson, D. Fraser, M. Quinlan, A. Junor & S. Gregson, *The Future of Aircraft Maintenance in Australia: Workforce Capability, Aviation Safety and Industry Development. Final Report*, 2015 Australian Research Council Linkage Grant (LP110100335).

We are not making claims about the reliability of particular off-shore MROs, and we recognise the role of specialist MROs, for example in engine-overhaul, avionics trouble-shooting or aircraft painting. We recognise the rise, both of large civilian/defence maintenance contractors and of support arrangements between air operators and original equipment manufacturers. Nevertheless, we are arguing there is a real potential for the erosion of safety and working conditions, given current airline policy trends and international regulatory gaps. Empirically, the analysis potentially applies to the maintenance of a specific range of aircraft. In Australia, in 2015, there were 85 wide-bodied aircraft in the over 100,000 kg MTOW (maximum take-off weight) range, mainly A330s, A380s, a small number of B777s and B787s coming on stream, with B747s being phased out. With the exception of the A330, the heavy maintenance of these aircraft was undertaken offshore (Table 1). There were 275 aircraft in the 50,001 to 100,000 MTOW range, such as the A320, B737, B717 and Embraer 190. These were maintained by a mixture of in-house, locally-outsourced and offshored arrangements (Table 2). The offshore MROs were subsidiaries of reputable offshore airlines, but they themselves tended to undertake further subcontracting of work to establishments in lower-waged countries. The issue is the potential for effective regulatory oversight of the aircraft on the Australian national register, and the impact of fragmented labour relations on job stability and on the working conditions that we argue provide the best assurance of safety.

Table 2. Main Operators of Large Narrow-bodied Aircraft (MTOW 50,001kg – to 100,000 kg MTOW) by Maintenance Strategy, Australia, 2015

Operator	Aircraft (numbers in CASA Register July 2015)	Maintenance
Airline A International and national main route RPT and freight subsidiary	67 Boeing 737NG (600–900)  4 Boeing 737 Classic (300 to 500)	Heavy maintenance project in house, Brisbane  Maintained in-house Sydney
(Airline A's Low-cost subsidiary)	53 Airbus A320 Offshore subsidiary airlines 6 Airbus A321	Maintained in-house at Newcastle NSW from 2015 All aircraft currently maintained offshore Maintained offshore
(Airline B & domestic main route)	2 Airbus A320 80 Boeing 737NG (600–900) 18 Embraer	Maintained offshore Heavy maintenance performed mostly in NZ
(Low-cost carrier B)	14 Airbus A320	Base maintenance Melbourne; line maintenance Melbourne, Sydney, Brisbane by Australian subsidiary of large UK Defence contractor

MTOW= Maximum takeoff weight. Source: UNSW 2015

We now turn to regulation governing the safety of offshored maintenance, but which may be falling short of that goal. The centrepiece of the international regulatory system, which expanded following the end of WW2, is the International Civil Aviation Organisation (ICAO), set up as an arm of the United Nations, under the 1944 Chicago Convention. This Convention now has 192 signatories, which are bound (under its Article 37) to keep their regulations uniform with the Standards and Recommended Procedures (SARPs) specified in its various Annexes. Of these, Annex One, which specifies training standards, and licensing scope and privileges of aircraft maintenance workers, and Annexes Eight and Six, covering airworthiness and safe operations of aircraft, are particularly important for our subject – aircraft maintenance safety. The longstanding problem is that these Articles and

Annexes are not always consistent. Annex Eight, for example, is very clear that the ‘state of registry’ – that is, the country in which a plane is registered – has overall responsibility for the safety of ‘its’ planes, even, or perhaps especially, when they are being maintained overseas. However, the extent this right can be exercised (for example, through surprise inspections of maintenance facilities), without violating the fundamental principle of national sovereignty, is questionable. Article 33 allows a state of registry to accept the oversight of another state provided its practices ‘... are *equal to or above the minimum standards* which may be established from time to time pursuant to this Convention’.<sup>12</sup> The difficulty for the state of registry pertains to their knowledge as to whether the ‘offshore’ state’s practices meet international standards. Means of verification are limited which means the regulator may, or even feel obliged to, accept the safety oversight practices of another country, even though means of verification are scant.<sup>13</sup>

When airlines were deeply embedded in their national context, and not subject to intense cost pressures, nation states were less concerned about verification. The growth of third party MROs, however, increased concerns over the safety of offshored maintenance, and by the mid-1990s, it became evident to the ICAO that some states were not observing the standards which were supposed to underpin the system, nor were they declaring ‘differences’ between their own systems and the ICAO standards, as required under Article 38. Accordingly, in 1998, the ICAO established the Universal Safety Oversight Audit Program (USOAP), with the aim of ensuring that states were meeting their obligations to ICAO.<sup>14</sup> Under the USOAP, teams of ICAO auditors visited national regulators by prior arrangement, examined their regulatory capacity, and issued ratings on their extent of compliance with ICAO SARPs. Since under Article 33, states can reject certificates issued by non- or weakly-compliant states, these audits were of quite some significance, potentially triggering a state to deny entry to its airspace to an airline from a non-compliant country, or denying access to its airspace to a plane maintained in a non-compliant state.

Subsequent ICAO monitoring identified “fundamental weaknesses in the safety programs of many States, resulting in significant differences in safety

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<sup>12</sup> ICAO, *International Civil Aviation Organisation, Convention on International Civil Aviation done At Chicago on the 7<sup>th</sup> Day of December, 1944*, [http://www.icao.int/publications/Documents/7300\\_orig.pdf](http://www.icao.int/publications/Documents/7300_orig.pdf)

<sup>13</sup> I. Hampson, D. Fraser, M. Quinlan, A. Junor, *The Uncertain Oversight of Offshored Aircraft Maintenance: The Case of Australia*, *Journal of Air Law and Commerce*, 2016 in press.

<sup>14</sup> J. Huang, *Aviation Safety, ICAO and Obligations Erga Omnes*, *Chinese Journal of International Law*, 2009, 8(1): 63-79.

standards around the globe”.<sup>15</sup> This finding might have been expected to lead to more intensive safety oversight. However, audits actually became less frequent, possibly due to inadequate resourcing of the monitoring agency or the prevailing policy orthodoxy of deregulation/light touch regulation. USOAP ‘evolved’ towards a ‘continuous monitoring’ approach (CMA), which seeks to gather information on an ongoing basis precisely because of the gaps between audits.<sup>16</sup> Whether this was an ‘upgrade’ as suggested in ICAO documentation is a moot point. For some states, CMA consisted of the regulator answering lists of questions provided by ICAO or, as one critic put it, ‘self-reporting’. For others, the old format of inspections and audits still applied. In its 2013 Safety Report, the ICAO put the average level of compliance in implementing the “critical elements” of safety oversight at only 61% across all nations audited (96% of its membership). This was hardly an impressive performance, and it may indicate that the ICAO-based system was experiencing some disintegration.

In fact, the international ‘regulatory space’ was becoming contested as alternative national and international agencies became more active. Approvals of the US aviation regulator, the FAA, began to play a greater role in the world system. Through its International Aviation Safety Assessment (IASA) program, FAA approves regulators, in accord with the ICAO principle that makes the state of registry responsible for the safety of ‘its’ planes, and Article Six, which allows a regulator ‘to request consultations concerning the safety standards maintained by the other party’.<sup>17</sup> FAA also banned non-approved airlines from its airspace. FAA approvals were increasingly relied on by other countries and airlines. FAA also inspected and approved maintenance facilities.

From 2003, the new European Aviation Safety Agency (EASA) was set up to ‘consolidate’ aviation safety regulation across Europe. EASA’s role was to approve national regulators as well as MROs, so that national airlines could offshore their maintenance to other countries within Europe, and increasingly outside it. Eventually, EASA’s approval powers extended to other countries, including some in Australia’s region. Yet both EASA and FAA used ICAO standards as their reference point, whereas a private sector entrant to this regulatory space – an offshoot of the International Air Transport Association (IATA), essentially a representative body of airline employers, claimed to go

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<sup>15</sup> ICAO, International Civil Aviation Organisation, *Safety Management Manual*, Doc 9859, Second Edition. 2008, Montreal: ICAO, p3-4-1.

<sup>16</sup> ICAO, *Evolving ICAO’s Universal Safety Oversight Audit Program: The Continuous Monitoring Approach*, *ICAO Journal*, 2010, 04: 24-25; and ICAO, *The USOAP evolved: Realizing the promise of the continuous monitoring approach*, *ICAO Journal*, 2010, 05: 25-28.

<sup>17</sup> FAA, *Federal Aviation Authority, International Aviation Safety Assessment (IASA) Program*, no date, [http://www.faa.gov/about/initiatives/iasa/media/FAA\\_Initiatives\\_IASA.pdf](http://www.faa.gov/about/initiatives/iasa/media/FAA_Initiatives_IASA.pdf)



above them. IATA Operational Safety Audits (IOSA) claimed to treat ICAO standards as minima, and its audits claimed to register standards of attainment that exceeded them.<sup>18</sup> Unlike ICAO, FAA and EASA, IOSA audits individual airlines. In doing so, IATA is seeking to position itself at the centre of safety regulation.<sup>19</sup>

The auditing process has arguably been weakened by changes in the methods of auditing – namely a shift from direct inspection to audits of process, and of ‘safety management systems’ (SMS). The most recent ICAO Annex (19) mandates the implementation of State Safety Programs (SSP) and SMSs at organisational and workplace level. However, any SMS is only effective to the extent that it represents real workplace processes. In other high hazard industries like mining the limitations of paper-based system auditing (often labelled ‘paper compliance’) have long been recognised with systems audits being accompanied by workplace inspections to ensure the processes described are actually being implemented.<sup>20</sup> Further, effective auditing depends on the skills of auditors, which Australia’s recent Aviation Safety Regulation Review found was lacking among CASA auditors.<sup>21</sup> The ASRR suggested CASA might outsource much of its inspection work to independent private auditors, in accordance with the IATA proposals. However, the privatisation of inspection process like auditing has its own limitations, raising serious concerns in a number of industries including aviation.<sup>22</sup>

The ASRR finding that many auditors and inspectors employed by Australia’s safety regulator lacked the skills necessary to audit modern safety management systems was similar to findings of the most recent ICAO Audit of Australia in 2008.<sup>23</sup> Importantly, these skills are among those on which Australia relies to verify that the MROs to which Australian registered planes are offshored for their heavy maintenance are fit for purpose, in accord with its obligations under Annex Eight of the Chicago Convention. CASA has long had in place mechanisms to issue approvals to overseas MROs to perform heavy maintenance on Australian registered planes – first under Civil Aviation

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<sup>18</sup> IATA, International Air Transport Association, *Safety Report*, 2014. Geneva: IATA.

<sup>19</sup> D. Hodgkinson, *IOSA: The Revolution in Airline Safety Audits*, *Air and Space Law*, 2005, 30(4-5): 302-329.

<sup>20</sup> Quinlan, M. *Ten Pathways to Death and Disaster: Learning from Fatal Incidents in Mines and Other High Hazard Workplaces*, 2014, Federation Press, Sydney.

<sup>21</sup> Truss, *Aviation Safety Regulation Review*, May, [http://www.infrastructure.gov.au/aviation/asrr/files/ASRR\\_Report\\_May\\_2014.pdf](http://www.infrastructure.gov.au/aviation/asrr/files/ASRR_Report_May_2014.pdf).

<sup>22</sup> M. Quinlan, I. Hampson & S. Gregson, *Slow to learn: regulatory oversight of outsourced aircraft maintenance in the USA, Policy and Practice in Health and Safety*, 2014, 12(1):71-90.

<sup>23</sup> ICAO USOAP, International Civil Aviation Oversight Audit Program, *Final Report on the Safety Oversight of the Civil Aviation System of Australia*, 2008, International Civil Aviation Organisation.

Regulation 30 (CAR 30) and lately, since the adoption of the EASA system, CASR part 145. These typically included initial inspections, with follow up inspections and, more lately audits, by representatives of the regulator. These, to be consistent with Annex Eight, must be regular. Our interviewees noticed and remarked upon the shift from direct inspection to ‘paper based’ audits of SMSs, both in the domestic sphere and overseas. It corresponds in time to the rapid escalation in offshoring heavy maintenance post-2012, and to the parallel move from CASA approval of offshore facilities based on direct inspection and/or auditing of SMS, to ‘bilateral aviation safety agreements’ (BASAs) according to which CASA accepts approvals of MROs in an offshore regulator’s national space as equivalent to its own.<sup>24</sup>

The processes by which approvals are issued, or withdrawn, are somewhat opaque and border on secretive. There are differences between approval authorities which hardly engenders confidence in the international regulatory system. As to secrecy, one example was FAA’s near downgrading of Australia’s safety regulatory system from Category One to Category Two. This move, which would have restricted Australian airlines’ access to the US, only surfaced through a WikiLeaks.<sup>25</sup> As to inconsistency, more recently, the FAA downgraded Thailand and restricted some of its airlines’ access to the US after an ICAO Audit revealed ‘serious safety concerns’. Yet Thailand passed an EASA audit, and Thai airways serving European destinations were allowed to continue flying to Europe.<sup>26</sup>

In Australia’s region, the crash of Indonesia AirAsia flight 8501, on 28 December 2014 into the Java Sea, with the loss of 162 passengers and crew, illustrates some of these issues. Shortly after take-off the pilot sought to climb above a storm. Permission was denied, and the plane entered the storm with weaknesses that were to prove fatal. For around 12 months the plane had been flying with an intermittent fault, due to a crack in a soldering joint, in a control unit that was part of what is known as a ‘rudder limiter’. In fact, pilots had known about the fault, and there had been 23 computer alerts about it. Engineers too had known about it, because they had instructed the pilot how to turn the alarm off by resetting the flight control computer – a dangerous workaround that was not permitted in flight. On the particular day, the alarm went off four times, angering and confusing the pilot, who reset the flight control computer, turning off the autopilot. With the auto pilot off, the faulty rudder began to cause the plane to bank, and the pilots, due to poor training

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<sup>24</sup> Hampson, I., D. Fraser, M. Quinlan, A. Junor, *The Uncertain Oversight of Offshored Aircraft Maintenance: The Case of Australia*, *Journal of Air Law and Commerce*, 2016 in press.

<sup>25</sup> B. Sandilands, *Wikileaks: Australia nearly lost its air safety rating*, *Plane Talking*, 31 August 2011.

<sup>26</sup> *Bangkok Post*, 8 & 14 December 2015

(the other main cause of the accident), were unable to prevent it falling into the sea.

Commentators at the time noticed that the plane had not been authorized to fly that particular route, drawing attention to the fact that Indonesia had the 'poorest safety oversight' of any ICAO member, and had an unenviable record of crashes. According to a media investigation, the Australian Department of Foreign Affairs and Trade (DFAT) had issued Australian travellers with advice not to fly on Indonesian internal airlines, because of safety concerns. This raised questions about the efficacy of Australia's aviation safety regulator, CASA, when it emerged that the unfortunate Air Asia plane had made 78 flights carrying Australian passengers between Perth and Denpasar. Further, Indonesia had failed an ICAO audit in 2007, with an average level of compliance of 30% - well below developed country standards. Little action appeared to have followed. In a media program, CASA's spokesperson acknowledged that CASA had no way of knowing that the aircraft had been flying with a serious defect for months. A former Indonesian official, close to the regulator, claimed that the primary problem lay with enforcement, not the regulation itself, and hinted at regulatory 'capture'. He said, - 'Because Air Asia knows the weakness of the Department of Transportation, it's not quite good in observing and making the close monitoring'.<sup>27</sup> Regulatory officials were vulnerable to corruption, he opined, because of the low wages paid to them and how inadequately trained pilots could bribe their way through assessment. FAA had long banned Indonesian airlines, including the national carrier, Garuda, from flying into US airspace. EASA allowed Garuda, but not the rest, into Europe. Yet CASA allowed Air Asia Indonesia to fly into Australia. CASA's spokesman said:

The reason it is allowed to fly into Australia is that we have made our own assessments of the airline, of the Indonesian safety system, and we believe they are meeting the required international standards and... have been granted an air operators certificate – if some other part of the world thinks otherwise, well that's a matter for them

The international system works on the regulator from the country of origin having the complete responsibility for the airline, so they have complete responsibility for the maintenance, the pilot training, reporting of defects,...

The international system can't work if every regulator took responsibility for every single airline around the world.<sup>28</sup>

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<sup>27</sup> Foreign Correspondent, *False Economy*, screened 3 April 2016. <http://iview.abc.net.au/programs/foreign-correspondent/NC1602H008S00>.

<sup>28</sup> Foreign Correspondent, *False Economy*, screened 3 April 2016. <http://iview.abc.net.au/programs/foreign-correspondent/NC1602H008S00>

Several things emerge from this. On the strength of how the ICAO-based system is supposed to work, CASA was arguably entitled to believe that the Indonesian regulator was adequately regulating Indonesian airlines, because ICAO had not acted against Indonesia despite its evident low level of compliance in the 2014 audit. This would, however, be an odd argument in the face of the DFAT advisories to people not to fly on Indonesian airlines inside the country. It would be further undermined by the stance taken by other regulators, FAA and EASA, which had partially or wholly banned Indonesian airlines. Moreover, Article Six, the basis of the FAA's IASA, allows any national regulator to request information about safety standards, and, in any case, CASA could have inspected the planes (including their defect logs) when they were in Australia. In fact, according to the *Foreign Correspondent* report, CASA did intensify its unannounced, on-ground inspections of AirAsia aircraft following the December 2015 disaster. The episode also raises questions about CASA's approach to its regulatory responsibilities regarding the landing rights for foreign airlines. There is also the question of national interests. Geoffrey Thomas, an Australian expert in aviation regulation, observed that Australian airlines have to fly over Indonesia to get to Europe, and the Indonesian regime could retaliate by denying that right. This might explain CASA's 'hands off' approach to AirAsia, although it is clearly out of line with CASA's brief to protect safety, and not 'the industry'. Thomas asserts that AirAsia should not be allowed to fly into Australia, and claims that the airline should be banned unless it undertakes an IOSA audit – to which it has agreed. The final thing to emerge is that private sector IOSA audits of airlines are here being put above public sector ICAO ones of national regulators, in terms of their protective role.

Concluding this section, a number of key points can be made. While the international regulatory regime based on ICAO might seem to place aviation in a stronger position to deal with the safety challenges posed by global supply chains/outsourcing, there is evidence this is not proving to be the case. Indeed, the regime itself appears to be weakening in the context of limited enforcement and tensions between the framework and national and business interests in a competitive environment. It cannot be assumed that a country that claims to meet international standards, and has not been censured for failing to do so, does indeed meet those standards. For example, Indonesia failed ICAO safety audits but there was no uniform/global regulatory response to this. While some national and transnational regulators (EASA and FAA) imposed sanctions to protect their own airspace, CASA did not. Further, the emergence of competing standards regimes, uncritical acceptance of system approaches, the privatisation of some inspection/audit activities and problems connected with moving towards uniform licensing of maintenance workers across a

number of jurisdictions have given rise to additional concerns.<sup>29</sup> Finally, these approaches to regulation, to the extent that they apply to the regulation of maintenance, are also problematic, because conditions at the lower end of the supply chain can provide low reference points for comparison in negotiations over wages and conditions.

### **Creating Vulnerability: The Working and Employment Conditions of Aircraft Maintenance Workers**

Beyond those considerations already raised there are also wider issues at play in connection to changes in work organisation. The shift to outsourcing of maintenance raises important questions about the adequacy of regulation and labour standards in countries where maintenance is being relocated. There are also questions about the effect of these changes on the working conditions, health, safety and wellbeing of aircraft maintenance engineers, both those in MROs and in-house workers in countries like the USA and Australia, and those in the poor/middle income countries where outsourcing is increasingly taking place. Under international regulation those undertaking critical aircraft maintenance activities are required to be trained and licensed. In Australia the skill-sets of these workers and the fact that they were unionised gave them considerable bargaining power to protect their role and working conditions in the past.<sup>30</sup> However, this position has been undermined by a number of changes. One is that cost pressures on their activities, especially in the context where work is being outsourced, threatens not only their jobs but also impacts on their activities, in relation to turnaround times and other pressures. Before discussing working patterns in Australia the working conditions of outsourced and offshored workers in other countries will be briefly considered.

As far as we are aware there have been no detailed studies of employment and working conditions of aircraft maintenance workers that compare those working in MROs with those directly engaged by airlines. In 2012, we attempted to obtain such data for Australia through the survey whose results are outlined in the next section. Our findings, drawn from the regional airline and general aviation sector as well as from the main route airlines that have so far been the focus of this study, require further validation. They provide some support for the fragmentary evidence that exists from other studies of the

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<sup>29</sup> I. Hampson, D. Fraser, M. Quinlan, A. Junor, *The Uncertain Oversight of Offshored Aircraft Maintenance: The Case of Australia*, *Journal of Air Law and Commerce*, 2016 in press.

<sup>30</sup> S. Gregson, M. Quinlan & I. Hampson, *Professionalism or Inter-Union Solidarity? Organising Licensed Aircraft Maintenance Engineers, 1955-1975*, *Labour History*, 2016, 110 (May):35-56.

effects on job security and working conditions of subcontracting/outsourcing in other industries. However, the situation is not simple. MROs vary in the degree of job insecurity and in their reputation regarding standards and reliability. Further, the trend to outsourcing has not been irreversible, with maintenance occasionally being returned in-house.

On the one hand offshore MROs specialising for example in avionics or off-wing engine overhaul may perform high quality work, with relatively well-paid labour, deriving their cost advantage from specialisation. Among them are OEMs (original equipment manufacturers) who have captured maintenance work by rolling it into TLS (through-life-support) contracts. On the other hand off-shore MROs performing the routine aspects of D checks and heavy maintenance derive cost advantages from, *inter alia*, low paid, weakly organised workers, and loose enforcement of regulatory standards, including OHS. Currency differentials, for example those between Australia and New Zealand, also play a role. Part of the cost advantages of these MROs comes from their tight adherence to the letter of the tasks and time frames specified in the contracts governing such work, with less scope for being remunerated for rectifying unexpected problems identified in the course of repair work. Similarly, as in other industries, cost savings are derived from tighter time-scheduling of work (including undertaking a higher proportion of repairs at night), using lower ratios of highly skilled workers, at least in offshore facilities (though regulations set minimums in this regard) and lower pay and conditions (especially when outsourcing is offshored to countries with far lower average wage levels, little union presence, weak and poorly enforced labour standards, and in some cases political regimes that actively repress worker organisation (in China and Thailand for example).<sup>31</sup> For example, offshore maintenance providers in countries such as Brazil, the Philippines and China had much lower labour costs (from 10 to 50 per cent) than those pertaining in the USA, Australia, the UK and other rich countries.<sup>32</sup>

Even amongst rich countries with weaker union presence and decentralised IR regimes like the USA there is potential for considerable labour cost savings (a significant component of maintenance activities) from outsourcing of one type or other. Further, multi-tiered subcontracting (ie the further outsourcing of all or part of the work to another party) has the potential to further drive down costs and be conducive to critical gaps in safety communication as well as greater ‘churning’ in the workforce of repair stations. Evidence of this emerged

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<sup>31</sup> M. Quinlan, I. Hampson & S. Gregson, *Slow to learn: regulatory oversight of outsourced aircraft maintenance in the USA*, *Policy and Practice in Health and Safety*, 2014, 12(1):71-90.

<sup>32</sup> M. McFadden & D. Worrels, *Global outsourcing of aircraft maintenance*, *Journal of Aviation Technology and Engineering*, 2012, 1(2):63-73.

in the NTSB investigation into the fatal crash of Air Midwest Flight 5481 in January 2003.<sup>33</sup> The NTSB investigation found that while maintenance work was contracted to one firm (RALLC) it was actually undertaken by another firm engaged by RALLC called Structural Modification and Repair Technicians (SMART). The investigation found short job tenure (often a matter of months), and consequent limited worksite experience, was typical amongst SMART mechanics at the maintenance site; training deficiencies with regard to new hires (and record keeping); and that RALLC's site manager worked a day shift and was not present at night to oversee maintenance when the work was actually being carried out – all factors that contribute to disorganisation and the likelihood of miscommunication or error.

It also critical to note that, as has been found in other industries, work intensification and cost cutting in outsourced work can then place pressures back on in-house workers due to the competitive pressures it places on the latter and fears of job loss.<sup>34</sup> The next section investigates work intensity and work extensification in the on-shore Australian MRO industry, in the context of increased off-shoring and declining local recruitment and apprentice intakes.

### **Work Patterns and Working Hours in Aircraft Maintenance — Safety Implications**

An extensive body of research points to the adverse health effects of excessive working hours, especially when combined with shiftwork and increased work intensification.<sup>35</sup> These studies have justifiably focussed predominantly on the health detriments suffered by long-hours workers themselves, resulting from too few hours remaining for a healthy lifestyle, rest and recreation.<sup>36</sup> However, in a safety-critical industry like aircraft maintenance, the ill effects may well spread beyond the workplace to consumers and the general public if, for example, fatigued workers make mistakes that contribute to negative aviation

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<sup>33</sup> NTSB, National Transportation Safety Board. *Aircraft Accident Report: Loss of Pitch Control During Takeoff Air Midwest Flight 5481 Raytheon (Beechcraft) 1900D, N233YV Charlotte, North Carolina January 8 2003*. NTSB/AAR-04/01 PB2004-910401, 2004, National Transportation Safety Board, Washington, DC, 58-59.

<sup>34</sup> C. Mayhew & M. Quinlan, *Economic pressure, multi-tiered subcontracting and occupational health and safety in the Australian long haul trucking industry*, *Employee Relations*, 2006, 28(3): 212-229.

<sup>35</sup> See for example A. Dembe, J. Erickson, R. Delbos, & S. Banks, *The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States*, *Occupational and Environmental Medicine*, 2005, 62:588-597. doi: 10.1136/oem.2004.016667.

<sup>36</sup> B. Pocock *The Work/Life Collision: What Work is Doing to Australians and What to Do about It*, 2003, Federation Press, Annandale.

incidents. We can surmise that fatigue may be exacerbated in the case of shiftwork, particularly nightwork.<sup>37</sup>

In aircraft maintenance, a combination of personal and industry pressures creates the circumstances where long working hours are normalised and where insufficient attention is paid to the risk factors generated by this trend. Campbell and van Wanrooy highlight the widespread ambivalence workers express about long working hours – that there are significant barriers to workers exercising free choice about their own optimal hours and that worker decisions to perform long hours are deeply affected by many factors, including household debt, family timetables, levels of work stress, fatigue and burnout etc., and workplace culture.<sup>38</sup> They argue that the term ‘preference’ may paper over a range of underlying reasons why workers do certain hours.<sup>39</sup>

Hours of work and shift patterns were among the aspects of the aircraft maintenance engineering work process we investigated through an Australia-wide survey conducted in 2012, as part of an Australia Research Council-funded Linkage Project studying the future of the aircraft maintenance industry in Australia.<sup>40</sup> Of 708 responses, 626 provided information on work patterns and working hours in aircraft maintenance jobs. 430 responses (68.7%) came from employees of main route and foreign airlines (of whom 380 were from major carrier Airline A). 33 respondents (5.3%) worked for regional airlines, 79 (12.6%) were from General Aviation, 58 (9.3%) were from independent MROs and the remaining 26 (4.1%) were from defence, education, contractors, or original equipment manufacturers. The responses provided evidence of working hours and shift patterns that suggested work extensification in the in-house sector. As 55% of respondents volunteered qualitative responses to a final open-ended question, it was possible to derive reasons for the long hours worked, including comments on the links between pay and ‘forced choice’ of hours, as well as to identify concerns about fatigue and safety.

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<sup>37</sup> J. Reason, Achieving a safe culture: theory and practice, *Work & Stress*, 1998, 12(3):293-306.

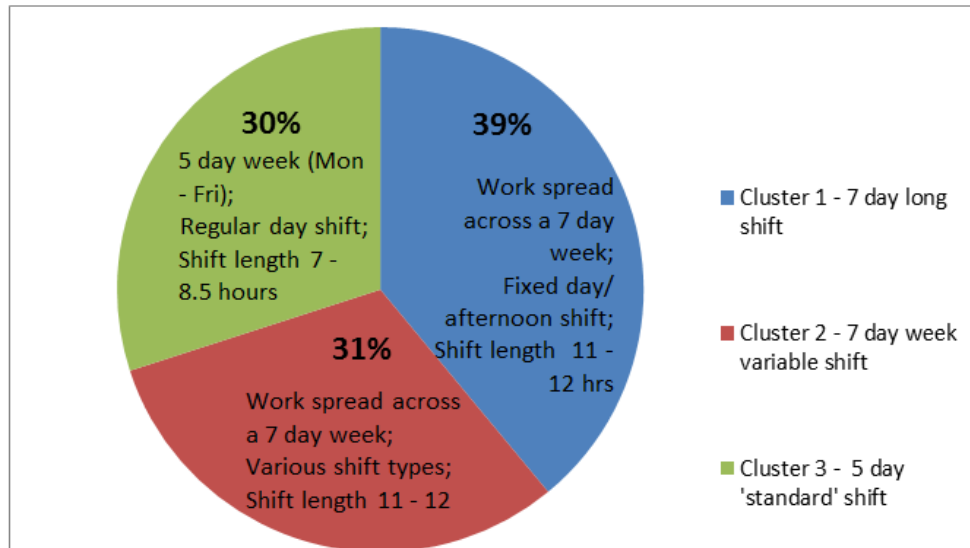
<sup>38</sup> I. Campbell & B. van Wanrooy, *Long working hours and working-time preferences: Between desirability and feasibility*, *Human Relations*, 2013, 66(8): 1131-1155.

<sup>39</sup> R. Drago, M. Wooden & M. Black, Long Work Hours: Volunteers and Conscripts, *British Journal of Industrial Relations*, 2009, 47(3): 571-600; and

<sup>40</sup> UNSW, *The Future of Aircraft Maintenance in Australia: Workforce Capability, Aviation Safety and Industry Development*. ARC Linkage Project 110100335.



Figure 1 Three main work patterns – aircraft maintenance survey respondents, Australia, 2012 (n=575)



Source: Survey of aircraft maintenance workers, Australia, 2012

Three characteristic work patterns emerged from a cluster analysis, identifying dominant combinations of three factors: the number and spread of days per work cycle; work schedules (rotating or regular shiftwork rosters) and hours per shift (Figure 1). The most common pattern (39% of the sample) was one in which respondents typically worked a 7 day week (62% of the cluster), a rotating day/afternoon shift (96% of the cluster), and a shift length of 11 - 12 hours (69% of the cluster). The second cluster (31% of the sample) was based on a 7 day week (77% of the cluster), with 57% working an average shift length of 11 - 12 hours, but with a variety of shift types: including rotating shifts other than day/afternoon (52%) and a regular day shift. The third cluster (30% of the sample) worked a 5 day week Monday to Friday (100%), a regular day shift (62%), and a shift length of 7 - 8.5 hours (92%). This cluster of respondents had a work pattern that was closest to the Australian ideal-type norm, and it can be surmised that this was the safest of the three clusters, with the least risk of fatigue.

The spread of work across a 7 day week meant that 70% of respondents did not have the regular two-day weekends that Australians associate with the 'standard' working week. Their work cycles were combined with long-hours days, a shift length of 11 to 12 hours being the norm. When translated to hours

per week, it emerged that compared with the Australian ‘standard’ full-time week of 35 – 39 hours (depending on industry), aircraft maintenance workers had a working week that was longer than the standard. The mean number of hours worked in the survey week was 43.85 hours, slightly more than the usual mean (42.3 hours) and considerably longer than that preferred (40.67 hours). Indeed 25% of respondents worked more than 48 hours in the reference week. Table 3 indicates that only a 35% minority usually worked a ‘standard’ full time week of 35 – 39 hours. For convenience, we can define as a ‘stretched’ full-time week the 40 – 44 hours usually worked by 31% of the respondents. A further 30% worked either long (45 – 49) hours or very long (50 or over) hours. Part time hours were worked by only 3.5%, mainly in the independent MRO sector.

**Table 3. Hours Usually Worked per Week – Aircraft Maintenance Industry Respondents, 2012**

<b>Hours per week</b>	<b>Number</b>	<b>Per cent</b>
Part time (34 hours or less)	20	3.5
Full time - standard (35 - 39 hours)	205	35.4
Full time – ‘stretched’ (40 - 44 hours)	181	31.3
Long hours (45 - 49 hours)	111	19.2
Very long hours (50 hours or more)	62	10.7
Total	579	100.0

Source: Source: Survey of aircraft maintenance workers, Australia, 2012

The high incidence of ‘stretched’, ‘long hours’ and ‘very long hours’ was in part a function of the incidence of overtime in the industry. Table 4 indicates this incidence. To analyse *overtime* patterns, the pay period was converted to weeks, obtaining 571 valid responses. Of these, 271 (47.5% of respondents) reported working overtime in the most recent pay period. Just over half (152 or 56% of the 271) had worked less than 5 hours of overtime. Of those working overtime, 56% had worked less than five hours, but 29% had worked five to under 10 overtime hours and 15% had worked ten or more hours of overtime. The mean number of overtime hours was 4.75, of which 3.65 were paid. Three-quarters of the 271 had been paid for all their overtime hours worked, although payment was most common for those working fewer than 10 hours

per week (80%). Among those working 10 or more hours of overtime, 34% were paid for only some of those hours and 27% were paid for none of the extra hours. The discrepancy between median overtime hours (4hrs) and median paid overtime hours (2 hrs) was significant (sig<0.0005, Wilcoxon ranked sign test). The inference is that where overtime was more likely to be paid, it was less likely to be excessive. This suggests that industrial regulation and its enforcement, for example by ensuring that additional hours are paid, is a potential means of curtailing excessive and risky unpaid overtime.

**Table 4. Actual Hours of Overtime Worked in Most Recent Paid Week—Australian Aircraft Maintenance Industry Survey, 2012**

Actual hours of overtime worked in most paid week	Number of respondents answering question		
	Number	% of respondents	% of those working overtime
No overtime	300	52.5%	
Worked overtime	271	47.5%	100%
<i>Less than 5 hours</i>	152	26.6%	56.1%
<i>5 to 9.5 hours</i>	78	13.7%	28.8%
<i>10 or more hours</i>	41	7.2%	15.1%
Total respondents	571	100.0	

Source: Source: Survey of aircraft maintenance workers, Australia, 2012

Significant sectoral differences were found in hours actually worked in the reference week (contingency coefficient 0.218, sig 0.036). About half of all Major Airline A and General Aviation respondents worked a standard (35-30 hour) or ‘stretched’ (40 to 44 hour) full-time week, but for those working additional hours, in Major Airline A more were in the ‘long (45-49) hours’ bracket than in the ‘very long’ hours, whereas in regional and General Aviation, an alarming 27% had worked 50 hours per week or more in the survey period (Table 5). Respondents working for regional airlines were the most likely to be working overtime (69%). In Major Airline A, 27% of respondents had worked no more than 5 hours overtime in the previous week while 14% had worked 5 to 9 hours. Those working in MROs were the least likely to work overtime (36%), perhaps because off-wing repairs and overhaul presented less intense pressure to return aircraft to service. The poor conditions in regional airlines suggest labour shortages.

Overall, it would appear from a comparison of usual and preferred hours, and paid and unpaid overtime, that there was a high incidence of ‘stretched’ and long hours in aircraft maintenance industry, and that some of this additional work was involuntary, reflecting a labour shortage or labour over-utilisation, at a time of significant job losses in the industry. This situation, if prolonged, represented a potential fatigue and safety hazard. This hazard was likely to be compounded by the relatively high incidence of 11-12 hour days and variable shift patterns. Many of the 55% who provided responses to the open-ended question painted a sobering picture of hazards turning to endemic risk.

Even when long working hours were undertaken voluntarily, to what extent were these preferences forced by other conditions of the job? Many respondents commented on unsatisfactory pay levels in the industry and declining relativities with other trades, especially in light of the heavy weight of safety responsibility borne by them, the high cost of self-funded training and, as one put it, “for what we put up with” (10016, 10025, 10028, 10185, 10187, 10189, 10198, 10223, 10279, 10336, 10375, 10420, 10440, 10492, 10506, 10530, 10560, 10568, 10588, 10651, 10660, 10683). Some referred explicitly to the need to do overtime hours to earn sufficient pay (10045, 10125, 10329).<sup>41</sup>

Respondents referred to the increased safety risks involved in shift work, especially night shift, advising that management should not schedule complicated, heavy tasks late at night because coordination and thinking was more impaired at that time (10128, 10129, 10406).

I have personally seen incidents occurring due [to lack of] situational awareness, communication breakdown and fatigue. The employer blaming the employee for incidents and employer not looking at their own policies and employment numbers for task requirements. The airlines preach ‘safety first’ but still carry on doing the opposite (10242).

Concerns were expressed that safety risks were being incurred because a lot of heavy and technical work was being performed between midnight and 6 am to allow maximum utilisation of the fleet (10121). One LAME detailed how more and more aircraft were serviced on night shift with the same number of staff. “I hate going to work at the moment. Not because of the work, but [because of] the resources and the politics” (10152).

Some reported that greater attention should be paid to incidences of mental health and depression; fatigue, one wrote, was not permitted on a sick form (10121, 10189). As another put it:

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<sup>41</sup> A five-digit reference number was assigned to each survey response to protect respondent anonymity.

I feel that safety is not a big enough concern within the company. Fatigue is also a major issue, the amount of hours we are required to do to maintain serviceability is excessive (10450).

Engineering staff were leaving and not being replaced (10189), more work was expected and turnaround times were reduced (10443, 10485). A respondent wrote:

My main area of concern in my career is the stress levels that have increased substantially due to reduced staff levels, inadequate time to carry out tasks thoroughly, and constant uncertainty in my future position through offshoring of maintenance, without adequate supervision by Australian qualified engineers (10349).

With an ageing workforce, work design was also important, wrote one 59-year old respondent. Recovery time from 12 hour shifts was significant (10194). Another wrote:

12 hour shifts have a massive impact on life outside work. While a lot of people will work many more hours per week for lower pay, 2 x 12 hour night shifts leaves you feeling like death warmed up and not being involved with the world for the best part of 3 days (10204).

LAMEs have developed a strong 'ideal worker' norm that posits them as the 'last line of defence' or 'guardian' against a catastrophic hull loss, insisting on high standards of work and passing on knowledge to the next generation (10012, 10024, 10070). A LAME 'creed', well known in the industry, commits those in the trade to refuse to sign out any aircraft on which they would not happily have their own family<sup>42</sup>. One wrote of 'the expertise, culture and determination to provide a first class product, on time, every time' (10018) and others of the 'pride' and professionalism involved in the reliability of their work, a reliability that was diminishing with increased use of outsourcing (10002, 10070, 10090, 10110, 10248). Undermining that commitment, however, was a recognition that correct procedures were often not followed during outsourced maintenance (10010), work was often 'deferred' to keep to flight schedules (10089) and problems existed that managers "turn a blind eye to" (10207). Our respondents felt a strong pressure to "do that bit extra" to fix the hundreds of defects that should have been done during routine maintenance performed elsewhere (10018, 10021, 10109). As one wrote:

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<sup>42</sup> S. Gregson, M. Quinlan & I. Hampson, *Professionalism or Inter-Union Solidarity? Organising Licensed Aircraft Maintenance Engineers, 1955-1975*, *Labour History*, 2016, 110 (May):38

They always threaten us saying how expensive it is and how cheap it is, the work done overseas. But they don't see that the aircraft that undergo an overseas check has so many defects that we have to fix during the next maintenance check that we do, so then it takes longer for us to fix things that the overseas people should have fixed. We are always under pressure to meet unrealistic deadlines to match what overseas MROs do (10375).

Supervisory pressures were increasing because LAME to AME ratios were declining and, coupled with high levels of redundancies in the industry, staff levels were “stretched thin” (10213, 10555). Increased pressure created by the development of complex, highly competitive supply chains for maintenance work has only increased the sense of obligation many LAMEs feel to cover for the effects of ‘disorganisation’ that now characterises the industry. Because of increased competition and managerialism, there was no longer “an even playing field” (10005) and, as a result, many LAMEs felt declines in quality, training and safety standards, often reduced to ‘ticking boxes’, were inevitable (10007, 10009, 10012, 10014, 10034, 10036, 10110, 10242).

### **Discussion and Conclusion**

There is now an extensive body of international research pointing to the adverse OHS effects of precarious work. However, a limitation with this categorical approach is that it fails to give sufficient recognition to the business practices and labour processes that give rise to precariousness/vulnerability or to consider whether these processes impact on the working conditions, health and wellbeing of all workers in an industry, not simply those in contingent work arrangements. We would argue it is more valuable to focus analysis on processes like outsourcing/subcontracting and to see the growth of precarious work as but one of a spectrum of changes to work arrangements that can have implications for OHS and also, in some cases at least, community health and safety. There is a relatively small but nonetheless persuasive body of international research on the adverse health and safety effects of outsourcing/subcontracting and supply chains. This research also points to serious challenges these work arrangements pose for regulators. Our review of US, Australian and other evidence found that the experience in aviation, and more especially heavy aircraft maintenance, very much fits the experience of other industries in this regard and for essentially the same reasons namely the cost-pressures underpinning outsourcing, disorganisation and regulatory failure.

Global supply chains present a particular challenge because they shift work processes outside the jurisdiction of national regulators in countries which are the primary market for such products and services and there is no enforceable set of OHS and labour standards internationally (even those countries signing ILO conventions will essentially decide to what extent they are implemented). Aviation, along with several other industries (like maritime transport), is exceptional in having an international regulatory framework. However, as this paper has indicated the regime has serious gaps (worse in some countries than others) and has been unable to effectively accommodate to the changes in business and work practices following deregulation of airlines and the emergence of low-cost carriers.

With regard to the effects of these changes on working conditions and OHS, the paper noted that changes could be identified at three levels. First, the movement of maintenance work to countries with substantially lower labour costs, many with weak or non-existent union representation/collective bargaining, often with weak social protection and safety regulation (especially when enforcement was considered), and some ruled by endemically corrupt if not totalitarian political regimes. There is little if any systematic research on the OHS conditions of these workers. Second, by outsourcing maintenance, work has also been shifted either internally to MROs within richer countries or to MROs in other countries at similar or lower levels of economic, regulatory and political development. Third, the outsourcing of work has also impacted on the job security and work intensity of those in-house maintenance workers in countries like Australia.

The paper assessed evidence on the second and third aspects, using survey and qualitative data pertaining to Australia. The findings can be summarised as follows. First, long working hours were a feature of the industry and one with significant consequences for OHS. As the evidence was cross-sectional we were unable to conclude whether the shift to outsourcing had contributed to longer working hours across the sector as a whole. Although this would seem a plausible scenario, and one worth exploring in aviation and other industries it would require longitudinal research methods. Having said this, the evidence indicates that while long hours were the norm, hours were comparatively lower in the more highly regulated Qantas sector and higher in the less unionised, less regulated other main Route regional and GA sectors.

Second, we found that long hours were endemic amongst aircraft maintenance workers in ways that were indicative of the over-utilisation of labour. Respondents found the combination of long hours and nightwork stressful, especially in the context of ongoing management claims about how much more costly was onshore maintenance and how much cheaper it would be to do it offshore. These threats – reinforced by knowledge that other work has

been outsourced or offshored – means that workers holding nominally secure jobs rightly feel insecure and precarious and adapt their work practices accordingly. Those retaining their jobs were working harder and feeling more pressured at the same time as other maintenance workers were losing their jobs. We would suggest this is not an uncommon scenario in other industries where strategies such as restructuring/downsizing, outsourcing and the like are being pursued. Whether such an approach is sustainable and its implications for burnout, labour retention and future hiring in aircraft maintenance or more generally are questions warranting serious consideration. Fatigue is known to contribute to poor decision-making and this too may have important implications in terms of public as well as worker safety – an especially significant consideration in high hazard industries.

Third, if hours seem overly long in Australia, what are working hours at offshore MROs in countries where working conditions are less regulated? Are long hours becoming characteristic of aircraft maintenance work in Europe and North America? The study also raises larger questions. Do the employment regimes in these countries mean that workers in aircraft maintenance and more generally essentially experience the precarious work that was characteristic of rich countries prior to World War II?<sup>43</sup> Are we witnessing a convergence in work arrangements between poor and rich countries even affecting industries making use of workers with specialist technical skills?

Taking working hours as one body of evidence it can be hypothesised that outsourcing, and especially when it is offshored, is a mechanism that drives down working conditions amongst non-outsourced and onshore workers, even groups like aircraft maintenance workers who were highly unionised and many with the additional apparent protection of needing to be licensed. As indicated earlier the regulatory protections, including licensing, have not prevented this shift. Indeed, some changes in regulatory regimes have arguably facilitated the process. Finally, this reinforces a more general point about precariousness and vulnerability. Rather, than being treated as a set of categories of work arrangement precariousness is better understood as something that can to some degree affect all categories of workers, encapsulating the loss of control over working-life. Research into the OHS and other effects of precarious and vulnerable work can be significantly advanced by viewing precarity in this broader way and relating its effects to underlying changes in business practices, regulation and work organisation like outsourcing/subcontracting and the use of elaborate global supply chains.

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<sup>43</sup> M. Quinlan, *The 'pre-invention' of precarious employment: The changing world of work in context*, *The Economic and Labour Relations Review*, 2012, 23(4):3-24.



# Occupational Accident and Protection of Temporary Workers' Rights in Nigerian Manufacturing Companies: A Study of Selected Manufacturing Companies in Lagos State, Nigeria

Dawodu Adeyemi Akinkunmi \*

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**Abstract.** The Nigerian Factories Act of 1987, 2004 and 2010 required every work organisations in Nigeria to put in place adequate health and safety measures for protection of factory workers against any occupational accidents. However, these factory Acts in reality are still very far from achieving the expected results due to high rate of occupational related injuries and accidents recording daily in most manufacturing companies which oftentimes lead to either physical dishabilles or death. Arising from this, it could be inferred that occupational accident and protection of temporary workers' rights' based on the provisions of Nigerian Factories Act is a subject of controversies due to poor penalty and compensational provisions offered the affected victims. In line with the foregoing, this study adopts a qualitative method to investigate occupational accident and protection of temporary workers' rights in Nigerian manufacturing companies with aim of proffering working solutions.

**Keywords:** *Occupational accident; temporary workers' rights, manufacturing companies; and vulnerability.*

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\* Dawodu Adeyemi Akinkunmi, University of Lagos, Nigeria. Email: [adeyemidawodu2011@gmail.com](mailto:adeyemidawodu2011@gmail.com).

## 1. Introduction

Manufacturing companies in Nigeria today are still striving to ensure safety of their workforce in the course of their daily work activities despite the existence of health and safety provisions in the Nigerian Factories act even before the country's independence. Despite several preventive measures put in place, occupational accident remains a major occurrence in some manufacturing companies in Nigeria<sup>1</sup>.

According to<sup>2</sup>, occupational accident is any physical injury condition sustained on a worker in connection with the performance of his or her job in the work place, and it poses a major threat to health and safety of such workers resulting into serious health, social, and economic consequences on workers and their employers.

<sup>3</sup>, gives a broader dimension to occupational accident and thus defines occupational accident as an unexpected and unplanned, including acts of violence, arising out of or in connection with work which result in one or more workers incurring a personal injury, disease or death. In line with the International Labour Organisation definition of occupational accidents, it becomes clear evidence that work-place accident in any forms may remain a permanent occurrence in the workplace as long as production system involves exchange system between human and material resources.

<sup>4</sup>, observes that physical environment of the workplace is an important concern to the stakeholders' but in most cases the impact of such physical environment on health and safety of employees in the workplace is almost non-existent<sup>5</sup>. In view of Price (2002) and Fisher, (2003), it may therefore imply that more concerted efforts are still needed from the stakeholders' in employment relations to reduce or if possible prevent occupational accidents among the workforce.

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<sup>1</sup> Y. Ahn, J. Bena, & A. Bailer, A, Comparison of unintentional fatal occupational injury in the Republic of Korea and the United States. *Injury Prevention*, 2004, vol, 10, n. 4, 199–205.

<sup>2</sup> A, Zewdie, E, Dagneu, T, Takele, Determinants of Occupational Injury: A Case Control Study among Textile Factory Workers in Amhara Regional State, Ethiopia, 2011, *Journal of Tropical Medicine*, vol, 11, n.19-27.

<sup>3</sup> International Labour Organisation Reports on Statistics of occupational injuries-(Report iii), Sixteenth International Conference of Labour Statisticians, Geneva, October 1998.

<sup>4</sup> I, Price, The complex adaptive workplace: a theoretical link between office design and productivity,2002, [Http://www.FMKx.co.uk/doqwnload/files/FM\\_Library\\_reports/Cambridge\\_2003.Pdf](http://www.FMKx.co.uk/doqwnload/files/FM_Library_reports/Cambridge_2003.Pdf). Retrieved May 18, 2016.

<sup>5</sup> L, Fisher, Shaping the millennium: a history of child and home injury prevention with application of leadership system, 2003, [Http://www.alpha.org](http://www.alpha.org). Retrieved, May 18, 2016.

The use of temporary worker is increasingly becoming a prominent feature in today's world of work<sup>6</sup>. According to<sup>7</sup>, the temporary workers account for a substantial percentage of the U.S workforce, and nearly four out of five employees of all sizes and industries use some form non-traditional/formal staff. <sup>8</sup>In the same line of argument stresses that temporary-help industry provides in excess of three million workers today, a three hundred (300) percent increase since 1991. In Nigeria, accurate statistic of temporary workers is very hard to ascertain due to several factors including the lack of accurate information on the activities of the companies involved.

<sup>9</sup>, has described a temporary employee as any persons hired directly by organisation that uses his or her service and such person(s) is legal employee of the firm for a specific fixed period of time specified in the employment contract and such employee's is easily dismissed when the contract period is expired. The nature of employment contracts offered to most temporary workers' expose them to many severe challenges especially where such persons sustain injuries in course of discharging his or her daily work activities in the workplace<sup>10</sup>. Mostly, the hired organisations often time deny these categories of people their compensation and or benefits thereby leaving them in a perpetual terrible conditions with many ended-up in total paralyses or death.

This study, therefore, uses a qualitative method to investigate occupational accident and protection of temporary workers' rights in Nigerian manufacturing companies.

### *1.2. Contextual Issue on Occupational Accidents in Nigeria.*

The Nigerian Factories Act of 1987, 2004 and 2010 require that every work organisations in Nigeria, particularly, the manufacturing companies to put in place adequate health and safety measures to forestall any form occupational accidents but in reality this is may be far true considering the number of injuries workers sustain as a result of occupational accidents recorded daily in some of the manufacturing companies operating in Lagos State, Nigeria.

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<sup>6</sup> R.M, Ongera, D, Juma, D, Influence of temporary employment on employee performance: a case study of Sararicon Ltd, Kenya, 2014, Business and Commerce, vol,4 n.4, 1-37.

<sup>7</sup> United States Bureau of Statistics (Department of Labor), Washington, D.C, 2012.

<sup>8</sup> G, Deseler, Human resource management (11th edition), New Jersey: Pearson Education, 2008.

<sup>9</sup> S.N, Houseman, Temporary agency work is not generally a stepping-stone to regular employment, 2014, IZA World of Labour, vol, 27, n. 1-10.

<sup>10</sup> Ibid

Due to the nature of manufacturing companies' activities, exposure to risks in form of offensive odds, poor ventilation, heat and noise occasioned by the use of heavy machineries, plants and equipment have become more pronounced. Without any doubt, this posse a major threat to health and safety of the workforce; and has accounts for several injuries sustained by the workers whether a minor or major one with little or nothing done by the hired organisations to bring relieves to the affected employees.

According to<sup>11</sup>, physical environment of the workplace is an important concern to the stakeholders' but the impact of physical environment on health and safety of employees in the workplace is almost non-existent. In Nigerian, Many factors can be attributed to the negative impact of physical environment on employees' performance in manufacturing companies including poor and untidy factory site, non-compliance to various factories Act as stipulated in the Nigerian labour laws and non-enforcement of penalties on defaulting organisations.

Due to poor enforcement of penalties on defaulting organisations, compliance rate to the provisions of the Nigerian factories Act is presently at the alarming rate and calls for a thorough research. Several cases of occupational accidents resulting into minor or major injuries including permanent disabilities and or sometimes deaths are on the increasing with no solution at sight. <sup>12</sup>, says that temporary work has long been viewed as exploitative or suitable only for those marginal attached to the work place.

In line with <sup>13</sup> and in view of the current situations in many manufacturing companies in Lagos State, Nigeria it is a case of an ugly scenario. Unofficial reports obtained from some of the employees in few of these manufacturing companies surveyed especially those owned by the Indians, Chinese and Lebanese indicate that the working condition is more of exploitative; the disturbing news also is that more that 80 percent of these workers are either temporary or contract employees with low pay and poor working conditions.

Apart from the exploitative nature, the rate of occupational accident in some of the manufacturing companies investigated in this study showed a higher incidence which could be attributed to non-compliance with the provisions of the Nigerian factories Act. The question therefore, is that 'should this ugly trend continues'? Arising from the problem analysis, this study investigates occupational accident and protection of temporary workers' rights in Nigerian manufacturing companies.

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<sup>11</sup> Price 2002, Op. sit.

<sup>12</sup> Houseman (2014), Op. sit.

<sup>13</sup> Ibid

### *1.3 Objective of the Study*

The aim of this study is to investigate occupational accidents and temporary workers rights in Nigerian manufacturing companies in Lagos State.

### *1.4 Research Question*

Arising from the objective of the study stated above, this study raises a research question: are temporary workers' rights in manufacturing companies protected in the event of occupational accidents?

### *1.5 The Scope and Delimitation of the Study*

The scope of this study is occupational accident and protection of temporary workers' rights in Nigerian manufacturing companies in Lagos State. The rationale behind the choice of Lagos State stems from the fact that it is the commercial capital of the country as well as Nigeria's economic nerve centre. In addition to this, most commercial activities take place in Lagos State, Nigeria<sup>14</sup>. The study focused on selected manufacturing companies in Lagos State.

### *1.6 Significance of the Study*

The study is expected to produce results that would assist policy makers, industrial relations practitioners, human resource management professionals and the relevant government agencies concern with ensuring compliance to the provisions of Nigerian Factories Act, particularly the 1987, 2004 and 2010 on the needs to make sure that the provisions Act(s) are enforceable in all manufacturing companies operating in Lagos State, Nigeria without compromise.

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<sup>14</sup> U. Eze, E-business development in Nigeria financial firms: An empirical analysis of key factors, 2008, International Journal of E-business Research, vol, 4, n. 2, 19-47.

## 2.1 Literature Review

### 2.1.1 Occupational Accident

<sup>15</sup>, describes an accident as “an unplanned and unanticipated event”. In other words, accident is an unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury. Similarly,<sup>16</sup> defines occupational accident as an unexpected and unplanned, including acts of violence, arising out of or in connection with work which result in one or more workers incurring a personal injury, disease or death.

In a different dimension, <sup>17</sup> describe occupational accidents as unplanned events that cause damage. Despite implementing safety measures in the workplaces, occupational injuries and incidents have been on the increase in industries especially in the developing countries and consequently the consequences are unpleasant<sup>18</sup>. The socio-economic impacts and human costs of occupational and industrial accidents are tremendous around the world. However, there is no enough or accessible information about these events from one country to another globally due inaccurate data.

According to <sup>19</sup> over 264 million industrial accidents happen every year globally, with over 350,000 mortalities and more than half of these mortalities occur in developing countries, the estimation of accident costs is difficult to ascertain <sup>20, 21</sup>.

### 2.1.2 The Concept of Temporary Worker

The use of temporary worker is increasingly becoming a permanent feature of the modern day world of work<sup>22</sup>. According to<sup>23</sup>, temporary workers account for a substantial percentage of the U.S workforce, and nearly four out of five

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<sup>15</sup> World Health Organization Statistical Information System. 2008 [cited 2016 April 11] Available from: <http://www.who.int/whosis/whostat>.

<sup>16</sup> International Labour Organisation (1998), Op sit.

<sup>17</sup> B.N, Gulhana, M, Ilhanb, E.F, Civilc, Occupational accidents and affecting factors of metal industry in a factory in Ankara. Turkey J Public Health, vol, 10, n. 76–83.

<sup>18</sup> L, Song, X, He, & C, Li, Longitudinal relationship between economic development and occupational accidents in China, 2007, Accident Anal Prevention, vol, 43, n. 82–86.

<sup>19</sup> P, Hämäläinen, The effect of globalization on occupational accidents, 2012, South Africa Science, vol, 47, n.733–742.

<sup>20</sup> World Health Organization Statistical Information System. 2008, Op sit.

<sup>21</sup> I, Mohammadfam, A, Moghimbeigi, Evaluation of injuries among a manufacturing industry staff in Iran, 2009, Health Science, vol, 9,n. 7–12.

<sup>22</sup> Ongera & Juma, 2015, Op sit.

<sup>23</sup> United States Bureau of Statistics (Department of Labor), Washington, D.C, 2012, Op sit.

employees in organisation of all sizes and industries use some form of non-traditional staff. Similarly, <sup>24</sup> stresses that temporary help industries provide in excess of three million workers to United State economy in 2007, a three hundred percent increase since 1991 and also accounts for about twenty percent new jobs in the United States.

<sup>25</sup>, say that understanding the consequences of workers in temporary employment contracts is complex and there is need to distinguish between high and low skill workers including those who are and are not on their contract of choice.

A further line of analysis presented by writers such as <sup>26</sup> and <sup>27</sup> is that the changing nature of employment is rendering even permanent jobs at risk. This possibility has been explored in the literature on job insecurity<sup>28</sup>, <sup>29</sup>. Based on the studies of <sup>30</sup>and<sup>31</sup>, temporary employment is receiving increasing supports in the world of work.

<sup>32</sup>, categorise employment into three types, namely: regular employment, temporary agency employment and fixed-term contract or direct-hire employment. Temporary workers as defined by <sup>33</sup> as those workers hired directly by the firm that uses their services and are legal employees of such firm. They are hired for a fixed term or period of time after which the contract is renewed or terminated with or without benefits.

The major distinction between a regular employee and temporary one is that while the regular staff contract of employment is governed by written rules and follow the details of relevant employment laws of a country, temporary employees may not and this has expose many of them into severe situations especially when it comes occupational accidents and or hazard. An investigation by the researcher reveals that most of the manufacturing companies in Lagos State, Nigeria show little or no concern to the plight of the temporary workforce in the event of occupational accidents.

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<sup>24</sup> Dessler (2008), Op sit.

<sup>25</sup> J, Marler, M, Barringer, G, Milkovich, Boundary less and traditional contingent workers: Worlds apart, 2002, Journal of Organizational Behavior, vol, 23, n. 425-453.

<sup>26</sup> P, Capelli, The new deal at work, Boston, MA: Harvard Business School Press, 1999.

<sup>27</sup> V, Smith, The Fractured World of the Temporary Worker: Power, Participation and Fragmentation in the Contemporary Workplace, 1998, Social Problems, Vol, 45, n. 4, 411-430.

<sup>28</sup> E, Heery, J, Salmon, The insecure workforce, Ed, London: Rutledge, 2012.

<sup>29</sup> B, Burchell, D, Lapido, F, Wilkinson, Job Insecurity and Work Intensification London: Rutledge 2002.

<sup>30</sup> Capelli (1999), op sit.

<sup>31</sup> Smith (2001), Op sit.

<sup>32</sup> Houseman (2014), Op sit.

<sup>33</sup> Houseman (2014), Op sit.

### *2.1.3 Occupational Accident and Temporary Workers Rights' in Nigeria*

According to<sup>34</sup>, precarious work is a means for employers to shift risks and responsibilities onto workers. It is a work performed in the formal and informal economy, and is characterised by variable levels and degrees of objective (legal status) and subjective (feeling) characteristics of uncertainty and insecurity.

Similarly,<sup>35</sup> describes precarious work as a combination of a low level of certainty over job continuity, poor individual control over work (notably working hours), a low level of protection (against unemployment or discrimination), and little opportunity for training and career progression. This has also been referred to as employment with 'low quality'<sup>36</sup>. The low quality jobs include, for example, 'dead-end jobs' and 'low pay/low productivity jobs'<sup>37</sup>. It includes temporary, seasonal, part-time, on-call, day hire, casual or short term contracts; as well as self-employment, home working and multiple jobs<sup>38</sup>.

Due to precarious nature of work activities in some of the workplaces especially in the developing world, occupational accidents have become more expedient and the most unfortunate thing is that while workers in regular employment may have been covered and protected under the employment laws of their respective countries, the same cannot be said of the temporary workers. However, the case of manufacturing companies operating in Lagos State, Nigeria requires an urgent attention as result of the risks most of the work-force in these companies is exposed to daily.

The Nigerian Factories Act(s) 1987, 2004 and 2010<sup>39</sup> contain several parts and provisions. Part one is on "registration of factories"; part two is on "health (general provisions) under which issues such as cleanliness, overcrowding, lighting, ventilations, drainage of floors and sanitary convinces. Part three is on

<sup>34</sup> International Labour Organisation, 'From precarious work to decent work: outcome document to the workers' symposium on policies and regulations to combat precarious employment'. International Labour Organization, Geneva: Switzerland, 2012.

<sup>35</sup> European Agency for Safety and Health at Work, 'Priorities for occupational safety and health research in Europe: (2013-2020) 2012, Office for Official Publications of the European Communities, Luxembourg, EU-OSHA.

<sup>36</sup> European Agency for Safety and Health at Work, 'Expert forecast on emerging psychosocial risks related to occupational safety and health'2007, Office for Official Publications of the European Communities, Luxembourg.

<sup>37</sup> Duell, E., 'Defining and assessing precarious employment in Europe: a review of main studies and surveys', Discussion paper - ESOPE Project. Economix, Munich, 2004.

<sup>38</sup> M, Sergeant, M, Giovannone, Vulnerable workers – health, safety and well-being, England: Gower Publishing, 2009.

<sup>39</sup> The Law of Federal Republic of Nigeria (Factories Act 1987, 2004 and 2010).



safety (general provisions) under which issues such as prime-mover, transmission machinery, powered-machinery, other machinery and provisions for unfenced machinery. Part four is on welfare (general provisions with issues like supply of drinking water, washing facilities, accommodation for clothing, first aid and exemption if ambulance room is provided. Part five is on health, safety and welfare (special provisions and regulations); it outlines various health, safety and welfare provisions that workplace must provide for the protection of its workers. Lastly, part six is on notification and investigation of accidents and industrial diseases.

A critical examination of the Nigerian factories Act(s) from 1987, 2004 and 2010 indicate that these Act(s) have the same contents with little modifications. The interesting thing is that despite the richness of the provisions of all the three Act(s), occupational injuries occasioned by occupational accident are still on the increase daily in some of the manufacturing companies investigated by this researcher. Quoting<sup>40</sup> of Nigerian Labour Congress: “Statistics from ILO showed that ‘one worker dies every 15 seconds worldwide, 6,000 die daily and more than two million die annually from work-related accidents and diseases’”, The Nations Newspaper, 2015.

In line with <sup>41</sup> position, <sup>42</sup> statistics had earlier reports that more people die at work than at wars and natural disasters. The statistic report affirms that beyond job-related deaths each year, there are some 268 million non-fatal workplace accidents as well as 160 million new cases of work-related illnesses. The International Labour Organisation (2000) statistic reports estimated that occupational accidents and diseases result in annual four per cent loss in global Gross Domestic Product (GDP) or about \$2.8 trillion in direct and indirect cost of injuries and diseases. In Nigeria, several cases of occupational accidents or injuries are recorded daily<sup>43</sup>.

<sup>44</sup>In a study ‘Individual characteristics in occupational accidents due to imbalance: a case-control study of the employees of a railway company’ found that some job categories were more affected by a specific release mechanism of work related accidents. <sup>45</sup>Posit further that certain individual characteristics

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<sup>40</sup>J. Ajaero, Occupational accidents and diseases in Nigerian Firms. The Nations Newspaper, 2015, p. 6.

<sup>41</sup> Ibid.

<sup>42</sup> International Labour Organisation, 2012 Op sit.

<sup>43</sup> Ajaero, 2015 Op sit.

<sup>44</sup> G.C, Gauchard, N, Chau, L, Touron, D, Benamghar, P.H, Dehaene, J, Perrin, J.M, Mur, Individual characteristics in occupational accidents due to imbalance: a case-control study of the employees of a railway company, 2003, Occupational Environment Medical, vol, 60, n. 330-335.

<sup>45</sup> Ibid.

such as smoking, alcohol consumption, inactivity, sleep disorders, and request for a job change were correlated with the occurrence of occupational accidents. Occupational accident remains one of the permanent features in today's world of work due to exchange relationship between human and material resources. However, many OECD and ILO member countries in compliance with some of the International Labour Organisation conventions on occupational health and safety; while several other nations are striving to ensure that occupational accidents in the workplace are non-existence<sup>46, 47, 48, 49</sup>.

The situation in third world countries at present is worrisome due to increasing number of precariousness in the workplace. For instance, the current trends in Nigeria manufacturing companies as regard occupational accidents and protection of temporary workers' rights remain a disturbing issue. In the recent time, there have been several safety disasters in Nigeria companies. The case of Boiler explosion in a Distillery company in Otta, Ogun State, Nigeria in which claim two lives and Ikorodu, Lagos State factory fire incident that claimed more twenty lives are few of such cases. Quoting a union leader in one of the companies investigated:

There are several cases of bodily injuries with some reported to the Union and several others happening in non-unionised workplace with very little support and compensation for the affected workers. Just recently, a staff of Dura Pack, a Chinese-owned Lagos-based company that produces nylon bags, died, as result of electric shock while carrying out a repair work in the company (Vanguard Newspaper, June 6, 2013; Workplace in Nigeria unsafe)

These are few instances of occupational accidents, as many were recorded daily in some manufacturing companies operating in Lagos State that are neither mentioned nor reported to the relevant regulatory agencies. Nigeria, as a signatory to some of the International Labour Organisation (ILO) treaties, especially, those treaties that related to workers' health and safety, is still grappling with the implementation of some of these treaties going by the reported cases of daily occurrences of occupational accidents and occupational hazard Nigerian workers are made to expose themselves to in the discharge of their daily work activities and despite the robustness of the provisions of 1987, 2004 and 2010 Nigerian Factories Act(s).

<sup>46</sup> European Agency for Safety and Health at Work, 2013 Op sit.

<sup>47</sup> European Agency for Safety and Health at Work, 2007 op sit.

<sup>48</sup> Sergeant & Giovannone, 2009 Op sit.

<sup>49</sup> A, Belin, T, Zamparutti, K, Tull, G, Hernandez, R, Graveling, R. 'Occupational health and safety risks for the most vulnerable workers'. European Parliament, 2011, Available at:[[www.europarl.europa.eu/document/activities/cont/201108/20110829ATT25418EN.pdf](http://www.europarl.europa.eu/document/activities/cont/201108/20110829ATT25418EN.pdf)].

### *3.1 Methodology*

The research setting for this study is Lagos State situated in South-Western part of Nigeria.

### *3.2. Research Design*

In this study, the researcher adopts a qualitative research design using oral interview and documented evidences<sup>50</sup>. In other to achieve this, the researcher interviewed one hundred and ten workers of some of the manufacturing companies based in Lagos State, Nigeria to get the true position of occupational accident occurrence and compensation pattern in their respective organisations. In addition to this, information from printed documents including Newspapers, News Magazine, company's safety hand-book and the company's annual reports.

### *4. Summary of Findings*

Several findings emerge from this study despite its qualitative nature. The major findings, however, include the following:

- The study found out that despite the richness of the provisions of Nigerian factories Act, occupational accidents still remain a daily occurrence in Nigerian manufacturing companies with little or no solution at sight.
- The study also found that most manufacturing companies operating in Lagos State, Nigeria only comply with the provisions of the Nigerian factories Act 1987, 2004 and 2010 on papers but failed in its application when situations demand. Unabated cases of occupational injuries arising from various occupational accidents in some of the companies investigated is an evidence to this and as exemplified from the reports obtained from some of the workers working in these companies.

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<sup>50</sup> N, Azika, Research methods for behavioural science, MacMillan Publisher, Lagos, 1991.

- The study, in addition, also found that most of the workers in some of the manufacturing companies studied were temporary or contract staff. Thus, many of the employers through the use of phony contract agreements show little or no concerns to their plight in case of any occupational injuries sustained from their daily work activities accidents.

#### ***4.1. Conclusion***

The main conclusion drawn from this study is that the rights of temporary workers in Nigerian manufacturing companies are currently under serious abuse.

#### ***4.2. Recommendations***

Based on the conclusion above, the following recommendations are raised for this current study.

The study recommends that relevant regulatory agencies charge with the responsibilities of monitoring and enforcement of implementation of the various provisions in the Nigerian factories Act(s) especially; the 1987, 2004 and 2010 among the manufacturing companies operating in Nigeria should perform their duties effectively. Through this, occupational accidents are likely to reduce marginally and compensation awards in case of any injuries will be strictly adhere to by the various actors concerned whether such injuries are minor or major one.

The study also recommends that Nigerian government should ensure that all the International Labour Organisation treaties on occupational health and safety signed into as member state is not only seen as government policy on papers but rather concerted efforts should be made to operationalise their contents for easy understanding and clarity to all public and private enterprises in the country. With this in place, any organisations found culpable of breaching any of these provisions can be dealt with severely.

Lastly, safety consciousness among manufacturing companies in Lagos State, Nigeria should be given more priority attention. To do this end, the labour inspectorate unit of the federal ministry of labour and productivity should wake-up from their slumber and develop a new work attitude of being consistency in their monitoring functions; as this is the only one way the level of safety consciousness in Nigerian companies can be improved and equally help to reduce injuries among workforce to a conservative level.

# Precarious Work in Drayage Trucking and Labor Action to Restore Labor Rights

David Bensman \*

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**Abstract.** Port truckers pick up and deliver containers at seaports. In the United States, since trucking deregulation in 1981, they have been working as independent contractors for mostly small trucking firms. These companies contract with shippers to deliver containers. They firms are small and usually possess few physical assets. They contract with port truckers, who own or lease their own trucks, to haul containers on a per load basis. All the expenses and risks associated with hauling freight are borne by the independent contractors. Under U.S. law, these truckers are not allowed to engage in collective action, and lack access to labor rights and many forms of social insurance. The drivers earn small fees for carrying each container, and because they encounter many delays at ports, on highways, and at warehouse, they are usually unable to make more than three deliveries per day. As a result, their net earnings are low and their work hours are long. The International Brotherhood of Teamsters has been organizing these drivers for more than a decade; in recent years, they have won regulatory and judicial decisions ruling that the truckers are misclassified as independent contractors when they are actually working as employees under relevant employment laws. The union campaign has formed alliances with environmental justice groups concerned with diesel pollution, and has mobilized political support for reclassifying drivers as employees entitled to legal protection and social insurance, as well as eligible to participate in collective action. The battle remains unresolved.

**Keywords:** *Precarious employment, Independent Contractors, Misclassification, Union organizing.*

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\* Rutgers University, School of Management and Labor Relations. Email address: [dbensman@smlr.rutgers.edu](mailto:dbensman@smlr.rutgers.edu)

## Introduction

In the retail-dominated, or buyer-driven, commodity chain, consumer goods move in large containers. Containers are unloaded from ships at port container terminals. Then they are transferred to another transport mode for movement off the terminal. The most common mode is short-haul trucking, known as “drayage,” which entails hauling containers on trailer chassis by diesel-powered truck cabs. Drayage is an essential link in the movement of goods from the terminal to the Warehouse/Distribution Center (W/DC). The industry is characterized by small logistics and trucking firms which compete for contracts with shippers. Drivers may be employees, but more commonly are “owner-operators,” often called “independent contractors.”

Port truckers represent a significant segment of the logistics labor force. The best study of the working conditions of truck drivers is Belzer’s *Sweatshop On Wheels*, a story of the decline in labor market conditions as trucking changes from a protected and regulated, to an unprotected and deregulated, industry with the passage of The Motor Carrier Act of 1980<sup>1</sup> Prior to deregulation, licensing requirements enforced by the Interstate Commerce Commission restricted the number of firms and trucks, thereby stabilizing prices and, with Teamster representation of drivers, providing truckers with attractive compensation and benefits. Rising wages and operating expenses were passed in higher shipping costs. Deregulation was accomplished in 1980 on a nonpartisan basis, as liberals led by Sen. Edward Kennedy called for an end to corporate monopolies, conservatives advocated market competition, and African-Americans protested their exclusion from well-paying jobs. The Motor Carrier Act altered the landscape, allowing the entry of low-cost, non-union firms. The resulting drop in the price of freight transport made the rapid expansion of offshoring and global trade possible, but it had a devastating effect on port truckers. The increasing number of players depressed compensation and union representation.<sup>2</sup>

Prince describes the trucking labor force as internally stratified. “At the bottom of the pyramid are owner-operators hauling international containers – the

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<sup>1</sup> Michael Belzer, *Sweatshops on Wheels*, Dale Belman and Kristen Monaco, “The effects of deregulation, deunionization, technology and human capital on the work and work lives of truck drivers,” David Bensman, “Port Trucking Down the Low Road,” and J. Peoples and W. K. Talley, “Owner Operator Truck Drivers Earnings and Employment.”

<sup>2</sup> Belzer, “Collective Bargaining after Deregulation: Do the Teamsters still count?”

fastest growing segment of intermodal traffic.<sup>3</sup> Bonacich adds, “Of all the global trade related logistics workers, port truckers are the most oppressed.”<sup>4</sup> The “independent contractor” arrangement represents the outsourcing model used in drayage trucking.<sup>5</sup> Trucking firms -- rather than owning trucks and hiring workers as employees -- contract with drivers who own or lease their vehicles. At the largest ports, Los Angeles and Long Beach, 86% of the drivers are owner operators.<sup>6</sup> These drivers work for, but are not officially employed by, one and only one trucking company, and they are paid by the trip, rather than the hour. Contracting with owner-operators frees trucking companies from any obligations they would incur as employers, including social security taxes, unemployment compensation, workers’ compensation, health benefits, pensions, and compliance with occupational health and safety and non-discrimination statutes. This “independent contractor” model, while vulnerable to legal challenges, serves to enhance the trucking firms’ flexibility. Further, and quite significantly, as an “independent business,” the owner operator is prohibited from joining with other owner-operators to act collectively to improve wages and working conditions through a union or a business association. Doing so, it is generally believed, would violate federal anti-trust laws.<sup>7</sup>

Though the truck companies categorize these drivers as “independent contractors” when they file 1099 forms with the Internal Revenue Service, the owner-operators are essentially “dependent” contractors who are not allowed to work for more than one trucking firm, receive no employee benefits, are compensated by the trip rather than the hour, and absorb all costs associated with the operation of their vehicles as well as with the inefficiency of the system. The latter includes routine but costly delays and bottlenecks (including terminal security clearance, dependence on terminal operations to locate containers, process paperwork, or provide roadworthy chassis, and traffic congestion). For owner-operators, who are paid by the trip, wait time is one of the most significant factors impacting compensation, contributing to the extended hours of the workday, and generating health-draining levels of stress.<sup>8</sup>

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<sup>3</sup> T. Prince, “Endangered species: Economic instability threatens drayage operators and their customers.”

<sup>4</sup> E. Bonacich, “Pulling the plug: Labor and the global supply,” p. 46.

<sup>5</sup> Bensman, “Port trucking down the low road;” Bensman, “Misclassification: Workers in the borderland.”

<sup>6</sup> K. Monaco and L. Grobar, A study of drayage at the ports of Los Angeles and Long Beach.

<sup>7</sup> See Paul on the ambiguities of anti-trust liability for worker collective action.

<sup>8</sup> On compensation and overwork, see Monaco & Grobar; Bensman & Bromberg; Harrison, Hutson, West, & Wilke; Port Jobs; East Bay Alliance for a Sustainable Economy; Jaffee & Rowley; Smith, Bensman, & Marvy. See also DePillis. For stress, see below.

Nevertheless, port truckers, like many immigrant contract workers, value their status as small businessmen at the same time that they bemoan their long hours, low earnings, and difficult working conditions. According to a survey of port truckers conducted at the New Jersey seaports in 2008, a majority expressed a desire to join a union at the same time that they expressed their desire to remain entrepreneurs.<sup>9</sup>

Overall, drayage owner-operators work in a labor market characterized by high turnover, long working days, low earnings, the absence of employer-provided benefits, poor occupational safety outcomes, poor standards and entitlements, and high exposure to injuries, disease and psychological distress. The drivers are responsible for maintenance, repairs, fuel, tire replacement, road taxes, insurance, tolls, traffic fines, radio and/or telephone bills, truck leases and tax preparation.<sup>10</sup>

The drivers' dependence on one firm limits the amount of work available to them to cover expenses. In a 2009 study, 98.1% of the owner-operators surveyed in Jacksonville indicated they were "not allowed to work for other firms".<sup>11</sup> Other studies reported similar findings. Therefore, truckers are 'misclassified' as independent contractors.<sup>12</sup> While they are strictly regulated by corporate entities to benefit the firms' production and economic advantage, they are considered 'independent owner operators' when it comes to benefits, worker rights, maintenance, and repairs. The misclassification of drivers as conditions for employee classification to their labor market status. As outlined by Smith, Bensman and Marvy, these conditions include "behavioral control", "financial control", and "type of relationship". Behaviorally, the contracting firm determines what containers are moved, when and where, so there is no autonomy or discretion. Financially, the firms set a price for the container move, and drivers have no independent ability to determine their level of compensation. Finally, drivers are only permitted to move containers for one trucking company. These three conditions establish – as is demonstrated by repeated rulings by California courts -- an absolute clear-cut case of the drivers' misclassification as "independent contractor".

In addition to the economic consequences of the independent contractor arrangement, there are implications for occupational health and safety, an area that deserves greater attention in the study of precarious work.<sup>13</sup> Trucking is

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<sup>9</sup>Bensman and Bromberg; V. Dubai, "Wage Slave or Entrepreneur?" Contesting the Dualism of Legal Worker Identities."

<sup>10</sup> Port Jobs; East Bay Alliance for a Sustainable Economy; Smith, Bensman & Marvy.

<sup>11</sup> Jaffee & Rowley.

<sup>12</sup> Bensman, 2014; Smith, Bensman & Marvy; Smith, Marvy & Zerolnick.

<sup>13</sup> A. Williamson, A. P. Bohle, M. Quinlan, & D. Kennedy, "Short trips and long days: Safety and health in short-haul trucking;" M. Quinlan., C. Mayhew, & P. Bohle, "The Global



classified as one of the highest risk occupations in the U.S. with Heavy and Tractor-Trailer Truck Drivers having the highest number of work fatalities of any occupation.<sup>14</sup> Nearly 15 million truck drivers are susceptible to occupationally-induced health conditions,<sup>15</sup> including high morbidity and mortality rates associated with: exposures to poor air quality and toxins from prolonged exposure to diesel emissions; insufficient diets, limited availability of nutritional foods available in truck stops and gas stations; injuries from accidents; anxiety and stress from deadlines, scheduling, long work hours, truck repair responsibilities, traffic congestion and safety concerns; being sedentary in truck cabs for long hours at a time; and unpaid wait times at ports, terminals and distribution centers.<sup>16</sup>

As owner-operators, the drivers are not provided with health insurance by their employer and thus may lack access to health care. More than two-thirds of port truckers in Houston, Seattle and Jacksonville reported lacking health insurance.<sup>17</sup> Of the owner operators who had insurance, less than one percent received it from their company.<sup>18</sup>

### **Labor Action in Port Trucking**

When the International Brotherhood of Teamsters (IBT) began organizing port truckers in 1998, its challenges were many. First, since most of the drivers worked as “independent contractors,” they were barred from joining a union under existing legal interpretations of the National Labor Relations Act.

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Expansion of Precarious Employment, Work Disorganisation, and Consequences for Occupational Health: A Review of Recent Research;” M. Quilan & P. Bohle, “Over-Stretched and Unreciprocated Commitment: Reviewing Research on the OHS Effects of Downsizing and Job Insecurity;” E. Tompa, H. Scott-Marshall, R. Dolinschi, S. Trevithick, & S. Bhattacharyya, “Precarious employment experiences and their health consequences: towards a theoretical framework;” W. Lewchuk, M. Clarke, & A. DeWolff, “Working without commitments: The health effects of precarious employment.”

<sup>14</sup> Bureau of Labor Statistics.

<sup>15</sup> Y. Apostolopoulos, S. Sönmez, & M. Shattell, M., “Worksite-induced morbidities of truck drivers in the United States.”

<sup>16</sup> Williamson, Bohle, Quinlan, & Kennedy; Apostolopoulos, Sonmez & Shattel; A. Hricko, “Ships, trucks, and trains: Effects of goods movement on environmental health;” P.A. Gonzalez, Minkler, M., Garcia, A. P., Gordon, M., Garzón, C., & Palaniappan, M., “Community-based participatory research and policy advocacy to reduce diesel exposure in West Oakland, California.”

<sup>17</sup> R. Harrison, Hutson, N., West, J. & Wilke, J., “Characteristics of drayage operations at the port of Houston, Texas;” Port Jobs; D. Jaffee & Rowley, A., “Hauling containers: Port drayage drivers in the logistics supply chain”.

<sup>18</sup> D. Bensman & Bromberg, Y. “Port truckers survey at New Jersey ports.”

Furthermore, the industry was fragmented, atomized, and competitive. Cost pressures compelled companies to squeeze their contracted drivers, resulting in a race to the bottom with regard to wages and working conditions, and a high rate of turnover among drivers.<sup>19</sup> Scholars have long regarded drayage as an industry immune to union organization.<sup>20</sup> But the organizing landscape is changing as organizers have recognized the growing and strategic importance of logistics for the larger economy. In 2005, a Cornell University conference on global unionism included a panel on organizing in the logistics industry, featuring representatives from the International Transport Workers' global union federation. In the following two years the Teamsters signed an agreement with the Change to Win Federation to partner in organizing port truckers, and Change to Win unveiled a campaign to organize warehousing.

In the beginning, the Teamsters/Change-to-Win campaign exerted political pressure on port authorities to require trucking companies hauling freight to and from the port to provide emission-compliant vehicles and employee drivers. The latter provision – known as the “employee-mandate” – would, proponents argued, reduce the number of owner-operators, increase the number of employee drivers, provide them with greater economic compensation and security, and make it legal for them to organize a union.

This campaign was launched in several ports. The Coalition for Clean and Safe Ports -- joining together labor, environmental, environmental justice, community, and faith-based organizations -- established a presence in Long Beach/Los Angeles, Oakland, Portland, Seattle/Tacoma, Miami, and Newark/Elizabeth. It developed most fully in Los Angeles/Long Beach, where the Los Angeles Association for a New Economy, the National Resources Defense Council, the Long Beach Alliance for Children with Asthma and the Southern California Environmental Health Sciences Center proved effective partners. Organizing under the banner of improving air quality and improving public health in port-adjacent communities, the Coalition enlisted the support of local politicians, including L.A. Harbor Commissioner Janice Hahn, who later was elected to the County Board of Supervisors and then to the U.S. Congress, and Los Angeles Mayor Ramon Villaraigosa.

In October, 2008, the Los Angeles Harbor Commission adopted a Clean Trucks Program containing a concession model and an employee mandate. Implementation was halted, however, by a court injunction lawsuit filed by the American Trucking Association. A Federal appeals court struck down the employee-mandate, in 2011, ruling that it was pre-empted by federal maritime

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<sup>19</sup> J. Husing, Brightbill, T. & Crosby, T., “San Pedro Bay Ports Clean Air Action Plan: Economic Analysis.”

<sup>20</sup> Belzer, 2000; Belman & Monaco.

regulations. The ruling meant that the Coalition had to adopt a different strategy. (While the employee mandate died, the Clean Trucks program did succeed in forcing the Southern California drayage industry to replace old trucks with a fleet compliant with 2007 federal emission standards).

The organizing strategy shifted to attacking the basis of the drayage industry's business model, which was the misclassification of its labor force as "independent contractors." This strategy had been rejected at the time the IBT/Change to Win alliance had been constructed, on the grounds that proving misclassification would be time-consuming and expensive, because each lawsuit alleging violation of employment laws would have to be based on the facts discovered at each drayage company. Nevertheless, once it became clear that federal preemption was going to prevail, the campaign shifted to proving that most owner operators were indeed dependent on the drayage companies, not independent businessmen.

The strategy moved on two fronts. Political mobilizing and lobbying pressure achieved success when the California state legislature revised the law defining employment and misclassification on Sept. 8, 2011. According to the California Division of Industrial Relations, the new law "prohibited the willful misclassification of individuals as independent contractors." It created "civil penalties of between \$5000 and \$25,000 per violation," and it prohibited charging fees to or making deductions from the compensation paid to those misclassified workers.<sup>21</sup> Going further, the law provided that "(w)orkers who do not receive minimum wages, overtime pay, or pay for meals and breaks because their employer misclassifies them as an independent contractor can file a wage claim with the Division of Labor Standards Enforcement."<sup>21</sup>

This legislation, which includes the strongest language prohibiting misclassification in the United States, grew out of not only the alliance's political mobilization, but also the success of California's then-Attorney General Jerry Brown's prosecution of cases involving misclassification in drayage. In 2008, Brown launched a series of lawsuits "prosecuting California port trucking companies for engaging in employee misclassification, and for failing to provide workers with Social Security, worker's compensation, and Medicare benefits that they are legally entitled to, according to California state law" (Howard Law, 2010). Five successful lawsuits were filed. One suit, filed against Pacifica Trucking, argued that "the drivers for Pacifica should have been classified as employees, with all of the legal benefits that employees are entitled to under state law, and not independent contractors--as Pacifica Trucks maintained total control over the drivers, by providing and covering the trucks, gas, equipment, and other employee expenses related to their business,

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<sup>21</sup> State of California.

including repairs.” California’s Superior Court in Los Angeles County upheld Brown’s complaint, after which Brown warned California employers “that if they cheat California workers out of their legally entitled employee benefits according to California state law—‘we’re coming after you.’”<sup>22</sup>

At the same time the Coalition was making progress in California, the National Employment Law Project launched research on the misclassification of port truck drivers. The work culminated in two reports -- The Big Rig, and a follow-up study, The Big Rig Overhaul, documenting how most port truck drivers were misclassified as “independent operators” when they were, according to the relevant labor and employment laws, actually employees whose rights were ignored by trucking companies and government regulatory agencies.<sup>23</sup> The reports fueled an IBT/Change-to-Win campaign against misclassification throughout the nation. In New Jersey, the campaign persuaded the Legislature to pass a bill revising the state’s labor and employment laws by making explicit that formal guidelines should be used to judge whether or not port truckers were employees. However, after the Legislature passed the bill, Gov. Christie vetoed it.

Nevertheless, the campaign against misclassification continued to rack up numerous victories. Between the publication of the two Big Rig NELP reports, up to 400 complaints were filed with the California Division of Labor Standards Enforcement for wage theft associated with misclassification.<sup>24</sup> In one representative case, seven drivers working for Pacer Cartage were awarded \$2.2 million for “unlawful deductions, reimbursable business expenses, interest, waiting time penalties and attorney fees.”<sup>25</sup> The hearing officer in the case declared that “(T)he defendant considered the plaintiffs to be independent contractors; however, the amount of control exhibited by the defendant over the plaintiffs was to such a degree that the defendant knew or should have known that the plaintiffs were employees.”<sup>26</sup> Further, there have been more than 115 official rulings since 2011 regarding the misclassification of port truckers, with state and federal courts and agencies concluding that the port drivers meet the criteria of employees rather than independent contractors.<sup>27</sup> The mounting legal violations are stimulating action at all government levels. “By treating employee drivers as independent contractors, port trucking companies are violating a host of state and federal labor and tax laws, including provisions related to wage and hour standards, income taxes, unemployment

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<sup>22</sup> Howard Law.

<sup>23</sup> Smith, Marvy & Bensman; Smith, Marvy & Zerolnick.

<sup>24</sup> Smith, Marvy & Zerolnick;

<sup>25</sup> TruckingInfo.

<sup>26</sup> Ibid.

<sup>27</sup> Smith, Marvy & Zerolnick.

insurance, organizing, collective bargaining, and workers' compensation."<sup>28</sup> Most recently, the Los Angeles County Board of Supervisors opened an investigation about how it could be more rigorous in regulating work conditions in the local drayage industry.<sup>29</sup>

On the federal level, the Federal District Court for Central California reinforced the truckers' local victories on Sept. 30, 2014 by rejecting the request of a trucking company, Shippers' Transport Express, to dismiss a complaint filed by port truckers citing seven causes of legal action including failure to pay minimum wage, failure to reimburse for business expenses, unlawful coercion, failure to provide accurate itemized wage statements, and unfair business practices. The Court's decision cleared the way for Shippers' drivers to claim their rights as employees.<sup>30</sup>

This was followed by another legal victory when a San Diego Superior Court upheld the \$2 million award to employees of Pacer Cartage who had been "improperly misclassified as independent owner operators."<sup>31</sup>

Emboldened by their victories in state regulatory bodies and in the courts, Southern California port drivers have been taking labor actions aimed at organizing for collective bargaining. In the fall of 2013, Los Angeles port drivers for Green Fleet Systems, Pac 9 Transportation and American Logistics International struck. In the Spring of 2014, the Teamsters supported a 48-hour work stoppage at LA/Long Beach by drivers for four trucking companies in order to address wage theft, workers' rights, and misclassification. They were joined by drivers at the Port of Savannah who were also protesting their status as independent contractors. The campaign escalated in the summer of 2014, when port drivers in LA engaged in a wider work stoppage with Pac 9 Transportation, Green Fleet Services, and Total Transportation Services that temporarily shut down three Marine Terminals including Evergreen Container Terminal, one of the port's largest, as longshore workers walked off the job in support. Unlike prior strikes which had been scheduled to last forty-eight hours, this strike was open-ended (Bradbury, 2014). Four months later, drivers struck what ultimately became eight trucking companies. This action occurred at the same time as the shipping industry and the West Coast longshoremen's union, the ILWU, were in the midst of tense negotiations, while containers were piling up on the docks. As a result of these coordinated actions, all eight

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<sup>28</sup> Ibid.

<sup>29</sup> Rhonda Smith, "Los Angeles County Board of Supervisors Reviewing Port Truckers' Concerns."

<sup>30</sup> United States District Court.

<sup>31</sup> P. Rosenberg, "Port truckers have gained two key victories, but the pain of deregulation persists."

trucking companies agreed to formal talks for resolving the issue of misclassification.<sup>32</sup>

Together, the IBT/Change to Win campaign's legal victories, and its escalating mobilizations bore fruit in the winter of 2015 when Shippers Transport, Inc., recognizing that a resounding defeat in District Court was impending, recognized its drivers as employees. The union quickly signed up members, won recognition with an 80% vote, and bargained a contract approved by a 65-5 vote. The agreement included an hourly wage boost of three dollars an hour, to twenty-one dollars, overtime, pay, full medical insurance, a defined benefit pension plan, paid holiday and sick leave, and a union grievance procedure.<sup>33</sup>

And then the Teamsters unveiled a new strategy to clinch its transformation of drayage, in April 2015, following another strike at the southern California ports. After the drayage firm Green Fleet announced that it would reclassify its drivers as employees, and negotiate a contract with the Teamsters – an action that the courts had all but forced the company to take – the Teamsters announced that L.A. Mayor Eric Garcetti would hold a press conference. Surrounded by representatives from the Teamsters and Change-to-Win, and Alex Paz, a port driver leader, as well as by executives of a drayage firm, the Mayor announced the formation of a new company that would revolutionize the industry. With capital raised by a private equity firm that owned one drayage company, Ecoflow Transportation would employ drivers, acknowledge their right to organize, operate with a union contract, buy new trucks, and introduce technological and operational innovations that would enable it to compete with companies paying much less. With help from the Teamsters and port truckers fighting misclassification, Ecoflow would recruit 600 drivers during a period when its much-smaller competitors were suffering a driver shortage. The age of wage theft in port trucking was over, Garcetti announced.<sup>34</sup>

Well, not quite. As of today, only 600 of Southern California port truckers have union contracts, out of a fleet of more than 10,000 trucks. In June, 2016, drivers at two companies struck against wage theft. The owners of both the struck companies represent new capital that has been invested in the industry. One is a Chinese company with ties to Chinese shipping lines. The other is XPO Logistics, which is the fastest-growing logistics company in the world, in the wake of its purchases of trucking and warehouse companies in the U.S., Britain and continental Europe. The labor problems at these two new entrants at the Southern California ports indicate that the business model in drayage is

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<sup>32</sup> Bensman, 2014.

<sup>33</sup> Rosenberg.

<sup>34</sup> B. Watt, "New port trucking company launches with employees."

shifting, as companies see the opportunity to extract greater rents by integrating links in the logistics chain that had previously been separate. How this shifting business model will affect workers' efforts to organize and gain voice, and unions' efforts to enforce labor rights in the port trucking industry remains to be seen.

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# Fixed-term Employment and Job Insecurity (JI) as Risk factors for Mental Health. A Review of International Study Results

Lena Hünefeld and Birgit Köper \*

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**Abstract.** Within the scope of the research project „Mental health in the working world - determining the current state of scientific evidence“ by the Federal Institute for Occupational Safety and Health (BAuA), we systematically reviewed studies on fixed-term employment, job insecurity (JI) and its effects on various mental health outcomes. The studies indicate that adverse health consequences of fixed-term employment are moderated by employees' attitudes as regards the form of employment (e. g. voluntariness) and general life circumstances such as private security needs. Health impact of fixed term employment is furthermore mediated by organizational working conditions – job insecurity in particular. Accordingly, the analysis reveals strong associations between job insecurity and psychological morbidity. The results suggest that an entanglement of fixed-term employment and JI significantly determines the health status of employees. In this paper, we report the outcomes of two scoping reviews, and summarize the findings of the research regarding the associations of fixed-term employment, JI and mental health. Thereby, we discuss the role of job insecurity and further aspects such as stressful working conditions and voluntariness for the health of fixed-term employees.

**Keywords:** *Non-standard Employment, Job Insecurity, Mental Health, Labour Flexibility, Review*

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\* Federal Institute for Occupational Safety and Health (BAuA), Dortmund (Germany). Email addresses: [Huenefeld.Lena@baua.bund.de](mailto:Huenefeld.Lena@baua.bund.de); [Koeper.Birgit@baua.bund.de](mailto:Koeper.Birgit@baua.bund.de).

## 1. Introduction

Non-standard employment is a growing global phenomenon that affects more than 30 % of the worldwide workforce.<sup>1</sup> The term “non-standard employment” might comprise different forms of employment among countries but it is normally used to cover those work arrangements that fall outside the realm of the standard employment relationship (full-time, open-ended and entitlement to social protection) and associated with numerous problems including low wages, job insecurity (JI) and comparably poorer working conditions. Examples of non-standard employment include fixed-term and casual contracts, temporary agency workers or self-employees.<sup>2,3,4</sup> Fixed term employment is the dominant form of non-standard employment in most European countries<sup>5</sup> and account for 14 % of working population in the EU-28 in 2014.<sup>6</sup> This employment form can be defined as paid employment with limited contract duration. The objective of this contribution is to report the health impact of fixed-term employment and potential mediators and moderators to this association based on two extensive literature reviews.

The shift towards non-standard forms of employment including fixed-term employment is mainly driven by technological developments and the increasing intensity of competition in global markets. Employers are using non-standard employment forms more and more frequently to cover irregular and temporary changes in labour demands and to reduce labour costs.<sup>7,8,9</sup> In addition to the economic changes political and regulatory developments promotes the distribution of the different forms of non-standard employment. Reacting to

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<sup>1</sup> OECD, *Non-standard work, job polarisation and inequality*, in *In It Together: Why Less Inequality Benefits All*. OECD Publishing, Paris, 2015, 135-208

<sup>2</sup> ILO, *World Employment Social Outlook, The changing nature of jobs*, ILO Research Department, Geneva, 2015

<sup>3</sup> Y. Asao, G. Slater, H. Seifer, A. Valenzuela, F. Michon, A. Keizer, *Non-regular employment—issues and challenges common to the major developed countries*, *JILPT Report* n. 10, 2011

<sup>4</sup> Eurofound, *Atypical Work*, 2015, <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work> (accessed August 15, 2016)

<sup>5</sup> OECD, *Job, Wages and Inequality*, OECD-Publishing, Paris, 2014

<sup>6</sup> Eurostat, *Employment statistics*, 2015, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics), (accessed August 16, 2016)

<sup>7</sup> C. Hohendanner, L. Bellmann, *Atypische Beschäftigung und betrieblicher Flexibilisierungsbedarf \* Ergebnisse des LAB-Betriebspanels*, in B. Keller, H. Seifert, (ed.), *Atypische Beschäftigung. Flexibilisierung und soziale Risiken*, Edition Sigma, Berlin, 2007

<sup>8</sup> M. Dietz, U. Walwei, *Die Zunahme atypischer Beschäftigung-Ursachen und Folgen, Orientierungen zur Wirtschafts- und Gesellschaftspolitik*, vol. 109, n. 3, 2006, 17-24

<sup>9</sup> U. Walwei, *Atypische Beschäftigungsformen: Kongruenz und Divergenz der Interessen*, in B. Keller, H. Seifert, (ed.), *Atypische Beschäftigung: verbieten oder gestalten*, Bund Verlag, Köln, 1995, 9-24

employment crisis in 1980 several European countries introduced labour flexibility as the solution to reduce unemployment rates and initiated policies of deregulation of labour markets. Finally, changes in workers' demands for flexibility are important in this context, because the standard employment does not cover alone today's heterogeneous preferences as regards e.g. work-life-balance. A non-standard form can also be a voluntary choice for certain workers. These might prefer the flexibility associated with employment relationships characterized by softer commitments<sup>10</sup> or prefer to move from one temporary job to another to build a broad set of skills and to increase their employability.<sup>11</sup>

As a result of the economic, political and social transformations over the last years – particularly after the financial crisis – a new flexible labour market has emerged which follows a core-periphery structure. Based on segmentation theories the labour market is divided into core (standard employment) and peripheral workers (non-standard-employment) and support the idea of insider and outsider groups.<sup>12,13</sup> Core workers are meant to be very important for the organization as they possess important job-skills, knowledge, and experience and thus are difficult to replace. Employers offer them high-quality employment including learning opportunities, job security, and proper salaries to tie these persons.<sup>14</sup> Peripheral workers surround the core workers and form a “buffer workforce”.<sup>15</sup> This group of workers is less important for the organization, easily to replace and employers are unlikely to invest in this group. Additionally peripheral workers are often affected by JI and further adverse job characteristics (e.g. low control, low social support, more repetitive tasks, and/or monotonous work).<sup>16,17</sup> Consequently, given these different aspects of uncertainty and adverse circumstances peripheral workers are often in a precarious work and life situation.

<sup>10</sup> OECD, *op cit.*, p. 2

<sup>11</sup> S. Barley ,G. Kunda, *Gurus, Hired Guns, and Warm Bodies: Itinerant Experts in a Knowledge Economy*, Princeton University Press, Princeton and Oxford, 2004

<sup>12</sup> A. L. Kalleberg, *Flexible firms and labor market segmentation effects of workplace restructuring on jobs and workers*, *Work and occupations*, vol. 30, n. 2, 2003, 154-175

<sup>13</sup> M. Reich, D. M. Gordon ,R. C. Edwards, *A theory of labor market segmentation*, *The American Economic Review*, vol. 63, n. 2, 1973, 359-365

<sup>14</sup> K. Hudson, *The new labor market segmentation: Labor market dualism in the new economy*, *Social Science Research*, vol. 36, n. 1, 2007, 286-312

<sup>15</sup> J. E. Ferrie, H. Westerlund, M. Virtanen, J. Vahtera ,M. Kivimäki, *Flexible labor markets and employee health*, *SJWEH Supplements*, n. 6, 2008, 98-110

<sup>16</sup> J. Benach, A. Vives, M. Amable, C. Vanroelen, G. Tarafa ,C. Muntaner, *Precarious employment: understanding an emerging social determinant of health*, *Public Health*, vol. 35, n. 1, 2014, 229

<sup>17</sup> M. Schuring, A. van Oosten ,A. Burdorf, *Flexibility of the labour market and health inequalities-a systematic review*, University Medical Center Rotterdam, 2013

Fixed-term employees as a part of the peripheral work force are also discussed as a precarious form of employment.<sup>18,19,20</sup> Although some studies suggest that fixed-term contracts can be a helpful strategy to integrate unemployed persons into the labour market and build a “bridge” into stable employment at least for some employees,<sup>21,22,23</sup> several studies point out that fixed-term employees are at increasing risk of poor work conditions and social disadvantages.<sup>24,25,26</sup> Among others Ruiz et al.<sup>27</sup>, Berton et al.<sup>28</sup> and Toharia and Cebrián<sup>29</sup> illustrate that accepting a fixed-term employment does not raise the employees’ chances to obtain a permanent position later on. For Europe the OECD<sup>30</sup> reports that less than 50 % of the workers who were on fixed-term contracts at in a given year are employed in a permanent position three years later. Additionally, studies indicate that repeated periods of fixed-term employment have a particularly negative effect on the probability of receiving an open-ended contract.<sup>31,32,33</sup> Furthermore, fixed-term employees often receive lower pay and

<sup>18</sup> N. D. Cuyper ,H. D. Witte, *Temporary Workers/Temporary Agency Workers*, Wiley Encyclopedia of Management, vol. 5, 2014, 1-3

<sup>19</sup> N. De Cuyper, J. de Jong, H. De Witte, K. Isaksson, T. Rigotti ,R. Schalk, *Literature review of theory and research on the psychological impact of temporary employment: Towards a conceptual model*, *International Journal of Management Reviews*, vol. 10, n. 1, 2008, 25-51

<sup>20</sup> J. Benach, F. G. Benavides, S. Platt, A. Diez-Roux ,C. Muntaner, *The health-damaging potential of new types of flexible employment: a challenge for public health researchers*, *Am J Public Health*, vol. 90, n. 8, 2000, 1316-7

<sup>21</sup> F. Berton, F. Devicienti, L. Pacelli, *Are temporary jobs a port of entry into permanent employment? Evidence from matched employer-employee*, *International Journal of Manpower*, vol. 32, n. 8, 2011, 879-899

<sup>22</sup> M. Gerfin, M. Lechner ,H. Steiger, *Does subsidised temporary employment get the unemployed back to work? An econometric analysis of two different schemes*, *Labour Economics*, vol. 12, n. 6, 2005, 807-835

<sup>23</sup> M. Kvasnicka, *Does temporary help work provide a stepping stone to regular employment?*, in D. H. Autor, (ed.), *Studies of Labor Market Intermediation*, University of Chicago Press, Chicago, 2009, 335-372

<sup>24</sup> N. De Cuyper, J. de Jong, H. De Witte, K. Isaksson, T. Rigotti ,R. Schalk, *op cit.*, p. 4

<sup>25</sup> V. Gash ,F. McGinnity, *Fixed-term contracts – the new European inequality? Comparing men and women in West Germany and France*, *Socio-Economic Review*, vol. 5, n. 3, 2007, 467-496

<sup>26</sup> F. G. Benavides, J. Benach, A. V. Diez-Roux ,C. Roman, *How do types of employment relate to health indicators? Findings from the second European survey on working conditions*, *J Epidemiol Community Health*, vol. 54, n. 7, 2000, 494-501

<sup>27</sup> J. I. C. Ruiz, F. F. Fernández ,J. I. G. Pérez, *Reforma Laboral 2010: Una primera evaluación y propuestas de mejora*, *Revista de economía aplicada*, vol. 19, n. 57, 2011, 147-182

<sup>28</sup> F. Berton, F. Devicienti ,L. Pacelli, *Temporary jobs: Port of entry, trap, or just unobserved heterogeneity?*, *LABORatorio Revelli Working Paper*, vol. 68, 2007

<sup>29</sup> L. Toharia, I. Cebrián ,J. M. Arranz, *La temporalidad en el empleo: atrapamiento y trayectorias*, Ministerio de Trabajo y Asuntos Sociales Madrid, 2007

<sup>30</sup> OECD, *OECD Employment Outlook 2014*, OECD Publishing, Paris, 2014

<sup>31</sup> S. Gagliarducci, *The dynamics of repeated temporary jobs*, *Labour Economics*, vol. 12, n. 4, 2005, 429-448

fewer benefits, are infrequently given the chance to participate in career planning and training and typically hold lower ranks in their workplaces.<sup>34,35,36,37</sup> In addition, they experience more JI than permanent employees.<sup>38,39,40,41,42</sup>

As a result of the increasing use of fixed-term employment and its assumed associations with a bad quality of work and JI researchers have raised concerns about how fixed-term employment affects employees' health.

Our two scoping reviews update existing evidence on the relationship between fixed-term employment and mental health and JI and mental health. Thereby, we focus on the entanglement of fixed-term employment and JI for the health status of employees.

In our paper, we analyse the literature regarding fixed-term employment, JI and mental health in three ways (see figure 1). First, we describe the association of fixed-term employment and mental health. Second, we focus on the association of fixed-term employment and JI. Third, we analyse the correlation of JI and mental health. Before presenting the results we will give an overview about the important theories, focussing on work stress and psychological contract breach to explain the association between fixed-term contracts and amplify the methodological approach how we collected and reviewed the literature.

<sup>32</sup> J. I. García-Pérez, F. Muñoz-Bullón, *Transitions into permanent employment in Spain: An empirical analysis for young workers*, *British Journal of Industrial Relations*, vol. 49, n. 1, 2011, 103-143

<sup>33</sup> B. Cockx, M. Picchio, *Are Short-lived Jobs Stepping Stones to Long-Lasting Jobs?*, *Oxford Bulletin of Economics and Statistics*, vol. 74, n. 5, 2012, 646-675

<sup>34</sup> OECD, *op cit.*, p. 2

<sup>35</sup> M. Virtanen, M. Kivimäki, M. Elovainio, J. Vahtera, J. E. Ferrie, *From insecure to secure employment: changes in work, health, health related behaviours, and sickness absence*, *Occupational and environmental medicine*, vol. 60, n. 12, 2003, 948-953

<sup>36</sup> A. L. Kalleberg, *Nonstandard employment relations: Part-time, temporary and contract work*, *Annual review of sociology*, n. 26, 2000, 341-365

<sup>37</sup> A. L. Kalleberg, B. F. Reskin, K. Hudson, *Bad jobs in America: Standard and nonstandard employment relations and job quality in the United States*, *American sociological review*, vol. 65, n. 2, 2000, 256-278

<sup>38</sup> N. De Cuyper, G. Notelaers, H. De Witte, *Job insecurity and employability in fixed-term contractors, agency workers, and permanent workers: associations with job satisfaction and affective organizational commitment*, *J Occup Health Psychol*, vol. 14, n. 2, 2009, 193-205

<sup>39</sup> I. Silla, F. J. Gracia, J. M. Peiró, *Job insecurity and health-related outcomes among different types of temporary workers*, *Economic and Industrial Democracy*, vol. 26, n. 1, 2005, 89-117

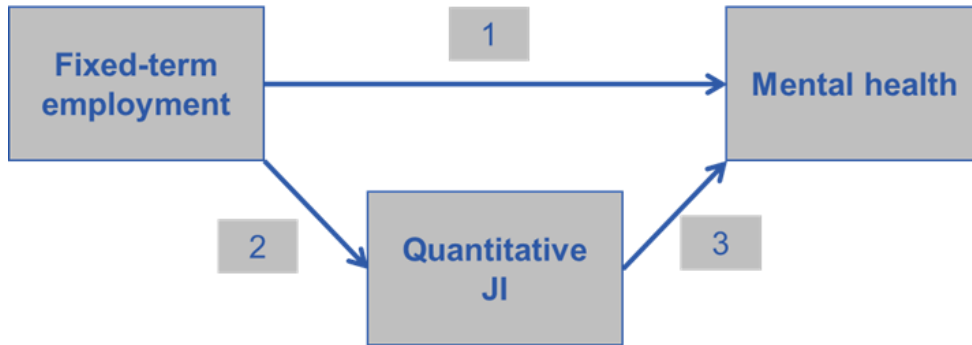
<sup>40</sup> N. De Cuyper, H. De Witte, *Job insecurity in temporary versus permanent workers: Associations with attitudes, well-being, and behaviour*, *Work & Stress*, vol. 21, n. 1, 2007, 65-84

<sup>41</sup> H. De Witte, K. Näswall, *'Objective' vs 'subjective' job insecurity: Consequences of temporary work for job satisfaction and organizational commitment in four European countries*, *Economic and industrial democracy*, vol. 24, n. 2, 2003, 149-188

<sup>42</sup> M. Kvasnicka, A. Werwatz, *Arbeitsbedingungen und Perspektiven von Zeitarbeitern*, *DIW Wochenbericht: Wirtschaft, Politik, Wissenschaft*, vol. 70, n. 46, 2003, 717-725.



Figure 1. Research Approach



## 2. Theoretical Background

There are a number of theoretical assumptions that explain how fixed-term employment might negatively impact (mental) health.<sup>43</sup> Economic strain is one mechanism linking fixed-term employment and (mental) health. The comparatively lower remunerations, reduced access to further education and possibilities of promotion in fixed-term employment increase the possibility of a higher risk of economic strain and in the long term of health impact.<sup>44,45,46</sup>

Prominent work-related stress theories, like the Job Demand-Control Model (JDC),<sup>47</sup> help to explain how certain working conditions lead to impairment of fixed-term employees' health. For instance, from a JDC perspective, health impairments in fixed-term workers can be attributed to the higher prevalence of combined low latitude and high requirements in the job among fixed-term employees as opposed to permanent employees. These types of jobs are known predict higher levels of work strain and impairment of psychological

<sup>43</sup> E. Pirani ,S. Salvini, Is temporary employment damaging to health? A longitudinal study on Italian workers, *Social Science & Medicine*, vol. 124, 2015, 121-131

<sup>44</sup> Eurofound, *Flexible forms of work: 'very atypical' contractual arrangements*, 2010, <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements>, (accessed August 16, 2016)

<sup>45</sup> J. Benach ,C. Muntaner, *Precarious employment and health: developing a research agenda*, *J Epidemiol Community Health*, vol. 61, n. 4, 2007, 276-277

<sup>46</sup> F. G. Benavides, J. Benach, A. V. Diez-Roux ,C. Roman, *op cit.*, p. 4

<sup>47</sup> R. A. Karasek Jr, *Job demands, job decision latitude, and mental strain: Implications for job redesign*, *Administrative science quarterly*, vol. 24, n. 2, 1979, 285-308

well-being.<sup>48,49,50</sup> Additionally, fixed-term contracts often involve further stressful and hazardous working conditions such as physically heavy works, exposure to harmful substances or unskilled tasks.<sup>51</sup>

Besides stress theoretical assumptions Social Exchange Theories (SET)<sup>52,53,54</sup>, especially the Psychological Contract Theory,<sup>55</sup> help to explain the association between fixed-term contracts and mental health. In general, SETs emphasize the norm of reciprocity and postulate that “[...] voluntary actions of individuals [...] are motivated by the returns they are expected to bring and typically do in fact bring from others”.<sup>56</sup>

The term psychological contract is used „when an individual perceives that contributions he or she makes obligate the organization to reciprocity (or vice versa)“.<sup>57</sup> Based on this idea, fixed-term employees contribute for example loyalty, commitment, and performance. In return they expect job security, prospects for personal growth, educational opportunities and/or appropriate salaries. Psychological contract breach may occur if the organizations or employers do not respond as expected to the efforts of fixed-term workers. Violating the contract on the part of the employer may lead to stress experiences and long term adverse health effects among fixed-term employees. Finally, unemployment and JI are two important mediating factors between fixed-term employment and health.<sup>58</sup> The negative health effects of unemployment are well documented.<sup>59,60</sup> Data from the EU Labour Force

<sup>48</sup> J. A. Häusser, A. Mojzisch, M. Niesel, S. Schulz-Hardt, *Ten years on: A review of recent research on the Job Demand–Control (-Support) model and psychological well-being*, *Work & Stress*, vol. 24, n. 1, 2010, 1-35

<sup>49</sup> A. H. De Lange, T. W. Taris, M. A. Kompier, I. L. Houtman, P. M. Bongers, "The very best of the millennium": longitudinal research and the demand-control(-support) model, *Journal of occupational health psychology*, vol. 8, n. 4, 2003, 282-305

<sup>50</sup> M. Van der Doef, S. Maes, *The job demand-control (-support) model and psychological well-being: a review of 20 years of empirical research*, *Work & stress*, vol. 13, n. 2, 1999, 87-114

<sup>51</sup> Eurofound, *Flexible forms of work and employment can lead to specific health risks*, 2003, <http://www.eurofound.europa.eu/observatories/eurwork/articles/flexible-forms-of-work-and-employment-can-lead-to-specific-health-risks>, (accessed August 15, 2016)

<sup>52</sup> P. M. Blau, *Exchange and power in social life*, Transaction Publishers, New York, 1964

<sup>53</sup> G. C. Homans, *Social Behavior: Its Elementary Forms*, Harcourt, Brace & World, Oxford, 1961.

<sup>54</sup> J. W. Thibaut, H. H. Kelley, *The social psychology of groups*, John Wiley, Oxford, 1959

<sup>55</sup> D. M. Rousseau, *Psychological and implied contracts in organizations*, *Employee responsibilities and rights journal*, vol. 2, n. 2, 1989, 121-139

<sup>56</sup> P. M. Blau, p.91, *cit. op.*, p.7

<sup>57</sup> D. M. Rousseau, p.124, *cit. op.*, p.8

<sup>58</sup> A. Milner, A. Kavanagh, L. Krnjacki, R. Bentley, A. D. LaMontagne, *Area-level unemployment and perceived job insecurity: evidence from a longitudinal survey conducted in the Australian working-age population*, *Annals of occupational hygiene*, vol. 58, n. 2, 2013, 171-181

<sup>59</sup> K. I. Paul, K. Moser, *Unemployment impairs mental health: Meta-analyses*, *Journal of Vocational behavior*, vol. 74, n. 3, 2009, 264-282

Survey 2000 illustrate that unemployed persons reported the ending of a fixed-term contract as the reason for being out of work.<sup>61</sup> Moreover, previous studies demonstrated that JI is associated with health impairments.<sup>62,63,64,65</sup> Job insecurity is defined as „[...] overall concern about the continued existence of the job in the future“.<sup>66</sup> Previous studies show that the association of fixed-term employment and health is partially mediated by JI.<sup>67,68,69,70</sup> Fixed-term employees might have more (mental) health complaints than permanent employees as a result of more experience in previous unemployment and perceived JI.

### 3. Methodology

Both reviews are based on a broad systematic literature search on non-standard employment including fixed-term (IV) employment forms and JI (IV) and its effects on various mental health outcomes (DV). The keyword search terms to identify studies of fixed-term employment include general search terms like „flexible work arrangements“ and „contingent employment“ as well as specific search terms like „temporary work“, „fixed-term contracts“ and „fixed-term employment“. The search string to identify the relevant literature on JI is based

<sup>60</sup> M. Bartley, *Unemployment and ill health: understanding the relationship*, *Journal of epidemiology and community health*, vol. 48, n. 4, 1994, 333-337

<sup>61</sup> A. Franco, K. Winqvist, *At the margins of the labour market? Women and men in temporary jobs in Europe*, *Statistics in focus*, vol. 13, 2002, 1-8

<sup>62</sup> G. H. L. Cheng, D. K. S. Chan, *Who suffers more from job insecurity? A meta-analytic review*, *Applied Psychology*, vol. 57, n. 2, 2008, 272-303

<sup>63</sup> M. Sverke J. Hellgren, *The nature of job insecurity: Understanding employment uncertainty on the brink of a new millennium*, *Applied Psychology*, vol. 51, n. 1, 2002, 23-42

<sup>64</sup> M. Sverke, J. Hellgren, K. Näswall, *No security: a meta-analysis and review of job insecurity and its consequences*, *Journal of occupational health psychology*, vol. 7, n. 3, 2002, 242

<sup>65</sup> H. De Witte, *Job insecurity and psychological well-being: Review of the literature and exploration of some unresolved issues*, *European Journal of work and Organizational psychology*, vol. 8, n. 2, 1999, 155-177

<sup>66</sup> C. A. Heaney, B. A. Israel, J. S. House, *Chronic job insecurity among automobile workers: Effects on job satisfaction and health*, *Social science & medicine*, vol. 38, n. 10, 1994, 1431-1437, p.1431

<sup>67</sup> L. Aletraris, *How satisfied are they and why? A study of job satisfaction, job rewards, gender and temporary agency workers in Australia*, *Human Relations*, vol. 63, n. 8, 2010, 1129-1155

<sup>68</sup> N. De Cuyper, J. de Jong, H. De Witte, K. Isaksson, T. Rigotti, R. Schalk, *cit. op.*, p.4

<sup>69</sup> A.-K. Waenerlund, P. Virtanen, A. Hammarström, *Is temporary employment related to health status? Analysis of the Northern Swedish Cohort*, *Scandinavian journal of public health*, vol. 39, n. 5, 2011, 533-539

<sup>70</sup> A. F. Wagenaar, M. A. Kompier, I. L. Houtman, S. van den Bossche, P. Smulders, T. W. Taris, *Can labour contract differences in health and work-related attitudes be explained by quality of working life and job insecurity?*, *International archives of occupational and environmental health*, vol. 85, n. 7, 2012, 763-773

on appropriate reviews and includes among others "job insecurity" OR "job security".<sup>71,72,73</sup> In addition the reviews discuss the reason why employees perceive JI and how fixed-term employment and JI are related.

The research was conducted within the scope of the project „Mental health in the working world - determining the current state of scientific evidence“ of the German Federal Institute for Occupational Safety and Health (BAuA). Scientific articles were identified from PSYINDEX, PsycINFO, PubMed, WISO and EconLit. The search was complemented by manually searching the bibliographies of articles, previous reviews and books. The search was limited to the period from 2000 until 2015 because for the period before 2000 comprehensive meta-analyses as regards the health effects of JI are available.<sup>74,75,76</sup> We included studies published in English and German focussing on mental health. The following indicators for mental health have been found: mental health unspecified (captured as „mental health“), psychological/affective well-being, burnout, depression and psychological and behavioural disorders (IDC).

In this paper, we report the outcomes of our two scoping reviews<sup>77,78</sup> and summarize the findings of the research regarding the associations of fixed-term employment, JI and mental health. For this reason no study was excluded because of methodological quality and we integrated both quantitative and qualitative studies and theoretical contributions. Thereby, we generated a broad overview of the scientific evidence that help answer the following research questions:

1. Are fixed-term contracts related to mental health impairments?
2. How is fixed-term employment related to JI?
3. Is JI related to mental health impairments?

<sup>71</sup> G. H. L. Cheng ,D. K. S. Chan, *cit. op.*, p.8

<sup>72</sup> A. C. Keim, R. S. Landis, C. A. Pierce ,D. R. Earnest, *Why do employees worry about their jobs? A meta-analytic review of predictors of job insecurity*, *Journal of Occupational Health Psychology*, vol. 19, n. 3, 2014, 269-290

<sup>73</sup> M. Sverke, J. Hellgren ,K. Näswall, *cit. op.*, p.9

<sup>74</sup> I.-H. Kim, C. Muntaner, F. V. Shahidi, A. Vives, C. Vanroelen J. Benach, *Welfare states, flexible employment, and health: a critical review*, *Health policy*, vol. 104, n. 2, 2012, 99-127

<sup>75</sup> G. H. L. Cheng ,D. K. S. Chan, *cit. op.*, p.8

<sup>76</sup> M. Sverke, J. Hellgren ,K. Näswall, *cit. op.*, p.9

<sup>77</sup> Bundesanstalt für Arbeitsschutz und Arbeitsmedizin (BAuA), Leitfaden für die Erarbeitung von Scoping Reviews, 2014

<sup>78</sup> R. Armstrong, B. J. Hall, J. Doyle ,E. Waters, *‘Scoping the scope’ of a cochrane review*, *Journal of Public Health*, vol. 33, n. 1, 2011, 147-150

The evaluation of the quantitative scientific findings is performed in three steps. Firstly, we present how many of the studies report a significant result ( $p$ -level  $<0.05$ ). Secondly, we specify how the measures of association of fixed-term employment and mental health and JI and mental health are directed (directionality). In order to assess the practical relevance of the reported study results, we finally present the effect size for all unadjusted correlations. For all studies that indicate a bivariate correlation we calculated mean correlations  $\bar{r}_{ij}$  for fixed-term employment and JI  $i$  and mental health outcomes  $j$  weighted by sample size with the following formula

$$\bar{r}_{ij} = \frac{\sum_s^k w_s \cdot r_{ij}}{\sum_s^k w_s}, \quad w_s = n_s$$

$s$ : particular study,  $k$ : total number of studies for each combination of IV-DV-combination,  $n_s$ : sample size of study  $s$ ,  $w_s$ : sample balanced weight.<sup>79</sup>

Besides bivariate correlations also odds ratios and regression coefficients were reported in the studies, these were, however, by majority adjusted for several covariates and hence not comparable or reasonably be summarized. Crude odds ratios and regression coefficients were transformed into bivariate correlations. Referring to Cohen<sup>80</sup> a correlation can be interpreted as trivial ( $\bar{r}_{ij} < ,1$ ), small ( $,1 \leq \bar{r}_{ij} < ,3$ ), medium ( $,3 \leq \bar{r}_{ij} < ,5$ ) and large ( $\bar{r}_{ij} \geq ,5$ ). Further down, we reflect our results corresponding to these evidence levels.

After duplicate check the search for publications regarding non-standard employment and health yielded 3017 citations for the period from January 2000 to January 2015. Based on abstract and full-text screening we identified 42 studies on the association between fixed-term employment and mental health, including 39 cross-sectional studies and three longitudinal studies. Some of the publications include more than one outcome, thus 84 analyses for fixed-term employment and mental health are described and interpreted below.

Further, we identified 2341 studies analysing the predictors of JI and the association of JI and health. These studies included 136 correlations between JI and mental health. In the majority of samples, participants were recruited from unselected general working population covering mixed industries and occupations. Likewise, most studies report results for men and women together and not gender-stratified.

<sup>79</sup> W. Viechtbauer, *Bias and efficiency of meta-analytic variance estimators in the random-effects model*, *Journal of Educational and Behavioral Statistics*, vol. 30, n. 3, 2005, 261-293

<sup>80</sup> J. Cohen, *A power primer*, *Psychological bulletin*, vol. 112, n. 1, 1992, 155-159

## 4. Results

Below, we present our results among the three research questions of this contribution. Firstly, we describe the association of fixed-term employment and mental health. Secondly, we focus on the association of fixed-term employment and JI. Thirdly, we analyse the correlation of JI and mental health.

### 4.1 Fixed-Term Employment and Mental Health

The first table summarizes the distribution of studies among the different health outcomes and the level of significance. The majority of the studies described psychological/affective well-being. The remaining studies were distributed equally across burnout, depression and psychological and behavioural disorders. Statistically significant associations between fixed-term employment and mental health were reported in 34 of 84 publications. With the exception of burnout in all categories of mental health non-significant associations were predominant.

Table 1. Number of Significant Associations of Fixed-term Employment and Mental Health

Mental health outcomes	Total	Significant associations ( $p < 0,05$ )	Non-significant associations
Mental health (total)	84	34 (40%)	50 (60%)
Psychological/affective well-being	52	22 (42%)	30 (58%)
Burnout	11	7 (63%)	4 (37%)
Depression	11	4 (37%)	7 (63%)
Psychological and behavioural disorders (IDC)	10	1 (10%)	9 (90%)

With regard of the consistency of the significant results, the studies revealed an ambivalent picture (Table 2). Within the significant results, we found only slightly more expected associations than unexpected. In 53 % of all studies fixed-term employees had a higher risk of mental health impairments. In

specific, studies focused on burnout and psychological/affective wellbeing reported slightly more expected significant results (57% respectively 55%).

Table 2. Significant Associations of Fixed-term Employment and Mental Health

Mental health outcomes	Total	Expected significant associations	Unexpected significant associations
Mental health (total)	34	18 (53%)	16 (47%)
Psychological/affective well-being	22	12 (55%)	10 (45%)
Burnout	7	4 (57%)	3 (43%)
Depression	4	2 (50%)	2 (50%)
Psychological and behavioural disorders (IDC)	1	0	1 (100%)

Furthermore, the overview of the mean correlations in table 3 shows only one statistically meaningful effect size. The effect size presented a small negative correlation between fixed-term employment and psychological/affective well-being. This indicates that fixed-term employees had a better psychological/affective well-being than permanent employees. For all other dependent variables (i. e. burnout, depression and psychological and behavioural disorders) no statistically significant effects were found.

Table 3. Mean Correlations  $\bar{r}_{ij}$  Weighted by Sample Size, Fixed-term Employment and Mental Health

Mental health outcomes	$\bar{r}_{ij}$	Spread	Based on k correlations
Mental health (total)	-.06	-.58; .37	57
Psychological/affective well-being	-.10	-.19; .37	34

Burnout	.02	-.12; .20	5
Depression	.02	-.58; .16	11
Psychological and behavioural disorders (IDC)	-.02	-.13; .02	7

Deeper analyses of the studies included showed that further factors were important moderators and mediators for the health consequences of fixed-term employment. The majority of non-significant associations was adjusted for instance by unemployment rate, further work characteristics and job insecurity.

However, studies indicated that specific conditions such as job insecurity or hazardous working conditions, which are linked to fixed-term employment, were important for the health consequences and might thus mediate the association of fixed-term employment and health impact.<sup>81,82,83,84</sup>

Furthermore, factors beyond of the employment contract like social determinants (e. g. unemployment rate and household context) and motivational aspects (e.g. volition and voluntariness) also played a moderating role.<sup>85,86</sup>

Studies regarding the association of temporary employment and mental health including the unemployment rate were ambivalent. On the one hand, Clark<sup>87</sup> showed that the well-being of temporary workers decreased less if they lived in a region with a high unemployment rate. Likewise, to be a temporary employee was less stigmatizing in contexts where unemployment was common<sup>88</sup>, this can also reduce the health damaging consequences of temporary employment. On

<sup>81</sup> Benach, J., Vives, A., Amable, M., Vanroelen, C., Tarafa, G., & Muntaner, C., *cit. op.*, p.4

<sup>82</sup> N. D. Cuyper, H. D. Witte, *cit op.* p.5

<sup>83</sup> C. Bernhard-Oettel, M. Sverke, H. De Witte, *Comparing three alternative types of employment with permanent full-time work: How do employment contract and perceived job conditions relate to health complaints?*, *Work & Stress*, vol. 19, n. 4, 2005, 301-318

<sup>84</sup> A. Wikman, A. Andersson, M. Bastin, *Nya relationer i arbetslivet* (New relations in working life), National Institute for Working Life, Stockholm, 1998

<sup>85</sup> M. Kauhanen, J. Nätti, *Involuntary temporary and part-time work, job quality and well-being at work*, *Social Indicators Research*, vol. 120, n. 3, 2015, 783-799

<sup>86</sup> C. Bernhard-Oettel, N. D. Cuyper, E. Berntson, K. Isaksson, *Well-being and organizational attitudes in alternative employment: The role of contract and job preferences*, *International Journal of Stress Management*, vol. 15, n. 4, 2008, 345-363

<sup>87</sup> A. E. Clark, *Unemployment as a social norm: Psychological evidence from panel data*, *Journal of labor economics*, vol. 21, n. 2, 2003, 323-351

<sup>88</sup> M. Strandh, M. Novo, A. Hammarström, *Mental health among the unemployed and the unemployment rate in the municipality*, *The European Journal of Public Health*, vol. 21, n. 6, 2011, 799-805



the other hand, high employment rates can decrease the well-being of temporary employments as a result of relative material deprivation. The disadvantages of temporary employment like job insecurity or income poverty can increase under the condition of high employment rates<sup>89</sup> and impair employees' health. In addition, Virtanen et al.<sup>90</sup> reported a higher morbidity rate of temporary workers in countries with a low employment rate, probably related to a health selection bias.<sup>91</sup>

Furthermore, the household circumstances were important for the consequences of fixed-term employment. On the one hand, if a certain form of atypical work is combined with another type of - typical or atypical - work, either by one and the same person (an employed professional with a small own-account consultancy practice), or between two partners in one household, the disadvantages of fixed-term contracts like income poverty can be compensated.<sup>92</sup> On the other hand, the combination of multiple atypical employment forms in one household can increase the possibility of precariousness and adverse mental health effects.

Besides social determinants also the volition and voluntariness doing a fixed-term employment are important moderators of fixed-term employment and (mental) health. Volition and voluntariness describes preference of workers for fixed-term employment.<sup>93</sup> De Cuyper and De Witte<sup>94</sup> specified reasons for accepting a fixed-term employment, that is free choice, forced choice, and instrumental choice with the prospect of gaining permanent employment or improving skills.

Data from the European Union Labour Force Survey show that by majority of countries, fixed-term contracts are not based on voluntary choices for most employees.<sup>95</sup> In the existing literature differences have been found in job

<sup>89</sup> L. Minelli, C. Pignini, M. Chiavarini, F. Bartolucci, *Employment status and perceived health condition: longitudinal data from Italy*, *BMC public health*, vol. 14, n. 1, 2014, 1-12

<sup>90</sup> M. Virtanen, M. Kivimäki, M. Joensuu, P. Virtanen, M. Elovainio, J. Vahtera, *Temporary employment and health: a review*, *International journal of epidemiology*, vol. 34, n. 3, 2005, 610-622

<sup>91</sup> L. Artazcoz, I. Cortès-French, V. Escribà-Agüir, Gender, work and health: a step forward in women's occupational health., in J. Gideon, (ed.), *Handbook on Gender and Health*, Edward Elger Publishing, Cheltenham/Northampton, 2016, 165-188

<sup>92</sup> A. Debels, Transitions out of Temporary Jobs: Consequences for Employment and Poverty across Europe, in R. Muffels, (ed.), *Flexibility and employment security in Europe : labour markets in transition*, Edward Elger Publishing, Cheltenham, 2008, 51-78

<sup>93</sup> N. De Cuyper, H. De Witte, Job insecurity and employability among temporary workers: A theoretical approach based on the psychological contract, in K. Näswall, J. Hellgren, M. Sverke, (ed.), *The individual in the changing working life*, Cambridge University Press, New York, NY, US, 2008, 88-107

<sup>94</sup> N. De Cuyper, H. De Witte, *cit. op.*, p.16

<sup>95</sup> OECD, *cit. op.* p.5

satisfaction and health outcomes depending on contract preferences. The results indicated that job satisfaction and health negatively affected, if workers were involuntarily employed on the basis of a fixed-term contract, while the reverse was true for workers being voluntarily employed on the basis of a fixed-term contract.<sup>96</sup> Isaksson & Bellagh (2002)<sup>97</sup> found that under the condition of not preferring a fixed-term contract employment was related to psychological distress among female temporary workers. Bernhard-Oettel et al.<sup>98</sup> found that low preferences for temporary contracts was associated via higher job insecurity with lower job satisfaction, impaired health, and higher irritation. Kauhanen and Nätti<sup>99</sup> reported that involuntary temporary workers experience a lower job quality with respect to training and career possibilities or job autonomy.

#### 4.2 Fixed-term Employment and JI

One further core mediator of fixed-term employment and health is presumably perceived job insecurity. Studies on predictors of JI and studies on the correlation of fixed-term employment and health, considering job insecurity, suggested an entanglement of the two working condition factors "fixed-term employment" and "JI".

With regard to the triangulation of fixed-term employment – JI – (mental) health we identified evidence for the following associations:

1. fixed-term employment is a predictor of JI
2. fixed-term employment moderates the association of JI – (mental) health
3. JI mediated the association of fixed-term employment and (mental) health

First, according to the literature of JI, fixed-term employment (employment contract on the individual level) is one of the important predictors of JI. In the meta-analysis on predictors of JI Keim et al.<sup>100</sup> reported significant associations of contract type and JI ( $r = .20$ ). Thus, fixed-term employees reported higher

<sup>96</sup> M. Beckmann, A. Binz, B. Schauenberg, *Fixed-term employment and job satisfaction: Evidence from individual-level data accounting for selectivity bias*, *WWZ-Discussionpaper*, vol. 07, n. 03, 2007, 1-30

<sup>97</sup> K. S. Isaksson, K. Bellagh, *Health problems and quitting among female "temps"*, *European Journal of Work and Organizational Psychology*, vol. 11, n. 1, 2002, 27-45

<sup>98</sup> C. Bernhard-Oettel, T. Rigotti, M. Clinton, J. de Jong, *Job insecurity and well-being in the temporary workforce: Testing volition and contract expectations as boundary conditions*, *European Journal of Work and Organizational Psychology*, vol. 22, n. 2, 2013, 203-217

<sup>99</sup> M. Kauhanen, J. Nätti, *cit. op.*, p.14

<sup>100</sup> A. C. Keim, R. S. Landis, C. A. Pierce, D. R. Earnest, *cit. op.*, p.9

job insecurity in comparison to permanent employees. Additionally, the association of fixed-term employment and JI was moderated by the general unemployment rate: JI of fixed-term employment decreased under conditions of low unemployment rates.

Second, the analyses of several studies suggested that the interaction of JI and fixed-term employment added significantly to the explained variance of the well-being.<sup>101,102</sup> These suggests that the characteristics of the employment contract co-determine the direction and strength of the association between JI and (mental) health. The analyses of Virtanen et al.<sup>103</sup> showed that JI was accompanied with health impairments for both permanent employees and fixed-term employees. However the strongest effect was found by fixed-term employees with job insecurity.

Third, we found support for the mediation function of JI between fixed-term employment and (mental) health. In the literature, JI is one of the core arguments behinds the worse (mental) health situation of fixed-term employees in comparison to permanent employees.<sup>104</sup> Different studies revealed that temporary employees reported job insecurity more frequently than permanent workers.<sup>105,106,107</sup> Among others Bernhard-Oettel et al.<sup>108</sup> underlined the importance of job insecurity for temporary workers as risk for impaired well-being. Waenerlund et al.<sup>109</sup> reported that JI partially mediated the association between temporary employment and health status with respect to self-rated health and psychological distress. Furthermore, Jahn<sup>110</sup> found based on longitudinal data from Germany, that it was not the formal job security

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<sup>101</sup> K. Kirves, N. De Cuyper, U. Kinnunen, J. Nätti, *Perceived job insecurity and perceived employability in relation to temporary and permanent workers' psychological symptoms: A two samples study*, *International archives of occupational and environmental health*, vol. 84, n. 8, 2011, 899-909

<sup>102</sup> T. Rigotti, N. De Cuyper, H. De Witte, S. Korek, G. Mohr, *Employment Prospects of Temporary and Permanent Workers: Associations with Well-being and Work Related Attitudes*, *Journal Psychologie des Alltagshandeln/ Psychology in Everyday Activity*, vol. 2, n. 1, 2009, 22-35

<sup>103</sup> P. Virtanen, U. Janlert, A. Hammarström, *Exposure to temporary employment and job insecurity: a longitudinal study of the health effects*, *Occupational and environmental medicine*, vol. 68, n. 8, 2010, 570-574

<sup>104</sup> N. De Cuyper, S. Mauno, U. Kinnunen, A. Mäkikangas, *The role of job resources in the relation between perceived employability and turnover intention: A prospective two-sample study*, *Journal of vocational behavior*, vol. 78, n. 2, 2011, 253-263

<sup>105</sup> J. Benach, A. Vives, M. Amable, C. Vanroelen, G. Tarafa, C. Muntaner, *cit. op.*, p.4

<sup>106</sup> P. Virtanen, U. Janlert, A. Hammarström, *cit. op.*, p.18

<sup>107</sup> M. Virtanen, M. Kivimäki, M. Elovainio, J. Vahtera, J. E. Ferrie, *cit. op.* p.5

<sup>108</sup> C. Bernhard-Oettel, N. D. Cuyper, E. Berntson, K. Isaksson, *cit. op.* p.15

<sup>109</sup> A.-K. Waenerlund, P. Virtanen, A. Hammarström, *cit. op.*, p.9

<sup>110</sup> E. Jahn, *Don't worry, be flexible. Job satisfaction among flexible workers*, *LASER Discussion Papers*, n. 71, 2013

provided by the contractual agreement but rather the perceived job security that mattered for job satisfaction.

### 4.3 JI and Mental Health

In line with various meta-analyses of JI impact<sup>111,112</sup> we found that job insecurity is consistently associated with overall unfavourable mental health outcomes. As regards the mental health impact of JI 68 % of the analysed associations demonstrated significantly negative health impact of JI. Only 6,7 % of the associations suggested that JI was not related to ill health.

Table 4. Mean Correlations  $\bar{r}_{ij}$  Weighted by Sample Size, JI and Mental Health

Mental health outcomes	$\bar{r}_{ij}$	Spread	Based on k correlations
Mental health impairment (total)	.18	.002–.43	136
Mental health impairment (unspecified)	.21	.19–.28	9
Psychological/affective well-being impairment	.16	.01–.42	46
Burnout	.19	.05–.41	40
Psychological and behavioural disorders / including depression (IDC)	.20	.002–.43	41

We found for all mental health outcomes statistically meaningful effect sizes. These presented all a small positive correlation between JI and mental health impairments. The strongest average correlation was found for mental health (unspecified) with  $\bar{r}_{ij} = .20$  (Table 4).

<sup>111</sup> G. H. L. Cheng, D. K. S. Chan, *cit. op.*, p.8

<sup>112</sup> M. Sverke, J. Hellgren, *cit. op.*, p.9

## 5. Discussion and Conclusion

This contribution refers to two scoping reviews including 84 associations between fixed-term employment and mental health and 136 correlations of JI and mental health. Our results showed that fixed-term employment was not consistently associated with mental health impairments as long as potential mediators and moderators to the association were neglected. 60 % of the included studies did not report a significant association of fixed-term employment and mental health. Moreover, half of the significant associations revealed a lower risk of mental health impact in fixed-term employment as opposed to permanent employment. In addition, one effect size indicated that fixed-term employees had a better psychological/affective well-being than permanent employees. Scholars come up with different explanations why fixed-term employees have a better health status compared to permanent employees and stress that negative health impact on fixed-term employment might be systematically underestimated: Firstly, fixed-term employees may not disclose health impairments or diseases to the organizations because they do not want to spoil the chance on a permanent position.<sup>113</sup> In conclusion, health impairments include various risks to continued employment depending on employment situations. It can be assumed that fixed-term workers who are in a probationary situation obtain from being absent from work due to health problems. This is in line with findings that fixed-term employees had less sickness absence than permanent employees<sup>114</sup> and that in times of increased JI absenteeism rates decrease whilst presenteeism increases.<sup>115</sup>

Another reason for inconsistent findings might be the so called healthy worker effect. Fixed-term employment is more common amongst younger people with shorter tenure. In case of a positive selection of young healthy individuals in fixed-term employment, less healthy workers remain in unemployment (healthy hire effect). Furthermore, we find an out-selection of less healthy worker which drop back in the group of unemployed persons while healthier employees remain in fixed term employment (healthy worker survivor effect).<sup>116,117</sup>

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<sup>113</sup> N. De Cuyper, J. de Jong, H. De Witte, K. Isaksson, T. Rigotti, R. Schalk, *cit. op.*, p.4

<sup>114</sup> L. Hünefeld, *Atypische Beschäftigung*, Bundesanstalt für Arbeitsschutz und Arbeitsmedizin, Dortmund, 2016

<sup>115</sup> S. Gerstenberg, B. Köper, *Einflussfaktoren auf und Auswirkungen von subjektiver (quantitativer) Arbeitsplatzunsicherheit / Job Insecurity (JI)*, Bundesanstalt für Arbeitsschutz und Arbeitsmedizin, Dortmund, 2016.

<sup>116</sup> L. M. Carpenter, *Some observations on the healthy worker effect*, *British Journal of Industrial Medicine*, vol. 44, n. 5, 1987, 289-291

Despite the inconsistencies in the study findings the other half of the studies indicated a significant positive association of fixed-term employment and mental health impact. Deeper analyses showed that moderators like unemployment rate, volition and voluntariness and mediators like job insecurity for the health consequences of fixed-term employment are very important. For instance, involuntary fixed-term employees reported more often mental health impairments than voluntary fixed-term employees. Furthermore, fixed-term employment is strongly associated with JI and Keim et al.<sup>118</sup> demonstrated the significant importance of the type of contract as predictor of JI. In addition JI is associated with unfavourable mental health outcomes and 68 % of the significant associations revealed a higher risk of mental health impact with increasing JI. In conclusion, the results suggest that an entanglement of fixed-term employment and JI significantly determines the (mental) health status of employees. Consequently, in future research the knowledge about the relationship between fixed-term employment and mental health of workers can be enhanced when the combined effects of employment contract and job insecurity are studied.

## 6. Limitations

The current study has some limitations. Firstly, the majority of the included studies have a cross-sectional design; and thus biases which can lead to the overestimation of effect sizes. Given the small amount of longitudinal studies our review allows only for statements about correlations rather than about causalities. Based on the majority of included studies we cannot conclude whether poor health is the consequence of or cause for fixed-term employment. Secondly, only the minority of studies reported reliability measures for the used variables. Often both JI and the dependent variable were captured by only one item. In general, the reliability of an instrument increases with the number of items.<sup>119</sup> Thus, lower reliability and increased measurement errors in terms of health outcomes might be assumed. Thirdly, the included studies controlled for gender, age and social status. However, occupation, industrial sectors and tenure/contract duration were not considered as covariates, which is a shortcoming as unfavourable working conditions are unequally distributed among different occupations and industrial sectors.

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<sup>117</sup> A. J. Fox ,P. Collier, *Low mortality rates in industrial cohort studies due to selection for work and survival in the industry*, *British journal of preventive & social medicine*, vol. 30, n. 4, 1976, 225-230

<sup>118</sup> A. C. Keim, R. S. Landis, C. A. Pierce ,D. R. Earnest, *cit. op.*, p.9

<sup>119</sup> R. Schnell, P. B. Hill ,E. Esser, *Methoden der empirischen Sozialforschung*, Oldenbourg Verlag, München, 2011

Therefore, it is unclear whether fixed-term employment is related to adverse mental health outcomes with different patterns depending on occupations and industrial sectors. Additionally, gender-based patterns in employees' health are uncovered and limit the interpretation of gender specific health inequalities in fixed-term employment.

Furthermore, existing studies reported that the contract duration is an important factor for the consequences of fixed-term employment.<sup>120</sup> Fixed-term employment includes contracts with different terms and conditions so that it can be assumed that fixed-term employment is more strongly associated with health impairments in case of short-term contracts as one indicator of instability.<sup>121</sup>

Consequently, we conclude that scholars should conduct more longitudinal studies to examine the causal effect of fixed-term employment and health. Moreover, future research should consider the context in which fixed-term employment is integrated. It can be expected that fixed-term employment is associated with different health effects depending on occupation and industry. Longitudinal research will also enhance the understanding of the mechanism through which fixed-term employment is associated with (mental) health.

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<sup>120</sup> N. De Cuyper, H. De Witte, *The impact of job insecurity and contract type on attitudes, well-being and behavioural reports: A psychological contract perspective*, *Journal of Occupational and Organizational Psychology*, vol. 79, n. 3, 2006, 395-409

<sup>121</sup> M. Virtanen, M. Kivimäki, M. Joensuu, P. Virtanen, M. Elovainio, J. Vahtera, *cit. op.*, p.15

# The Emerging Nature of Work in Platform Economy Companies in Bengaluru, India: The Case of Uber and Ola Cab Drivers

Aditi Surie and Jyothi Koduganti \*

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**Abstract.** This paper investigates the work experiences, perceptions of security and risk of platform economy drivers in Bengaluru, India from a sociological perspective. The article presents these experiences and perceptions through rich ethnographic detail from in-depth, qualitative interviews with forty-five platform economy drivers driving on Uber or Ola cabs platforms. Drivers' narratives are used to bring out compelling shifts in informal economy employment experiences in Indian cities. These shifts are used to examine the diversity of lived experiences present in the Indian urban informal economy and to distinguish Indian platform economy drivers from their global counterparts. The conceptual tool of temporality is employed in reading through drivers' perceptions of risk, security and their management of these. The central finding of this article is that platform economy companies have given drivers a stable, mid-term period of time to accumulate wealth, which in turn has allowed them to stabilize and take short-term decisions by making large investments in their work, and to bear the risks of flexible working conditions in the short-term with more confidence.

**Keywords:** *platform economy, informal economy, temporality, Bengaluru*

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\* Aditi Surie is Senior Associate (Academics and Research) at the Indian Institute for Human Settlements. Email: [asurie@ihs.ac.in](mailto:asurie@ihs.ac.in). Jyothi Koduganti is an Associate (Academics and Research) at the Indian Institute for Human Settlements. Email: [jkoduganti@ihs.ac.in](mailto:jkoduganti@ihs.ac.in). We would like to thank Lakshmee Sharma for her assistance during fieldwork.



## Introduction

This paper's core preoccupation is to investigate shifts in informal economy employment experiences in Indian cities through the example of platform economy companies like Uber and Ola cabs in Bengaluru, India.

The 'uberization' of work is a thread that has been richly investigated in academic and popular reporting in developed economies as a result of neoliberal restructuring<sup>1</sup>, specifically innovations like the sharing economy<sup>2</sup> of which platform economy companies<sup>3</sup> are a sub-set. Platform economy companies have created flexible and impermanent conditions of work for workers who have moved away from a standard employment relationship of full-time, protected and continuous employment<sup>4</sup>. Popular debates have represented this change as freeing workers from workplace hierarchies thereby allowing them to structure their own time and spend it creatively away from full-time work. It has also empowered workers to be self-employed. The digital marketplaces created by Uber and Ola cabs allow for the transaction of goods and services between consumers and service-providers without any formal employment relationship between the platform and the service provider or driver. On the other side of the debate are those who term these types of workers as precariats<sup>5</sup> and who claim that these companies are 'precariatizing' work. Popular reporting has settled on investigating the precarity of workers in these companies—how the job has been unbundled<sup>6</sup>, and how<sup>7</sup> and whether<sup>8</sup> social security can be delinked from the work profile of a citizen.

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<sup>1</sup> Allison. Precarious Japan. Duke University, Durham. 2014. and G. Standing. Global Feminization through Flexible Labor A Theme Revisited. World Development. 1999. 27. 583-602. and D. Tweedie. Making Sense of Insecurity: A Defence of Richard Sennertt's Sociology of Work. Work, Employment and Society. 2013. 27. 94-104.

<sup>2</sup> Companies like Uber were initially subsumed under the concept of the sharing economy. As these companies evolved their business models, their innovative value has settled on the digital platforms or marketplaces they have created. They are now referred across media and academic reporting as platform economy companies.

<sup>3</sup> 'Platform economy' is a term that has been used in a number of ways. For this article, platform economy refers to business models that create digital marketplaces that make use of efficient matching of supply and demand. Here, transactions are done over the platform or digital marketplace between individuals or organizations that would have found it difficult to find each other. Uber and Ola cabs is an example of this. Source: [http://www.thecge.net/wp-content/uploads/2016/01/PDF-WEB-Platform-Survey\\_01\\_12.pdf](http://www.thecge.net/wp-content/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf)

<sup>4</sup> A. Kalleberg, *Good Jobs, Bad Jobs*, S. Edgell, H. Gottfried, E. Granter (eds.) The SAGE Handbook of the Sociology of Work and Employment, SAGE, London, 2015, 111-128

<sup>5</sup> Guy standing

<sup>6</sup> JP Morgan Chase Institute, *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*, 2016

The discourses around platform economy companies in developed economies are closely linked to changes in labor practices and work experiences because these companies have created quantifiably more flexible work options. In India however, the presence and market share of these companies is increasing but investigation into the labor experience is scant because of the existence of the 'informal economy'. The Indian urban workforce stitches together work and income through self-employment and sub-contracted work because of pervasive informality in employment.<sup>9</sup> This is in consonance with platform economy work which is structured as self-employment or contracted work. Since platform economy companies have been able to create efficiency in an unorganized transport market, the value of this has outweighed any real investigation into the impact of platform economy labor practices or work experiences of the Indian worker.

In this paper, it is argued that platform economy drivers do not easily share the same experiences of precarity, risk and security with a wide range of other informal sector workers in urban India. Unpaid, subsistence work and daily wage work reflects the work experiences of more workers in urban India. Platform economy companies have given drivers the ability to accumulate wealth over a period of time. Drivers have the opportunity to earn a high income, commensurate to their hard work – an opportunity that is novel in their work lives. While platform economy companies are global and follow similar labor practices across their global markets, individuals on the platform in India cannot be easily compared to their global counterparts because of the flexible work options workers in India have always had.

We employ the conceptual terrain of temporality to read through drivers' narratives of work. This is because time underscores the imagination of work and employment assurances and expectations that span short, mid and long term decisions. We find from our study that platform economy companies have given drivers a stable, mid-term period of time to accumulate wealth, which in turn has allowed them to stabilize and take short-term decisions by making large investments in their work, and to bear the risks of flexible working conditions in the short-term with more confidence. Temporality allows Indian platform economy drivers to be compared with other informal

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<sup>7</sup> The Economist, *Universal basic incomes*, 5 June 2016 <http://www.economist.com/blogs/economist-explains/2016/06/economist-explains-4>

<sup>8</sup> S. Hill, *The Future of Work in the Uber Economy: Creating a Safety Net in a Multi-Employer World*, The Boston Review, 22 July 2015 <https://bostonreview.net/us/steven-hill-uber-economy-individual-security-accounts>

<sup>9</sup> S. Srinivas. *Place, Work, Workplace. IIHS Teaching Cases*. Indian Institute of Human Settlements. Bangalore. 2016. 1

sector workers in India and contrast them with platform economy drivers in developed economies.

India's persistent informality in trade, services and employment is easily related to vulnerability, poverty, insecurity and precarity. The variety of work experiences, opportunities to accumulate wealth and creation of personal security are bucketed under a term too broad to accurately represent this diversity. Through the case of platform economy drivers we tease out the distinct set of opportunities and barriers available to these drivers from other informal sector workers in Indian cities. The value of this case rests in this teasing of these characteristics to contribute to a better understanding of labor and of the informal sector, which resists easy classification.

This paper first lays out Bengaluru's existing transport market and the emergence of platform economy companies. The majority of the drivers interviewed in the study are career drivers making this context vital to understanding their previous working conditions. We justify the use of time as a conceptual tool to work through drivers' narratives of work. The paper then moves on to presenting rich ethnographic data to profile the sample of drivers for their past and previous work, their perceptions of work security and finally to show how they plan welfare across multiple but simultaneous time periods – day to day, weekly, mid and long-term. Driving as a livelihood is often seen as accessible line of work as it has low barriers to entry. We conclude this paper by investigating the nature of barriers and their lack of transferable skills that restrict workers options to driving.

### **Transport-based Platform Economy Companies in Bengaluru**

The demand for transport solutions, whether public or private, long or short distance travel, is high. Rising income levels, a young population, and penetration of smartphones and the internet have made India a prime, growing market for transport-based platform economy companies<sup>10</sup>. It is reported that Uber's second largest market after the United States is India. The company claims that 12% of all trips taken globally are in India<sup>11</sup>. Uber's Indian rival

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<sup>10</sup> Ernst and Young LLP, *The rise of the sharing economy: The Indian landscape*, 2015, <http://www.ey.com/in/en/industries/technology/ey-the-rise-of-the-sharing-economy>

<sup>11</sup> D. Busvine, *Uber says Didi deal frees resources for key Indian market – Letter*, Reuters, New Delhi, 8 September 2016, <http://in.reuters.com/article/uber-india-market-investment-idINKCN11D236>

Ola<sup>12</sup> cabs, which is present in 102 cities in India, reported that over 25 million customers used their service as of October 2015 recording up to 1 million requests a day<sup>13</sup>. Data on the number of drivers or customers on either platform are guarded by both companies who are a part of “India’s taxi wars”. Uber reports as having 400,000 drivers in India<sup>14</sup> and Ola 550,000<sup>15</sup> drivers across the country. Reports estimate that Bengaluru has a total of 40,000-45,000<sup>16</sup> drivers between both the Uber and Ola cabs platforms. Both companies are aggressively investing in Indian cities to capture users, habituate them to low fares, and onboard drivers through incentive schemes. Moreover, agencies of the Indian government, financial institutions, consultancies and platform economy companies in different permutations<sup>17</sup> are forming links to increase skilling and employability of individuals to work with these companies. The Indian taxi market is estimated at USD 9 billion according to calculations by consulting agencies<sup>18</sup>, of which the organized sector has a revenue share of approximately 6%. While accurate numbers are difficult to provide because of insufficient data, this estimate is indicative of the magnitude of taxi services that are part of the informal sector. Given the vastly unorganized nature of urban services, there is plenty of scope for companies like Uber and Ola cabs to absorb thousands of workers. The same agency estimated a growth rate of 25-30% CAGR for the organized sector including platform economy companies.

<sup>12</sup> NDTV, *Ola Claims 25 Million Customers, 150 Million Cumulative Bookings*, 19 October 2015 <http://gadgets.ndtv.com/apps/news/ola-claims-25-million-customers-150-million-cumulative-bookings-754492>

<sup>13</sup> The Economic Times, *Ola eyes 3 million daily bookings by April next year*, 19 October 2015 <http://economictimes.indiatimes.com/small-biz/startups/ola-eyes-3-million-daily-bookings-by-april-next-year/articleshow/49453803.cms>

<sup>14</sup> D. Busvine, *Uber says Didi deal frees resources for key Indian market – Letter*, Reuters, New Delhi, 8 September 2016, <http://in.reuters.com/article/uber-india-market-investment-idINKCN11D236>

<sup>15</sup> S. Chakraborty, *Uber vs Ola: The battle for dominance in India’s taxi market*, Livemint, Bengaluru, 8 July 2016 <http://www.livemint.com/Companies/okLbTyf5QtqKnO1roYBAeP/Uber-vs-Ola-the-battle-for-dominance-in-Indias-cab-market.html>

<sup>16</sup> S. Johari, A. Sharma, *We’re telling the drivers to file cases against Ola and Uber – M Manjunath of Bangalore’s Adarsha Taxi Union*, Medianama, Bengaluru, 2 June 2016 <http://www.medianama.com/2016/06/223-Bengaluru-taxi-union-ola-uber/>

<sup>17</sup> The Indian Express, *Uber India partners with NSDC, Maruti to skill 1 million by 2018*, New Delhi, 15 September 2016 <http://indianexpress.com/article/business/companies/uber-india-ubershaan-maruti-skill-development-project-3032210/>; Uber Newsroom, *Labour Ministry Signs Partnership With Uber to Create Micro-entrepreneurial Opportunities*, Uber, 5 February 2016 <https://newsroom.uber.com/india/labour-ministry/>

<sup>18</sup> Red Seer Consulting, *Taxi market in India: Driving into the future*, 2014 <http://redseerconsulting.com/market-insights/taxi-market-india-driving-future>

There are multiple motivations to conduct this research in Bengaluru located in the state of Karnataka in India. Bengaluru has a sizable share of users and service providers of the platform economy taxi services in India. The city of Bengaluru also acts as a regional economy with its own economic and labor specificities with generalizable features of urban growth. The city is also the technology innovation capital of India and a hotbed for both innovations in transport (like various transport-based platform economy companies)<sup>19</sup> platforms and for the regulation of these platforms. While Ola is headquartered in Bengaluru, the city is a prime market for Uber.

Indian cities show great diversity for their city-based taxi presence. Cities like New Delhi and Mumbai have public hail taxis for intra-city travel regulated through city taxi schemes<sup>20</sup> and through strong worker organization.

Mumbai's *kaali peeli*<sup>21</sup> taxi service which was started in 1911 is one of the oldest in the country. These taxis are an integral part of Mumbai's cultural history. Currently, there are close to 45000 registered taxi drivers in the city<sup>22</sup> and the major taxi unions are the Mumbai's Taximen Union and the Mumbai Taxi Association along with several other smaller unions. These unions have worked extensively towards negotiating higher taxi fares, better working conditions, and the release of new taxi permits by the city's Transport Department. With one of the most influential transport unions in the city, the *kaali peeli* taxis dominate routes between Bandra and Churchgate on the Western line and Sion and Chatrapati Shivaji Terminus on the Central line<sup>23</sup>.

The official *kaali peeli* Delhi taxi service is run by the Delhi government's Tourism Department. There are close to 15000 *kaali peelis* here and the main union group is the Delhi Pradesh Taxi Union<sup>24</sup>. This union played an active role in the conversion to compressed natural gas from petrol or diesel along with also fighting for the other demands mentioned above. Many of these

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<sup>19</sup> Other platform economy companies in India are Taxi For Sure (which was bought by Ola cabs), Rapido is another example

<sup>20</sup> New Delhi and Mumbai have separate city taxi schemes created by the state governments of New Delhi and Maharashtra respectively

<sup>21</sup> *Kaali peeli* translates as black & yellow; public hail taxis are known as *kaali peeli* taxis.

<sup>22</sup> KK. Tiwari, *Regulate All Taxi Services: Why we oppose mobile app-based private taxi aggregators*, Business Today, 19 July 2015 <http://www.businesstoday.in/magazine/current/corporate/mobile-app-based-private-taxi-aggregators-why-they-are-being-opposed/story/221097.html>

<sup>23</sup> P. Singh, R. Singhal, *Priyadarshni Taxi Service: Steering the Wheel*, in Journal of Case Research, 2014, vol. 5, n. 2, 91-107 <http://home.ximb.ac.in/~jcr/cases/Case03-Priyadarshni-dec2014.pdf>

<sup>24</sup> M. Agarwal, *Delhi City Taxi And Auto Unions On Strike; Demands Ola-Uber Ban*, Inc42, 26 July 2016 <https://inc42.com/flash-feed/ola-uber-ban/>

unions are attached to larger trade and labour unions at the state and national level and show solidarity towards various worker movements in the country.

The biggest cost incurred by the traditional taxi drivers is the procurement of the taxi permit from city governments. More recently, unions in both Delhi and Bombay and in a few other cities have strongly opposed the entry of app-based taxi services, viewing them as a threat to their market share. Taxi unions in Bombay have led many strikes opposing the business models of on-demand services which do not have to incur the costs of acquiring a permit or following regulations like fixed fares<sup>25</sup>. The history of taxi unionisation is shaping how the platform economy develops in these cities. For example, the *kaali peeli* taxis in Mumbai are attempting to compete with platform economy companies like Uber and Ola by launching their own app ‘9211’<sup>26</sup>. Unlike these cities with histories of taxi unionisation, Bengaluru has always had a large fleet of private taxis without influential and cohesive transport associations. Platform economy services faced no resistance when they entered into Bengaluru when compared to New Delhi and Mumbai with unions.

Bengaluru city does not have public hail taxis. Instead, the market consists of private taxi firms that are small in size<sup>27</sup>. ‘Transport vehicles’<sup>28</sup>, whether for goods or people, are thus regulated for movement across the state rather than within the city. These vehicles are governed by a national act, The Motor Vehicles Act of 1988. It is important to note here that the vehicles and their use are governed by this Act but the drivers of these vehicles and their terms of work are not. Only drivers employed in public sector enterprises such as state transport services, train drivers, etc. have legally-regulated employment which come under the purview of the Act.

Taxi transport in Bengaluru then is regulated by the fare charged for short distance travel, or through hourly packages (in 8 and 12 hour segments) for intra-city travel or out of state travel. Drivers who work in these firms are most often engaged in transporting people through the state, traveling for days on end and often sleeping overnight in their cars. The employment models of the private ‘tourist operators’<sup>29</sup> as they are called, does resemble the platform

<sup>25</sup> KK. Tiwari, *Regulate All Taxi Services: Why we oppose mobile app-based private taxi aggregators*, Business Today, 19 July 2015 <http://www.businesstoday.in/magazine/current/corporate/mobile-app-based-private-taxi-aggregators-why-they-are-being-opposed/story/221097.html>

<sup>26</sup> N. Konde, *Mumbai’s Kaali-Peeli Cabs Lock Horns With Uber/Ola; Launches A New App 9211*, Techstory, 9 January 2016 <http://techstory.in/mumbais-kaali-peeli-cabs-9012016/>

<sup>27</sup> Red Seer Consulting, *Taxi market in India: Driving into the future*, 2014 <http://redseerconsulting.com/market-insights/taxi-market-india-driving-future>

<sup>28</sup> As they are called in Motor Vehicles Act, 1988

<sup>29</sup> As they are referred to colloquially

economy model to some extent. Many drivers do come with their own cars, and 'attach' themselves to operators in order to get business. Some are employed solely as drivers to drive the cars owned by the tourist operators.

### Drivers' Work Profiles

This section touches upon the work histories of the drivers in the study to indicate the experiences they compare their platform economy work with. It is important to note that 92% of these drivers were driving to earn an income before joining a platform economy company. Only 8% shifted to these companies from different professions.

Broadly, four career paths of drivers can be discerned. The four career paths are: one, drivers who have had a long history of driving different kinds of vehicles for livelihoods; two, drivers who moved to Bengaluru to drive in private taxi companies; three, drivers who have switched from low-skill informal work to driving over the course of their work history and four, drivers who switched from formal and professional work to platform economy work. Drivers' have been engaged in very short-term work in their work histories—work that spanned one week for example—which they have glossed over in their narratives. While there are gaps in the information given by drivers, these paths are useful for understanding their histories of work. One driver explained,

I have 22 years' experience in driving heavy vehicles, commercial vehicles, Meru cabs<sup>30</sup> and light goods vehicles. I have had all kinds of licenses.

A number of drivers indicated that they had started their driving work with heavy trucks moving goods across the state or the country. Others indicated that they started by driving small goods vehicle such as lorries within the city or between the city and their village to transport goods.

The second path is explained through another drivers' experience,

I came to Bengaluru 16 years ago. I started working at a tour and travels company as soon as I came and worked with that company for 13-14 years. When the time came to buy my own car, Uber and Ola had started. I decided that if I was going to buy my own car, then I should try to work with one of these new companies.

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<sup>30</sup> Meru cabs is India's first radio taxi service which was founded in 2007.

The majority of drivers in our study follow the above two paths. These drivers indicated driving as one of their only options for work and income while living in Bengaluru. This is described along with the drivers' educational backgrounds in detail in a later section. The third path that came out strongly was drivers switching to driving from a handful of low-skill informal work. One driver explained,

When I came from my native village to Bengaluru I started by working in a photo studio where I was a helper. I would help photographers set up lights, and also arrange things. Like a helper. I was there for two years and then I worked in a hotel as a helper for another two years. During the time at this hotel, I learnt how to drive. I drove a canter<sup>31</sup> for four years. Then I paid the down payment for my own car and joined Ola for 3 months. I didn't like it so I left it and have been with Uber for one month.

Another driver explained,

*For five years I worked with a family. I did their household chores, and housework. I cleaned, and I used to run their errands, do the shopping from the market. After that I joined a tour and travels company for five years. When I was with this company I heard of Uber and Ola cabs – when you're in the driving field you hear about these things. Now, I've been with Uber for 7 months.*

Very few drivers in the study switched from professional or formal work into platform economy work. There were only three drivers in the study that indicated this kind of work history. Below are two short descriptions from their interviews.

*I completed school and then my engineering diploma – both from Bengaluru itself. I was born here. I first got a heavy vehicles license to drive with KNP travels – those big tourist Volvo buses. Then a friend got me a job at a real estate company. I liked the work there first. I was in the design wing and worked with the architects as a draftsman. I worked there for five years and only got an increase of 5% in my salary over 5 years. Only 5% in 5 years! Then both my friend and I left that company and joined Uber.*

This was the only driver in the study who had any experience with a 'standard employment relationship' commensurate to the employment expectations of developed economy workers. He spoke about being evaluated for skill and career progress at work, and about receiving a timely salary from the company, a written contract, and expectation of an increase in salary over the years. Another driver was engaged in professional work yet did not have a written contract. He said,

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<sup>31</sup> A light-duty commercial vehicle, similar to a small truck



*I worked with the ISKCON temple<sup>32</sup> doing their marketing and communications for about ten years. As a devotee of the ISKCON temple that was a very good job to have. Now my children are a little older, they need to go to better schools, so I needed more money. That's why I started driving for Ola cabs. It's good, I can stop whenever I want if I need to pray. I can do all of that in a car.*

### The 'Standard Employment Relationship'

The resounding message from debates on the sharing economy in developed economies has been that these companies have ushered in 'the end of employment'<sup>33</sup> as they dilute the idea of labor relations between a firm and an individual. These debates span administrative and political issues of worker classification as dependent<sup>34</sup> or independent<sup>35</sup> contractors, effects of casualization of the workforce, and deeper questions of receding social security, precariatization of work<sup>36</sup> and new ideas on disentangling social security from the work profile of an individual. These transformative effects are linked closely to the use of technology to atomize work into discrete tasks<sup>37</sup> allowing the quickening of labor commodification. Employment insecurity is viewed as the transition from the standard contract of employment to flexible contracts and non-standard labor processes like subcontracting. The debate has since moved towards finding solutions for workers in these employment relations – such as the idea of portable benefits<sup>38</sup>. Other studies have touched on how twenty-first century neoliberalism has ushered in work informalization

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<sup>32</sup> ISKCON is an abbreviation for International Society for Krishna Consciousness, it is a religious movement in India that has centers of devotion across the globe.

<sup>33</sup> A. Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism*, MIT Press, Cambridge, 2016

<sup>34</sup> L. Weber, *What if There Were a New Type of Worker? Dependent Contractor*, The Wall Street Journal, 28 January 2015 <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>

<sup>35</sup>R.E. Silverman, *Judges Skeptical of Uber-Lyft Claims in Labor Cases*, The Wall Street Journal, 2 February 2015 <http://www.wsj.com/articles/court-rulings-may-redefine-ride-sharing-drivers-1422922890>

<sup>36</sup> G. Standing, *The Precariat: The New Dangerous Class*, Bloomsbury Academic, 2011

<sup>37</sup> P. Mason, *Post Capitalism: A Guide to our Future*, Allen Lane, London, 2015

<sup>38</sup> N. Scheiber, *Care.com creates a \$500 Limited Benefit for Gig Economy Workers*, The New York Times, 14 September 2016 [http://www.nytimes.com/2016/09/14/business/carecom-creates-a-500-limited-benefit-for-gig-economy-workers.html?\\_r=0](http://www.nytimes.com/2016/09/14/business/carecom-creates-a-500-limited-benefit-for-gig-economy-workers.html?_r=0)

and casualization across the developed world forcing workers to resort to informal economic activity to support themselves<sup>39</sup>.

It is our intention in this section to briefly indicate the points of debate that are taking place in developed economies. This is by far no exhaustive review of the literature on this subject, which is aplenty. The proliferation of academic and media reporting in developed economies has gone a long way in archiving the restructuring of the formal economy.

### The Informal Economy in India

Work, like that of platform economy companies, has been the norm in the Indian informal economy. The structure of this employment relationship is expected to continue because of an ailing agricultural sector<sup>40</sup> and increased automation in the manufacturing and Information Technology (IT) sectors. Micro-entrepreneurship in the informal sector is widespread, and most workers in urban India already have multiple jobs without formal standing in labor laws and multiple employers through heavily subcontracted work<sup>41</sup>.

Reporting on platform economy companies in India is generally positive, with news stories lauding the platforms for creating new jobs despite stringent government regulation which are starting to curb the sector<sup>42</sup>. These companies have rarely been associated with precarity since the adoption of tech-based work by blue collar workers fits well into India's growth and IT story.

There is scant Indian or the global South academic literature that formed the background for this study. Employment studies in India which focus on formality and informality or issues of subcontracting based largely in the

<sup>39</sup> V. Smith. *Employment Uncertainty and Risk*. The Sage Handbook of the Sociology of Work and Employment. S. Egdell, H. Gottfried. E. Granter (eds). Croydon, 367

<sup>40</sup> CP Chandrasekhar, *India's informal economy*, The Hindu, 3 September 2014 <http://www.thehindu.com/opinion/columns/Chandrasekhar/indias-informal-economy/article6375902.ece>

<sup>41</sup> S. Srinivas. *Place, Work, Workplace*. IHS Teaching Cases. Indian Institute of Human Settlements. Bangalore. 2016.

<sup>42</sup> M. Sharma, *Follow Rules Or Stay Off Roads, Bengaluru Government Tells Uber, Ola*, NDTV, 30 May 2016 <http://www.ndtv.com/bangalore-news/follow-rules-or-stay-off-roads-bengaluru-government-tells-uber-ola-1413541>; S. Jog, A. Peermohamed, *Uber, Ola face the heat in Maharashtra, too*, Business Standard, 8 April 2016 [http://www.business-standard.com/article/companies/uber-ola-face-the-heat-in-maharashtra-too-116040700306\\_1.html](http://www.business-standard.com/article/companies/uber-ola-face-the-heat-in-maharashtra-too-116040700306_1.html); Firstpost, *Delhi govt drafts policy to regulate Uber, Ola et al; surge pricing won't be allowed*, 11 August 2016 <http://www.firstpost.com/business/delhi-govt-drafts-policy-to-regulate-uber-ola-surge-pricing-wont-be-allowed-2948512.html>

manufacturing sector are insufficient to comprehend the changing employment relations and perceptions of work in the platform economy companies.

The lives of a majority of urban residents in Bengaluru are marked by informality in their work, housing, access to basic services etc. Close to 90% of the workforce in urban India is part of the informal sector which is characterized by self-employment, fringe social welfare and little work security. The lived experience of work is shaped less by the standard employment relationship and employment benefits, but more by the vulnerabilities imposed by living in Indian cities.

In India, informal sector has been defined by the National Commission for Enterprises in the Unorganized Sector (NCEUS) as ‘all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary or partnership basis and with less than ten workers’<sup>43</sup>. With informal workers being spread both in the organized and unorganized sector, the NCEUS also defined informal workers as follows: “Informal workers consist of those working in the informal sector or households, excluding regular workers with social security benefits provided by the employers and the work”<sup>44</sup>.

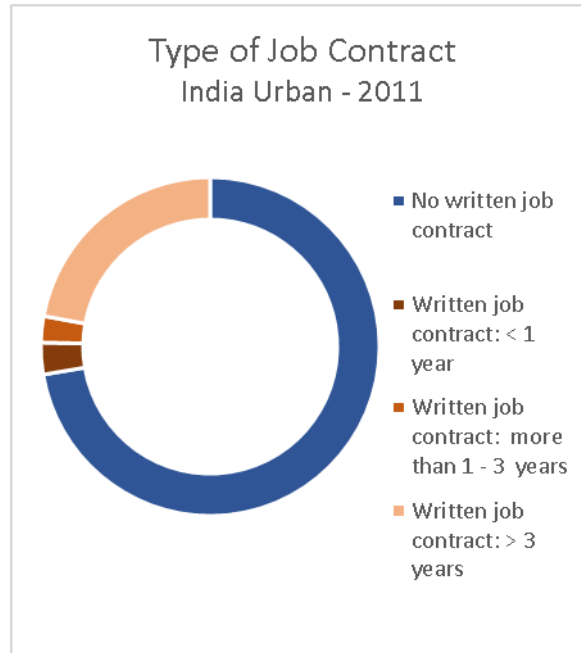
As illustrated in Figure 1, the Employment and Unemployment Survey 2011 conducted by the National Sample Survey Organization enumerated workers for their employment status over certain reference periods and for the nature of employment.

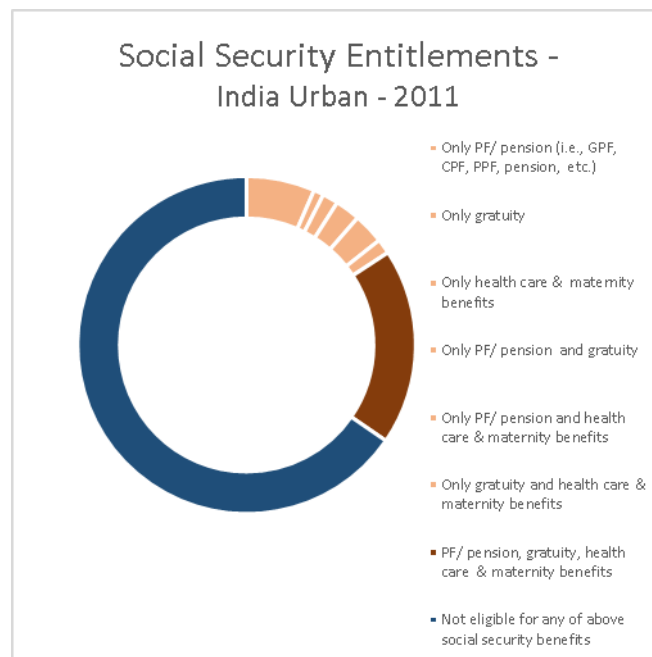
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<sup>43</sup> The National Commission for Enterprises in the Unorganized Sector (NCEUS), *The Challenge of Employment in India*, Ministry of Micro, Small and Medium Enterprises, Government of India, 2009

<sup>44</sup> The National Commission for Enterprises in the Unorganized Sector (NCEUS), *Reports on Social Security*, Ministry of Micro, Small and Medium Enterprises, Government of India, 2006

Figure 1. Type of Job Contract in Urban India and Social Security Entitlements in Urban India





Source: Employment and Unemployment Survey, NSSO, 2011

The survey also captures that 70% of urban Indian workers have no written job contract. There are a significant number of workers who move in and out of informal sector employment – represented by workers who have access to a written contract for less than a year or between 1-3 years. Here, the mere existence of a written contract is being used to signify formal sector employment. The survey also captures data on workers’ access to entitlements. While there are state-assisted or promoted social security schemes for workers in the informal sectors, the schemes have not covered more than 6% of workers<sup>45</sup>. These schemes are created on insurance and state assistance models that cover issues of life and disability insurance, pension and provident funds. There have been numerous issues in identifying and enumerating workers for the implementation of these schemes. The survey data reflects this – 65% of urban workers have no access to social security entitlement. Highly-skilled professional white-collar workers and government officials form the small section of urban Indian workers that have access to whole host of entitlements.

<sup>45</sup> The National Commission for Enterprises in the Unorganized Sector (NCEUS), *Reports on Social Security*, Ministry of Micro, Small and Medium Enterprises, Government of India, 2006

The 65% that do not have access to social security entitlements nor higher incomes face lives marked by vulnerability and risk – this comes out clearly looking at the example of street vendors. Street vendors in urban India are statistically invisible, they occupy street space ‘illegally’ or without tenure, their operations are marked by constant rent-seeking from municipal authorities to ward off evictions, pay for basic services like water, toilets, waste removal<sup>46</sup>. There are a number of disadvantageous ways in which informal economic actors are incorporated into the economic and social life of cities that bears on their ability to have decent work and income<sup>47</sup>.

Development for the Indian economy has been conceived of as a transition from custom to contract though structurally the economy continues to be informal and unorganized. The urban experiences of work are then shaped by an absence of welfare as India’s welfare state has been tailored to the conditions of rural poverty<sup>48</sup>. It is assumed that an urban workers’ mere proximity to private means of health, employment and food resources is supposed to suffice<sup>49</sup>. The costs of ensuring income and work securities are borne by urban workers personally, crafted through strategies that maintain income and balance the high costs of urban healthcare, education and nutritional security.

Looking specifically at Bengaluru city, data from various rounds of the National Sample Survey indicates clear trends in Figure 2<sup>50</sup>.

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<sup>46</sup> S. Roever. *Informal Economy Monitoring Study Sector Report: Street Vendors*. WEIGO. Web. 2014

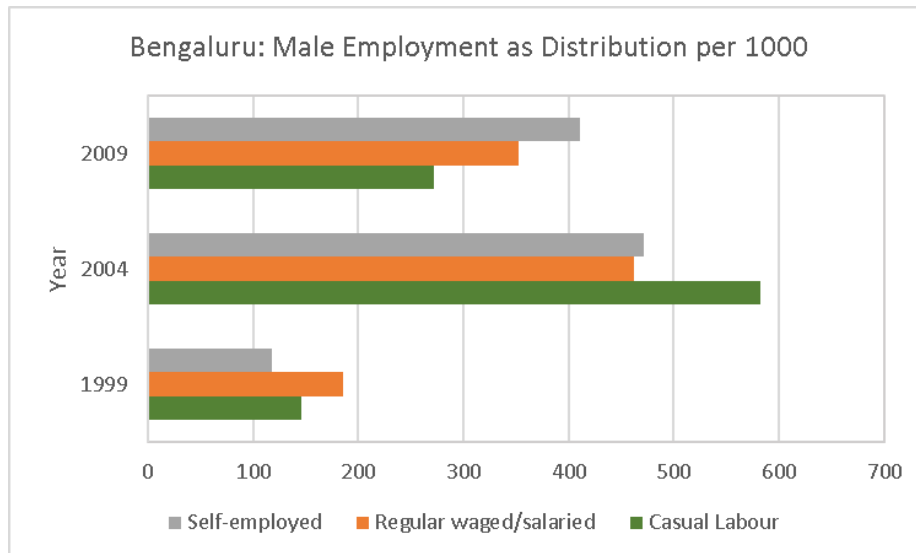
<sup>47</sup> G.Bhan, A.Surie, S.Srivatsav. *Urbanization in Karnataka. Karnataka Human Development Report*. Government of Karnataka. Bangalore. 2016. Forthcoming

<sup>48</sup> UNDP, *India: Urban Poverty Report 2009*, Ministry of Housing and Urban Poverty Alleviation, Government of India, 2009

<sup>49</sup> G.Bhan, A.Surie, S.Srivatsav. *Urbanization in Karnataka. Karnataka Human Development Report*. Government of Karnataka. Bangalore. 2016. Forthcoming

<sup>50</sup> G. Bhan, A. Surie, S. Srivatsav. *Urbanization in Karnataka. Karnataka Human Development Report*. Government of Karnataka. Bangalore. 2016. Forthcoming

Figure 2. Bengaluru: Male Employment as Distribution per 1000



Source: Employment and Unemployment Surveys, 55th, 61st and 66th rounds, NSSO

There is a persistence of casual work, a reduction in the number of male workers in regular/salaried work and an increase in self-employment. Self-employment, here, largely consists of what is called “own-account” work<sup>51</sup> that occurs mostly in the informal economy. It is this category of worker that has similar structural elements to the work performed by a worker in the platform economy. Yet this category encompasses a wide range of work experiences – like that of being a street vendor which is undoubtedly vulnerable and marked by risk. Precarity can take the form of brutal discrimination against low caste people being denied access to education, health facilities, and livelihoods. Precarity in India has to be understood on its own terms, apart from the global discourse that has been created through works like Standing’s ‘The Precariat’.

<sup>51</sup> The National Commission for Enterprises in the Unorganized Sector (NCEUS), The Challenge of Employment in India, Ministry of Micro, Small and Medium Enterprises, Government of India, 2009

### “Temporality” and Time

Initial interviews with platform economy drivers did not yield significant distinctions in drivers’ experiences of platform economy work and their previous work. The newness of the platform economy companies was difficult to grasp in drivers narratives. To reiterate, micro-entrepreneurship in the informal sector is widespread and most workers in urban India already have multiple jobs without formal standing in labor laws, and multiple employers through heavily subcontracted work.

To critically question whether platform economy companies were indeed bringing anything new or disruptive to driver’s lives, experiences of work, precariousness and security became the focus of the study. Strategies to gain control over turbulent work and create security of income formed a second focal point. This study uses sociological methods of investigation, analysis and frames of reference, which spotlights the subjective experiences of risk, how drivers define and rationalize risk, and adjust their cognitive frameworks to it.

The qualitative research was conducted through in-depth, semi-structured interviews with 45 drivers working on the Uber and Ola platforms in Bengaluru. Drivers were accessed using platform economy company apps.

Central to security of work and work welfare is time. Income security, labor market security, employment security, job security and other terms that relate to economic security are underscored by an idea of time. For example, the assurance of timely payment, the assurance of income over time, the expectation of current and future income, retirement, protections against untimely dismissal, assurance of work in the future, the idea of progress in income and employability over time are *vital* in how we understand security in the context of work. Time underscores the imagination of assurances and expectations that span short, mid and long term work and life decisions.

It is this idea of time and the conceptual terrain of temporality that is employed in reading through the narratives of the drivers’ work experiences. Drivers’ imaginations of the future, their idea of progress, decisions to save, invest, and leave or join a competing platform were all underscored by different ideas of time. Platform economy companies have allowed drivers to stabilize mid-term decision-making including making large investments in their work and to bear risks in the short-term with more confidence. This is because these companies have given drivers a large enough time frame to create income stability and reinvest their wealth in their work.



The use of temporality to understand the lives of workers is not new. EP Thompson postulated in 1967 that the development of a 'time-sense'<sup>52</sup> among workers in industrial Britain was critical to the success of industrial capitalism. Researchers argue that the atomization of work in the post-industrial world has created and transformed this time-sense by shortening the horizons of economic decision-making among workers<sup>53</sup>.

The frame of a changing time sense is a useful analytical tool to describe the shift in understanding security from that in secure formal jobs to new forms of work in the platform economy.

### Wealth as Personal Welfare

Wealth, for the drivers in the sample, is what creates personal welfare. The idea of a lifetime of security guaranteed by state social protections, regulations that shape firms' labor practices, expectation of a future income in old age or disability retirement<sup>54</sup> is difficult for drivers to perceive. Their perceptions are shaped not only by their current work with platforms but also the work they have been engaged in previously.

The clear sentiment across all the drivers we spoke to was that security was borne by them personally through strategies crafted by their own wit and social networks. The responses noted below were captured on asking whether the drivers had a wish list of assurances they could ask from platform companies.

What we need is lifetime support. But no company will ever give us that.

Another driver said

More than [the company] doing something for us or for our families, we can care for our families ourselves if we earn.

While many pointed out that they would enjoy company-sponsored accident insurance, car insurance and health insurance for their families, they were equally quick to add responses such as the following:

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<sup>52</sup> EP. Thompson, *Time, work-discipline and industrial capitalism*, in *Past and Present*, vol. 38, n. 1, 56-97, 1967

<sup>53</sup> C. Hardin, *Neoliberal Temporality: Time-Sense and the Shift from Pensions to 401(k)s*, in *American Quarterly*, vol. 66, n. 1, 2014

<sup>54</sup> *What we mean when we say "economic security"*. International Labor Organization Socio-Economic Security Programme.

[www.ilo.org/public/english/protection/ses/download/docs/definition.pdf](http://www.ilo.org/public/english/protection/ses/download/docs/definition.pdf)

We don't really have an option to ask for more from companies like Uber or anyone else... there is no such thing as benefit for family from a company; if I earn that's a benefit to my family

There is a certain impossibility that drivers in our sample found with the idea of expecting assurances of long-term security, and of linear progress in career and life which is guaranteed by employer and state. Earning to provide personal forms of welfare comes out as central in drivers' ideas of selfhood. The weight and responsibility of crafting paths out of vulnerable living is common to their concept of work. A handful of drivers in our sample expressed that they were living in Bengaluru only to earn; earn to repay their car loans and to accumulate enough wealth to eventually allow them to return to their hometowns or native villages. Other drivers who were born in the city spoke about their futures as if they were a distant horizon of stitched work opportunities – whether at platform economy companies, driving other kinds of vehicles or driving for different purposes. Thus, the temporality of work arrangements have bearings on a worker's sense of future.<sup>55</sup>

Drivers manage their long *durée* through strategies that straddle the short, mid- and long-term welfare. This is similar to other informal sector workers who often have to make snap short-term decisions when work is a survival activity<sup>56</sup>.

Yet, the model of work and earning that Uber and Ola cabs follow currently is that drivers' earnings are based on the trips they complete, often accompanied by packages of incentives based on the number of trips or the amount of business they created in a day. The break from payments based on hours of work and their efficiency in connecting demand to supply is significant for drivers in our sample. In their previous work, drivers were often 'on duty' for many hours although they only earned for the trips that were allotted to them by a private taxi firm owner.

Drivers' expressed comfort and a sense of self-respect at their current work with platform economy companies.

Uber will at least pay us for our hard work.

I used to work for a private taxi company before,...if I can work as hard here [Uber] as I was expected to there [previous taxi stand] then I'll earn really well.

<sup>55</sup> J. Powell, J. Hendricks, *The Welfare State in Post-Industrial Society: A Global Perspective*, Springer Science & Business Media, 2009

<sup>56</sup> J. Unni, *Wages And Incomes In Formal And Informal Sectors In India*, The Indian Journal of Labour Economics, vol. 48, n. 2, 2005

Being given their due, at least financially, has given the drivers a sense of autonomy and agency that was previously unavailable to them from their work. This is reinforced by other drivers too.

With Uber, if you work then you get money. There is a lot of freedom in this.

### **The Incentive**

With earnings commensurate to their hard work, drivers have the opportunity to earn a high income, save and invest it to create more stable mid-term living conditions. The incentive is the main profit-making mechanism for drivers in Bengaluru. It is an offering of both Uber and Ola operationalized to capture market share and retain drivers on their platforms. It's a dynamic if not volatile calculation that changes every week. It is this incentive that directly structures the workday and work week of drivers. Descriptions of the incentive were by far the most articulate part of drivers' narratives of platform work even though they consistently presented differing information on what the incentive was. The narration of the incentive was scripted.

This is why the incentive is perhaps one of the only terms in the platform economy lexicon that drivers have adopted into their daily language. Uber and Ola cab's terminology for 'trips', 'rides', 'ratings', 'carpooling' and so on are switched around in drivers' usage as they please.

The quantum of the incentive was an ever-present thought and calculation in how the drivers' imagine their work in the future. Their decision to leave a platform is also directly related to the incentive. Drivers indicated that the incentive given by Uber and Ola cabs is slowly decreasing.

Madam, I joined [Uber] two years ago. At that time the incentives were very high. I wanted to drive seven days a week at that time. They keep going down though. First the incentive was based on trips, now the incentive is based on the amount of business you get. If it goes down more then I'll have to find some other work. I can't make profit if the incentive goes down very much more.

Its significance in structuring their experience and strategies of work cannot be emphasized enough. The near-term decisions of working hours, breaks during a work day, holidays and days off were determined by this financial instrument.

### Daily Work Decisions

While the incentive impacts the way drivers structure their hours of work and their work weeks, it also enables them to exercise freedom within these daily and weekly structures – a welcome break from their previous work.

Reporting on the effects of platform economy companies in developed economies often cites that these companies have introduced 'the ideas and benefits of economic liberty, freedom and free markets to the average individual'<sup>57</sup>. For the drivers in our sample, the association of freedom with Uber or Ola was present in their narratives. The value of this freedom was most expressed at the release of everyday decisions into their own hands – especially their hours of work.

One driver emphatically explained,

Every time there was a family emergency I had to beg for a day's leave. Sir, please give me leave. Sir, please one day. If I was sick they wanted that I inform them in advance. How do you know you will fall ill in advance?

Drivers, like the one above, expressed more freedom and joy at being able to take one day's leave at will than at the concept of being self-employed.

Another driver explained the value of the freedom to structure his everyday work.

[At Uber], I know I can go home and sleep one day if I'm sick, I'll feel better the next day and the next day there will be duty. I can rest easy because I know when I wake up I will have work.

The structure of their work day is determined by the company's incentive packages.

At Uber... there is freedom. When you work for a tour and travels company, they can call you at any time and you have to go. Sometimes they used to call us at 2 am, that's torture. Driving for a call center you have to do 24-hour duty. I hate driving at night. They ask us to login at 5 am and do many, many pick-ups within 3 hours. Here, even if you work those hours you still get commission and more money. There I would only get peanuts.

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<sup>57</sup> R. Nhan. *Lyft, Uber and the Sharing Economy creates new opportunities for entrepreneurs*. 2015. <http://blog.pacificlegal.org/lyft-uber-and-the-shared-economy-creates-new-opportunities-for-entrepreneurs/>

### Income: A Context

Drivers have been able to make stable, mid-term decisions about their investments, financial risks and commitments to work through their tenure in platform economy companies. Our qualitative data shows that the fulcrum for this is *the opportunity to earn high incomes* from these companies. The kinds of precarity that shape their lives are thus offset by the opportunity presented by platform economy business practices like the incentive to earn higher incomes. They have the option of earning higher incomes than many qualified, skilled formal sector workers. This section provides a context for drivers' current and previous earnings and average incomes for urban households in Bengaluru.

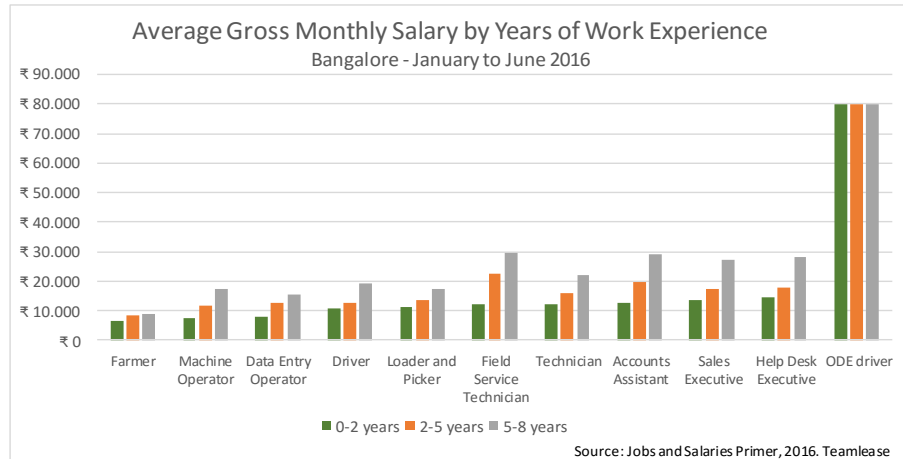
The argument is often made that income for flexible work is often higher than secure work because the costs of work security are transmuted into cash payments. Drivers in the sample have never had access to these work securities as entitlements or cash. Their pathways to secure living come from accumulating wealth over a stable duration of time. This is why the paucity of income is a vital part of a multi-dimensional measurement of poverty in India.

Drivers in our sample earned between INR 18,000 and 30,000 a month (USD 270450) in their previous work. Uber and Ola Cabs have given them the opportunity to earn up to Rs. 120,000 (approximately USD 1700) a month.

This is contrasted with the fact that nearly 90% of urban households in India earn less than Rs 200,000 a year (USD 3000). In Bengaluru, the measurement of poverty—the poverty line, which represents minimum levels of expenditure—starts at Rs. 27,000 a month (USD 400). Many have argued that the poverty line measures destitution, and that poverty exists above the poverty line in large measures.

Figure 3 represents the income of drivers in our sample have reported being mechanics, clerks, electricians, domestic workers, call center drivers, loaders and pickers.

Figure 3 Average salaries in Urban India



Source: Jobs and Salaries Primer, 2016. Teamlease

Public sector data is difficult to come by for informal sector work such as these occupations. Recruitment consultants like Teamlease whose data is used here provide an indication of the set of professions and their corresponding incomes available to the drivers in our sample. The income that platform economy work offers is much higher than that offered by many other urban jobs that these workers have access to. Drivers' net earnings after platform commission, fuel and maintenance, is still higher than gross salaries in other jobs.

Most drivers in our sample said they drove anywhere from 150 to 200 kilometers (90-125 miles) a day, 5 to 6 days a week to make Uber or Ola profitable for them. One driver, driving for 22 years said,

Hum toh purane keede hai is profession mein, aaram se 16 ghanta duty kar lete hain' (I'm an experienced player in this game, I can comfortably work for 16 hours at a stretch).

The drivers use the term 'duty', an English word, to refer to their work, and they scatter this generously in their speech no matter what their native language is. It is a word that implies going to work or working. It signifies their hours of work, and it is also used as a unit of work similar to the word 'trip' used by Uber or Ola cabs. It is a word that they use to describe any driving they have ever done whether as a driver for a corporation ferrying employees to meetings, driving tourists long distance or driving within the city. There is a

sense, then, that the nature of work *endures* across models of the old economy and the new. For them, the work is the same.

### Payment Intervals

In India, at a larger scale, incomes are usually higher in urban areas. Yet, costs are also higher, proximity does not always imply meaningful access to services, and the presence of work does not equate to a living wage<sup>58</sup>. This is why the urban location in India is seen both as a dividend and a penalty. Those living in urban areas pay a 'poverty premium'<sup>59</sup> for basic services including food and non-food expenses, spending more as a percentage of their income than their rural counterparts, on average. Urban areas are highly and rely on frequent cash transactions for everyday life. This implies that it is not just that income must be sufficient but that it must also be *regular and timely*. Informal sector workers and platform economy drivers have to strategize to manage regular and timely payments.

*The money here is good because if you work from Monday to Sunday, Tuesday you'll get money in your account, no worries there. If you work hard you'll get good money. In tourist cabs you don't find enough work, they don't give duties correctly. Even if you get duties you don't get the money immediately. You will get paid for today's work three months later. Then the money is of no use because we have to pay monthly EMIs on our cars. And there is rent to be paid. Kid's school fees need to be paid. So it's a problem. Here the money comes correctly.*

Another driver explained,

*I worked with a big corporation here in Bengaluru. I drove 7 days a week for them. Their Finance Department would only release money for people like me every 3 months. And even then we had to fill invoices, we wasted 2 days of work just doing that, running around their offices. How can I survive with a salary only a few times a year?*

Uber and Ola cabs offer drivers a range of similar work experiences, but differ on *intervals* of payments. In their preference of payments, drivers illustrate intricate strategies of managing different units of time and security of income. Drivers working simultaneously on both platforms categorically stated that they preferred the way Uber paid them – weekly deposits into their bank

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<sup>58</sup> G.Bhan, A.Surie, S.Srivatsav. *Urbanization in Karnataka. Karnataka Human Development Report*. Government of Karnataka. Bangalore. 2016. Forthcoming

<sup>59</sup> C.Lee. *Challenging Assumptions: Wake up and smell the masala: Contested realities in urban India. Geography*. 2011. 96. 95-100. D. Mitlin, D. Satterthwaite, *Urban Poverty in the Global South*. IIED, 2013

accounts. Ola Cabs, they said, paid daily and mostly through cash making it difficult for them to hold on to the money and account for their expenses. The fact that the majority of Uber's transactions are through digital payments, allowed the drivers to easily save in the short-term.

A career driver explained,

If you work for a family, they sometimes give you meals, there is usually less work but the payment is sometimes late and comes at the end of the month. It gets difficult waiting for the payment to come. In Ola, every day we get cash and spend it. You don't know where the money goes. At least in Uber you can think about your day and your week and save.'

Another driver said,

We get both cash and online payment in Ola. I use the cash for petrol and other daily expenses. All the money that gets deposited into my account is my saving.

Organizing and timing weekly payments to both spend and save has let a number of drivers manage their mid-term investments with near-term consumption. The temporality of this payment system has shortened the 'time sense' of the drivers who used to earlier receive incomes every month or every three months.

### Investing in Cars

The majority of drivers we spoke to had bought cars through bank loans for the purpose of driving on the Uber or Ola cabs platforms. 86% of drivers in the sample chose to finance these assets through a combination of car loans from banks and personal and family savings. Only 6% chose the Uber or Ola cabs leasing schemes and 9% of the drivers were not driving a car that they owned.

Stories of mini-entrepreneurship were difficult to come by in drivers' narratives. Attempts to capture other stories related to car purchases such as choice of car, color, feelings of excitement, anxiety and so on, —were repeatedly met with very casual responses.

I guess I felt happy when I bought the car but it was not really special. I felt happy.

Even though most drivers on these platforms are *driving in debt*, they have sense of security in being able to repay this debt because of the high income they



have access to. Most expect to pay off their loans within three years and express no anxiety in their monthly payment calculations.

Both Ola cabs and Uber offer financial tools similar to Uber's XChange Leasing Scheme in America to help the drivers buy cars. The majority of platform economy drivers in our study chose not to take car loans through Uber and Ola cabs as a way to maintain their freedom in the short-, mid- and long-term. Drivers have to strategize to manage their terms of labor participation within the wider market, and in this case, work to maintain control over their autonomy.

Perceptions of mid-term strategizing comes out clearly as one driver said,

I didn't take any help from Uber in case I wasn't comfortable with this company. I should be able to attach my car to a different platform or company. I shouldn't be under any pressure to stay with them. It should be up to me, and my liking. How does it matter to me if I'm in Uber or elsewhere? I want to make a living.

Another said,

If you take a loan from Ola, they expect you to drive for them 14 hours a day for 4 years. Who can do that? Who wants to do that?!

Notwithstanding, the profitability of platform economy work is encouraging drivers to invest their earnings and multiply the effects of platform economy profitability. 14% of the drivers in the study have stated their intention to buy cars that they can 'attach' to the platform. One driver told us,

I have 8 cars, madam. All of them are Toyota Etios (which is a four-door sedan). Customers like these cars. I have drivers who drive these cars – 3 are on Uber and 3 are on Ola and 2 others are with a private taxi stand. I give the drivers a set salary every month.

Many drivers indicate no change in their consumption patterns in spite of earning a higher income. They simply said they had more fixed deposits in banks or chit funds, or had invested in land or other kinds of savings to secure their future. For them, this is likely to reward them with higher gains and actually fits well into the ways in which urban citizens in India invest. The majority of personal savings in India go into physical assets (77% in land and 18% in buildings<sup>60</sup>).

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<sup>60</sup> NSSO, *NSS 70th Round: Debt & Investment*, Ministry of Statistics and Programme Implementation, Government of India, 2013

### Transferability of Skills

While most Ola and Uber drivers are career drivers, there were two drivers who were previously employed in formal jobs with work benefits. They were quick to highlight the issue of poor remuneration and limited career progress in these jobs.

I went to an ITI<sup>61</sup> and learnt engineering. I worked as a draftsman for 5 years in a real estate development company. After five years of working in the same company I was earning Rs. 22,000 (USD 340). They refused to promote me or give me a raise, not because I wasn't smart but because my English was poor. See madam, I've studied in Kannada my whole life, sorry if my English is poor.

He didn't consider attempting to find another formal sector job either. He said,

No madam, I tried getting a different job after I left the real estate company, but I didn't find anything. I am happy driving with Uber. Here in Uber no one tells me that my English is bad.

Drivers' narrated learning to drive for one of two reasons – either as a skill they learnt growing up or specifically to shift from a different occupation into driving. Their formal education and associated skill sets have rendered driving the only easily marketable skill they have, in a profession which has low barriers to entry.

No matter how much you earn with Uber or Ola you will never be allowed to do other kinds of jobs in this city.

Another driver said,

Madam, what other work will I do? This is the only use I have and there is nothing else for me to do.

A different driver expressed,

I will do driving as nothing else will work out for me.

Work opportunity is shaped and restricted by the skills they have been able to gather over time. Systemic precarity shapes their cultural and economic capital and restrains their long-term autonomy in choosing work that suits them. The mismatch of skills and formal sector job availability forces a number of

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<sup>61</sup> ITIs are Industrial Training Institutes are state-run and teach vocational skills.

workers to accept self-employment or contractual jobs in the informal economy.

Other drivers remarked that,

I don't like this job. This is like a 24 hour service. There are health issues. There is no future here. I don't like it. There is no personal growth.

The drivers in the study were acutely aware of the inability to achieve growth in work or a change in occupation.

My life is driving. I don't know how long my life will be, I can't say what will happen one day or the other, but I will drive. My profession is driving so that is what I have to wake up to

Overwhelmingly, while the lack of transferability restricted drivers' incomes and work opportunities, the ever-growing demand from urban elites and the middle-class who want private, chauffeur and taxi services has given them a keen sense of income security for the future. When one driver was asked whether he was apprehensive about Uber or Ola being shut down he reacted,

Well, look at you, you now have the habit of calling a cab, this is not going to change for you. If you can help it you won't take an auto rickshaw or a bus. Some other company will come up. They've made this a habit for you.

Other drivers brushed off the question saying that there is always work in the city. The promise of the city and of its insatiable consumption was a settled idea in their speech that would provide for them in future. The faith that this is where they can earn has allowed them to be that kind of Indian 'urban citizen who can play the game, take on its windfalls but also weather its risks.'<sup>62</sup>

### **Concluding Remarks**

Works like the 'Precariat' are indeed dangerous and emblematic of the lack of understanding of how the rest of the world copes with casualized conditions of work. Economies of the global South like India's are emerging markets for global technology companies and hotbeds of technology innovation in their own right. Their landscapes of security and precarity stand on terms unfamiliar with the imaginations of developed economies. The scope of informality in

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<sup>62</sup> G.Bhan, A.Surie, S.Srivatsav. *Urbanization in Karnataka. Karnataka Human Development Report*. Government of Karnataka. Bangalore. 2016. Forthcoming

urban services, trade and work is large, making the implications for questions like this equally important.

Understanding the dynamics of economic decision-making of drivers attached to platform economy companies like Uber and Ola affords us valuable insights into the shifts within the informal economy in India. Drivers in the study indicate a sense of stability in income management and mid-term decision making that is otherwise not available to the majority of informal sector workers in India. The efficiency brought by technological innovations in creating a platform that constantly matches demand to supply has allowed drivers to perceive their near and mid-term decisions to work, save and invest their income in a more durable way.

At the level of the worker, platform economy companies have afforded drivers income security while the market for platform economy taxi services remains irrational. Drivers' perceptions of security and strategies of income security are crafted on the varying timelines of daily incentives, daily or weekly payments, and the uncertain longevity of these platforms. Here, income security takes precedence over other forms of security like unionization and collective bargaining.

It also remains to be seen how the vagaries in global venture capital will impact these processes and how platform economy companies will accommodate company profitability while also remaining attractive to drivers.

This study finds that the self-employment model and short-term work and medium-term planning are not creating forms of wholly insecure work. The temporality of this perception of security deviates drastically from the Eurocentric definitions of security arising out of formal jobs and access to social security provided by a welfare state. As new forms of employment like the work in the platform economy become the norm around the world, it becomes imperative to study the intricacies of the nature of the employment being created and its impact on the economic and social lives of workers.

Looking beyond the individual experiences of drivers, we find that these companies are acting to organize elements of the transport market and work experiences. The case of drivers in platform economy companies in India bypasses the binary of standard and non-standard employment. Platform economy companies have been able to organize aspects of work experience for drivers—providing continuous demand for their services and easy access to this demand as well as income that is linked to the formal banking system, and encouraging more drivers to participating in the formal banking system through loans. The access to continuous demand for taxi service has alleviated several parts of insecure work for drivers in the study. The core of India's economic development project is to achieve less informality in the economy by formalizing employment and services. While platform economy companies

have not formalized employment relations for workers in India, they have been able to organize several aspects of employment informality in taxi transport.

The discourses that dominate how the new economy is spoken or written about globally, filters into the Indian media faster than the spark for localized study. Business leaders and media outlets put out messages mistakenly lauding platform economy companies for ‘formalizing’ the Indian urban workforce. This study helps discern the difference between organizing and formalizing the workforce.

Using technology to organize a workforce then raises bigger and more interesting questions for what technology can do for workers’ autonomy. Not in the linear understanding of ‘working without a boss’ but rather how technology can increase efficiency, match demand and supply and therefore shape the landscape of opportunity for work.

# Unions and Traditionally Disadvantaged Workers: Evidence from Union Wage Premiums in Canada 2000 to 2012

Rafael Gomez and Danielle Lamb\*

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**Abstract.** It is well documented that unionised workers earn significantly more than their non-union counterparts. However, over the last three decades, the union wage premium along with overall union coverage has fallen in most industrialized economies. Though the principal causes are still under dispute, the effects of technological change, managerial opposition, globalization and other factors have clearly lessened the bargaining power of labour with respect to employers. Given the commensurate rise of non-standard work and inequality in most developed nations, this paper examines the extent to which unions can still provide some immunity against the pressures of these “new labour market realities”. Using data from the Canadian Labour Force Survey for the years 2000 – 2012 inclusive, we estimate union wage premiums amongst historically disadvantaged groups: i.e., youth, women, low wage workers, immigrants, Aboriginals and workers in non-standard jobs. The results suggest that across almost every dimension of vulnerability or disadvantage used in the paper, unions are associated with a larger than average positive impact on workers’ earnings. The findings support the powerful redistributive role that unions still play in contemporary economies especially for the most vulnerable.

**Keywords:** *Unions, Wage differentials, Vulnerable Workers*

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\* Rafael Gomez, Centre for Industrial Relations and Human Resources (CIRHR) University of Toronto, Toronto. Email [ralph.gomez@utoronto.ca](mailto:ralph.gomez@utoronto.ca). Danielle Lamb, Human Resources and Organizational Behaviour, Ted Rogers School of Management, Ryerson University, Toronto. Email: [danielle.lamb@ryerson.ca](mailto:danielle.lamb@ryerson.ca)

## 1. Introduction<sup>1</sup>

It is well known that workers *gain* by being a member of a trade union. This advantage has been traditionally expressed in the form of a *wage premium* that union members (and those covered by a collective agreement) receive after controlling for all other observable factors that impact earnings. Historically, the union wage advantage has been large and significant but since the 1980s has been falling (along with overall union density) for most workers.<sup>2</sup> Though the reasons for this decline are varied, the effects of economic restructuring, technological change, globalization and managerial opposition have clearly lessened the bargaining power of workers with respect to employers. Conterminously and perhaps relatedly, earnings have become more dispersed, employment relationships less standardized and work itself increasingly more precarious.<sup>3</sup>

Despite these well noted declines in overall union density, lower wage premiums and less standardized employment for the workforce as a whole, what is not as well documented is the extent to which unions have *buffeted* the pressures of these “new labour market” realities for historically disadvantaged<sup>4</sup>

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<sup>2</sup> D. Blanchflower and A. Bryson (2010). The Wage Impact of Trade Unions in the UK Public and Private Sectors, *Economica*, 77(305), 92-109; K. Thorpe (2012). *The State of the Unions in 2012*. Ottawa: Conference Board of Canada. <http://www.conferenceboard.ca/insideedge/2012/feb2012/feb7-unions.aspx> (accessed Aug. 22, 2016).

<sup>3</sup> W. Lewchuk (2013). Has There Been a She-covetry? The Financial Crisis of 2008 and Its Impact on the Ontario Labour Market. *Relations Industrielles/Industrial Relations*, 68(1), 25-45.

<sup>4</sup> We deploy the term disadvantaged worker – rather than vulnerable as found in M. Sargeant and E. Tucker (2009) Health and safety of vulnerable workers: case studies from Canada and the UK. *Policy and Practice in Health and Safety* 7(2) 51-73 - to signal that we are strictly referring to groups that have traditionally faced either wage discrimination in the labour market and/or for whom, historically at least, unemployment rates and wages have been lower (i.e., women, youth, immigrants) as compared to more advantaged groups (i.e., males, older workers, and native born workers).

groups (i.e., youth, women, low wage workers, immigrants, Aboriginals and workers in non-standard jobs). As noted by Blackburn,<sup>5</sup> the decline in union wage premium for the overall labour market obscures the fact that union wage effects have been found to differ according to characteristics of the worker (e.g., education and gender). This is an important observation not only because of what it implies for present-day labour markets but because the union advantage for workers may not be as obvious as it first appears.

The predominant view of modern trade unionism as a progressive societal force aimed at advancing the *common rule* belies the early history of trade unions as fairly rigid member-based associations restricting entry and enshrining (rather than advancing) labour market advantages. Just as the twin objectives of advancing rights for the weakest by “clearing markets of all particularistic obstructions...[and protecting]...worker[s] from the destructive effects of unregulated competition”<sup>6</sup> have been long-standing goals of the modern-day labour movement, the tendency for unions to focus on a narrower view of dues-paying bargaining agency has been an equally compelling counter-narrative<sup>7</sup>. Beginning with pre-industrial European craft guilds and early associations of skilled tradesmen all the way to present-day associations of professional workers that include athletes, doctors and lawyers, there is a clear pattern of unionism enshrining privilege rather than extending it. The move of trade unions away from craft-based solidarity (or labour cartels) towards social justice and broad-based representation for the least skilled is, at least when viewed over a longer historical backdrop, a relatively recent phenomenon.

In North America, unions as late as the 1930s were still divided as to whether they should admit “industrial” workers into their associations. According to labour historians there were always: “Two conflicting views of the trade-union movement that strove for ascendancy in the nineteenth century (America): One, the defensive-restrictive guild-craft tradition passed down through journeymen’s clubs and friendly societies...the other the aggressive-expansionist drive to unite all ‘labouring men and women’ for a ‘different order of things.’”<sup>8</sup>

It is against this historical backdrop that we seek to understand the modern role of unions in helping (or not helping as the case may be) those that have been traditionally viewed as most vulnerable in the labour market. In this

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<sup>5</sup> M. Blackburn (2008). Are Union Wage Differentials in the United States Falling? *Industrial Relations*, 47(3), 390-418.

<sup>6</sup> M. Poole (1981). *Theories of Trade Unionism; A Sociology of Industrial Relations*. London. Routledge & Kegan Paul, 82-83.

<sup>7</sup> A. Fox (1975). Collective Bargaining, Flanders and the Webbs. *British Journal of Industrial Relations*, 13(2): 151-74.

<sup>8</sup> R. Leeson (1971). *United We Stand*. London: Adams & Dart Publishers, page 10



regard, one could imagine two possibilities as work becomes increasingly non-standardized and the role of unions in regulating the labour market abets:

First, union decline is being disproportionately felt by traditionally disadvantaged workers; this is so because as union power has waned, *unions have consolidated around workers with more labour market advantages* (i.e., those facing less labour market discrimination, lower unemployment rates and most shielded from market pressures). This means a move towards even lower coverage and lower wage premiums for the least advantaged and most precarious of workers. This would be in keeping with the narrower view of trade unions “as securer of restrictive entry and guarantor of labour market privilege”<sup>9</sup>

A second scenario is that *unions have stepped up and are extending their more contemporary role as a ‘sword of justice’*<sup>10</sup> acting to maintain equity and fairness in the employment relationship, especially for the most vulnerable as it pertains to wages and working conditions. This would mean equal or higher coverage rates and equal to greater wage gains for the least advantaged over time.

This study estimates the evolution of union coverage rates and trends in union wage premiums since 2000 as a test of these two scenarios. We begin in section 2 with a review of the wage premium literature in Canada and also where relevant globally. We end by stating our main research questions in this paper. In section 3 we discuss our data and methods. In section 4 we describe the results of our data analysis and detail the major implications for theory, policy and practice. In section 5 we offer some conclusions.

## 2. Related Literature

The present analysis examines union wage premiums in Canada leading up to and following the Great Recession of 2008 amongst historically disadvantaged groups. Unions in Canada raise wages primarily through collective bargaining and possibly through improved managerial practices, which raise both the productivity of the firm and the demand for union labour resulting in subsequently higher wages<sup>11</sup>. It is conceivable that the fiscal and profit

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<sup>9</sup> R. Leeson, page 12

<sup>10</sup> Metcalf D., Hansen K., Charlwood A. (2001). Unions and the sword of justice: Unions and pay systems, pay inequality, pay discrimination and low pay. *National Institute Economic Review*, 176: 61-75.

<sup>11</sup> A. Bryson (2014). Union Wage Effects. What are the economic implications of union wage bargaining for workers, firms, and society? *IZA World of Labor*. 2014: 35

constraints imposed by the 2001 and 2008 downturns would have weakened labour's ability to negotiate wage gains and thus a narrowing of the union-non-union wage differential following the recession would be observed.

Analyses of public sector collective bargaining in the US following the financial crisis by Freeman and Han<sup>12</sup> found "a wide range of evidence that unions made substantial wage and benefit concessions to save jobs and preserve public services in the 2008-2011 period." On the other hand, if unions promote improved managerial practices,<sup>13</sup> then it is also plausible that severe economic downturns would cause less productive firms to fail, leaving only top (mostly union) performers in a given industry, resulting in an even wider union-non-union wage gap. It should be noted that the ability of unions to 'shock' firms into ameliorated behaviour<sup>14</sup> creates a spillover into non-unionized firms as well, thus creating a downward bias in the estimates of the true union wage premium.<sup>15</sup>

Fang and Verma<sup>16</sup> track union-non-union wage differentials in Canada from 1984 to 1998 using a variety of statistical sources. The authors concluded that while wage gaps between the two groups generally narrowed, the year 1990 witnessed an above-average union wage premium of 20 percent. The authors conclude that, "this is not surprising, given that 1990 was a recession year, and the union effect on wages tends to be larger during recessions."<sup>17</sup> More recently, Walsworth and Long,<sup>18</sup> studying the relationship between unionization and employment growth, find that the union wage premium in Canada has declined 4.5 percentage points from 2001 to 2006. Results further suggest a significant negative correlation between the magnitude of the union

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doi: 10.15185/izawol.35 <http://wol.iza.org/articles/union-wage-effects.pdf> (accessed Aug. 22, 2016); H. Drost and R. Hird (2006). *An Introduction to the Canadian Labour Market 2<sup>nd</sup> ed.* Toronto: Thompson Nelson.

<sup>12</sup> Freeman, R. & Han, E. (2012). The War Against Public Sector Collective Bargaining in the US. *Journal of Industrial Relations*, 54(3), 386-408, page 398.

<sup>13</sup> A. Verma (2005). What Do Unions do to the Workplace? Union Impact on Management and HRM Policies. *Journal of Labour Research*, 26(3), 415-449.

<sup>14</sup> S. Slichter, J. Healy and R. Livernash (1960). *Impact of Collective Bargaining on Management*. Washington: The Brookings Institute.

<sup>15</sup> D. Benjamin, M. Gunderson and C. Riddell (2002). *Labour Market Economics 5<sup>th</sup> ed.* Toronto: McGraw-Hill Ryerson Ltd.

<sup>16</sup> T. Fang and A. Verma (2002). Union Wage Premium. *Perspectives on Labour and Income*, 3(9) <http://www.statcan.gc.ca/pub/75-001-x/00902/4168247-eng.html> (accessed Aug. 22, 2016).

<sup>17</sup> T. Fang and A. Verma, page 2.

<sup>18</sup> S. Walsworth and R. Long (2012). Is the Union Employment Suppression Effect Diminishing? Further Evidence from Canada. *Relations Industrielles/Industrial Relations*, 67(4), 654-680.

wage premium and employment growth, finding that employment suppression is more sensitive to wages in the service sector as opposed to manufacturing.<sup>19</sup> Counter to the trend of declining union wage premiums noted in Canada, Blackburn in the US found a narrowing of the union-non-union wage gap for females from 1983 to 2005, but found that the trend among males is more complex and largely dependent on observable characteristics<sup>20</sup>. “In particular, there is no apparent decline in the differential for a male worker with average union characteristics, though there is for a worker with characteristics of the overall sample of men.”<sup>21</sup> In a comparative study of union density rates across OECD countries, Blanchflower<sup>22</sup> finds the probability of being a union-member is related to personal characteristics such as gender, age, race and level of education. A follow up study using UK data finds the union pay premium (inclusive of benefits) though down from post-war highs is still significant<sup>23</sup>. While we have witnessed a modest decline in overall union density rates in Canada, roughly 30 percent of the Canadian work force still remains unionized. In the private sector, however, union density rates reached a historical low in 2012 at 15.9 percent.<sup>24</sup>

In a detailed review of the union impact in North America, Peter Kuhn<sup>25</sup> writes, “the union wage effect is one of the most-studied questions in the history of labour economics.” From the influential work of Lewis<sup>26</sup> to that of Kuhn<sup>27</sup> as well as others, estimates of the union-non-union wage differential for workers in North America have been relatively consistent, finding the average wage premium to be around 15 percent<sup>28</sup>. As noted above, the most recent of these studies finds union wage premiums have declined from 15.6 percent in 2001 to 11.1 percent in 2006.<sup>29</sup>

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<sup>19</sup> S. Walsworth and R. Long

<sup>20</sup> M. Blackburn

<sup>21</sup> M. Blackburn, page 416.

<sup>22</sup> D. Blanchflower (2006). *A Cross-Country Study of Union Membership*. Bonn, Germany: IZA Discussion Paper 2016. <http://ftp.iza.org/dp2016.pdf> (Accessed Aug. 22, 16).

<sup>23</sup> D. Blanchflower and A. Bryson

<sup>24</sup> K. Thorpe.

<sup>25</sup> P. Kuhn (1998). Unions and the Economy: What we Know: What we Should Know. *The Canadian Journal of Economics*, 31(5), 1033-1056, page 1036.

<sup>26</sup> Lewis, H. (1963). *Unionism and Relative Wages in the United States: An Empirical Inquiry*. Chicago: University of Chicago Press.

<sup>27</sup> P. Kuhn

<sup>28</sup> D. Benjamin, M. Gunderson and C. Riddell. A summary of studies to estimate union-nonunion wage differentials in Canada up to the late 1990s can be found in Benjamin et al (2002).

<sup>29</sup> S. Walsworth and R. Long

To our knowledge, despite the large volume of union wage premium research, no study has estimated the union vs. non-union wage differential in Canada since the Great Recession. This is an important gap (no pun intended) especially in light of the dislocation caused by that event and the push for wage restraint in many jurisdictions. Moreover, no study has yet looked in depth at the subcategories of workers that some might deem vulnerable<sup>30</sup> or as we term “traditionally disadvantaged” with respect to wages and union representation. Much work in this well-studied area therefore still remains.

### **2.1 The Main Research Questions**

Our principal concern in the empirical analysis that follows is to isolate the union wage premium for vulnerable workers that could in theory benefit the most from unionisation. This includes those with fewer labour market supports (i.e., those in non-standard employment) and those that have historically faced challenges in the labour market (i.e., women, youth, immigrants, and Aboriginals). We therefore address the following three questions:

Q1: What has happened to union coverage rates for workers in the Canadian labour market between 2000 and 2012 and have traditionally disadvantaged workers been underrepresented over time?

Q2: Have union wage premium amongst traditionally disadvantaged groups in the labour market been disproportionately affected (in a negative way) between 2000 and 2012?

Q3: What implications do these findings have for both theory and policy?

### **3. Data and Methodology**

The data for the present analysis is obtained from the master files of the Canadian Labour Force Survey (LFS) for the years 2000 to 2012 inclusive. The LFS is a nationally representative survey of Canadians living off reserves and outside of the Yukon, Nunavut and Northwest Territories.<sup>31</sup>

The methodology involves estimating a number of multivariate equations where individual worker earnings are regressed on a vector of wage

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<sup>30</sup> M. Sargeant and E. Tucker.

<sup>31</sup> Statistics Canada (2012) *Guide to the Labour Force Survey*. Catalogue No. 71-543-G. <http://www.statcan.gc.ca/pub/71-543-g/71-543-g2012001-eng.pdf> (accessed Aug. 22, 2016).

determining characteristics for various groups at four-year time intervals (i.e. 2000, 2004, 2008 and 2012).<sup>32</sup> For illustrative purposes, the estimation equation is:

$$(1) \text{Ln}W = a + \beta_1 U + \beta_2 X + \varepsilon,$$

where  $\text{Ln}W$  is the natural log of weekly earnings and the focal independent variable,  $U$ , denotes a respondent's union status. We define union status to include all respondents covered by a collective agreement regardless of union membership. Previous studies have differentiated between union membership and union coverage, a specification that in some cases has been shown to have a significant impact on the magnitude of the associated wage premium.<sup>33</sup> In Canada, however, the vast majority of employees covered by a collective agreement are also *de facto* union members owing to the "agency shop" privileges that exist in every jurisdiction including federally regulated industries; as a result, we do not distinguish between union membership and union coverage in the paper.

The variable  $X$  denotes a number of observable wage determining characteristics that capture differences in human capital, job-type, firm size, industry and geography. Included in the human capital endowments are variables capturing a respondent's age, marital status and level of education. Variables related to the respondent's job include hours worked, tenure at the current job and whether the respondent's employment is seasonal, contract or casual. Indicators of the respondent's industry of employment are based on the 2007 North American Industry Classification System (NAICS). To account for regional differences in earnings, control variables for province as well as residence in a major urban centre (Toronto, Montreal or Vancouver) are added to the analysis. Finally, the models include a variable denoting whether or not the respondent was employed in the public (versus private) sector acknowledging that substantial wage premiums may exist for some public-sector employees.<sup>34</sup>

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<sup>32</sup> Andrews, M., Stewart, M., Swaffield, J & Upward, R. (1998). The Estimation of Union Wage Differentials and the Impact of Methodological Choices. *Labour Economics*, 5(4), 440-474.

<sup>33</sup> W. Koevoets (2007). Union Wage Premiums in Great Britain: Coverage or Membership? *Labour Economics*, 14(1), 53-71; M. Andrews, M. Stewart, J. Swaffield and R. Upward (1998). The Estimation of Union Wage Differentials and the Impact of Methodological Choices. *Labour Economics*, 5(4), 440-474.

<sup>34</sup> M. Gunderson (1979). Earnings Differentials between the Public and Private Sectors. *Canadian Journal of Economics*, 12(2), 228-242.

### *3.1 Defining the “Disadvantaged” in our Sample*

The sample is restricted to individuals over the age of 15 years who are employed and report positive (greater than zero) earnings from wages and salaries. Individuals who are self-employed are excluded from the analysis. Estimated union wage premium are first computed for the entire sample in each of the four periods considered in the analysis (i.e., 2000, 2004, 2008, 2012). Separate models are then estimated for each of our five categories of workers who have traditionally faced labour market impediments such as discrimination (i.e., women and Aboriginals) or a lack of domestic labour market experience (i.e., immigrants and youth). The within-group wage comparisons between union and non-union workers include: i) males vs. females; ii) those in standard (full-time, permanent positions) vs. those in non-standard employment relationships (part-time, temporary positions); iii) young vs. older workers; iv) immigrants vs. non-immigrants and, finally v) Aboriginal and non-Aboriginal persons.

In terms of how we define or identify these groups in the data, gender is obtained from a standard male or female identifier,<sup>35</sup> full-time permanent refers to respondents who have a permanent job working 30 or more hours per week. We define non-standard employment to include anything other than the full-time permanent ‘standard.’ Specifically, this includes respondents whose main job is part-time, seasonal, casual or contract. We define young workers as those aged 15 – 29 years. Immigrants include any respondent who identified as being a landed immigrant (or permanent resident) regardless of the year he/she immigrated to Canada<sup>36</sup>. An Aboriginal person is defined as any respondent within the appropriate sampling universe who self-identified as belonging to one or more Aboriginal groups. Note that union wage premium for immigrants and Aboriginal persons are only estimated for 2008 and 2012, as these variables were not available in the Labour Force Survey until 2006 and 2007 respectively.

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<sup>35</sup> As of 2012, the Labour Force Survey did not contain more inclusive questions related to gender identity.

<sup>36</sup> A relatively small number of respondents identified as being born outside of Canada, however, they did not identify as being landed immigrants or permanent residents. These respondents were considered as part of the non-immigrant population.

## 4. Results

### *4.1 Union coverage rates for Traditionally Advantaged and Disadvantaged Workers in Canada between 2000 and 2012*

Table 1 top row displays the proportion of the sample covered by a collective agreement for all workers. Across all employees, union density rates have remained relatively stable over the twelve-year period with union coverage falling a modest 0.8 percentage points from 2000 to 2012. The highest rates of union coverage are observed among those with the highest levels of income. In 2012, for example, the proportion of individuals covered by a collective agreement with incomes above the median was nearly double that of those covered by a collective agreement with incomes below the median. This fact raises the familiar question of causation in union wage rates. It is well established that causality cannot be inferred from studies of this nature that employ only time series data, however, there is often at least an implicit tendency to argue that unions raise the wages of their members. It is important to bear in mind the reverse is also plausible, specifically, as discussed in our introduction concerning the historical role of unions as guarantors of labour market privilege, implying that higher earners are the ones who seek out unionization in part because they can afford the costs of such associations.

Table 1 also breaks down union coverage by the five traditionally disadvantaged sub-groups in both the beginning and end point periods considered in the study.

Unionization rates for women grew by 1.4 percentage points whereas for men they fell 2.9 percentage points. In fact, by 2012, women had greater union representation than men, reversing a long-standing historical inequity. Among employees with standard jobs (i.e., full-time, permanent employees) unionisation fell 1.8 percentage points from 2000 to 2012, while the proportion of non-standard workers covered by a collective agreement rose 2.2 percentage points in the same period. Young workers had the lowest rates of unionization among all the groups but the proportion of young workers covered by a collective agreement did rise from 19.1 percent in 2000 to 21.5 percent in 2012, while the proportion of unionised workers 30 years of age and older declined 2.6 percentage points in the same period. This trend may be indicative of overall demographic shifts in the workforce, growing demand for unions amongst youth,<sup>37</sup> union organizing efforts, or some combination of all three. Finally, while immigrants have unionization rates slightly lower than that of all

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<sup>37</sup> R. Gomez, M. Gunderson and N. Meltz. (2002). Comparing youth and adult desire for unionization in Canada. *British Journal of Industrial Relations*. 40 (3): 521-542.

employees they too grew by 1.1 percentage points, and a slightly higher proportion of Aboriginal workers versus non-Aboriginals were covered by a collective agreement by 2012, reflecting a 3.3 percentage point gain as opposed to a -0.2 percentage point drop for non-Aboriginals. It should be noted that these latter two figures reflect changes between 2008 and 2012 since the LFS data did not collect immigrant or Aboriginal status until after 2006 and 2007 respectively.

Table 1: Collective Agreement Coverage (%) in Canada, 2000-2012

	2000 (1)	2012 (2)	2012-2000 (2)-(1)
All Employees	32.3%	31.5%	-0.8%
Above Median Wage	43.6	40.9	-2.7
At or Below Median Wage	21.1	22.3	+1.2
Males	33.2	30.3	-2.9
Females	31.4	32.8	+1.4
Standard (Full-time Permanent)	34.7	32.9	-1.8
Non-Standard	25.4	27.6	+2.2
Mature Workers (30+)	37.9	35.3	-2.6
Young Workers (<30)	19.1	21.5	+2.4
Non-immigrant	32.5	32.8	+0.3
Immigrant <sup>a</sup>	25.6	26.7	+1.1
Non-Aboriginal	32.8	33.0	-0.2
Aboriginal <sup>a b c</sup>	30.8	34.1	+3.3
N	593, 020	645, 784	--

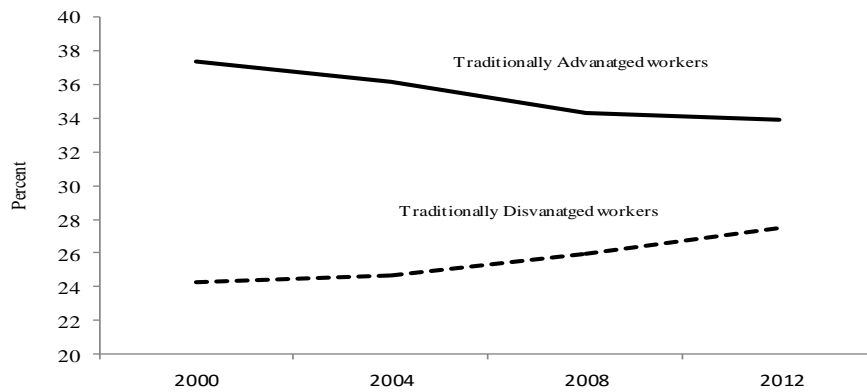
Source: Authors calculations based on Canadian Labour Force Survey data.<sup>38</sup>

<sup>38</sup> Table 1 Notes: <sup>a</sup> Variables indicating Immigrant Status and Aboriginal identity were not available in the Labour Force Survey until 2006 and 2007 respectively. We take the difference between 2008 and 2012 in these cases. <sup>b</sup> Sample sizes for the Aboriginal and non-Aboriginal



In short, as summarised in Figure 1, where we take the arithmetic average (i.e. this average does not weight components by the size of category) union coverage rates for all disadvantaged categories of workers found in Table 1 between 2000 and 2012 and compare that rate to the advantaged categories, we see that although unions are still more strongly represented amongst traditionally advantaged groups, the rates of unionisation between the disadvantaged and advantaged are converging, with rises in membership rates apparent in all categories of “vulnerability” observed in our study.

Figure 1: Unionisation (%) Rates for Traditionally Advantaged versus Disadvantaged Workers in Canada, 2000-2102



Source: Authors calculations from Table 1 figures based on Canadian Labour Force Survey (LFS) data<sup>39</sup>.

populations do not sum to the total sample of all workers due to the fact that the Aboriginal identity question was only asked to respondents born in Canada, the United States or Greenland. Respondents born outside of these areas were coded as missing for the Aboriginal-non-Aboriginal indicators. <sup>c</sup> Proportions for the Aboriginal sub-group were estimated using a unique sampling weight specifically included in the Labour Force Survey to allow for comparisons to be made between Aboriginal and non-Aboriginal populations.

<sup>39</sup> Note: Traditionally advantaged worker category includes the arithmetic average union coverage rate amongst high pay, male, standard employed, non-immigrant, mature and non-Aboriginal workers. Traditionally disadvantaged includes the average union coverage rate amongst low pay, female, non-standard employed, immigrant, youth and Aboriginal workers.

*4.2. Union Wage Differentials for Traditionally Advantaged and Disadvantaged Workers in Canada between 2000 and 2012*

Table 2 compares raw mean weekly earnings, expressed in 2012 constant dollars, for all groups by collective agreement coverage for 2000 and 2012 respectively. All groups experienced earnings growth over the twelve-year period and in all cases, the mean wages for unionised workers were higher than those not covered by a collective agreement.

In 2012, the absolute raw union wage advantages were largest for non-standard workers followed by those for females, and young workers respectively. Conversely, raw union wage gaps were smallest among full-time permanent workers and males. The fact that the raw union wage differentials were smallest for males and full-time permanent workers -- groups that tend have high and relatively stable rates of union density and also tend to experience the highest earnings regardless of a collective agreement -- may point to spillover or 'threat' effects that unions have on non-unionized firms in a given industry or for a particular group where there exists a well-established union presence. The fact that some of the highest raw union wage gaps are observed among the most traditionally vulnerable groups, where union density tends to be lower, may also suggest an important role for unions in raising earnings of historically lower paid workers.

Table 2: Weekly Real Wages (\$) in Canada by Union Status, 2000-2012

	2000			2012			2012-2000
	Union (1)	Non-Union (2)	Union Gap Diff (U - NU) (3)	Union (4)	Non-Union (5)	Union Gap Diff (U-NU) (6)	Change in Gap Diff <sup>12</sup> -Diff <sup>00</sup> (6)-(3)
All Employees	\$911	\$726	\$185	\$ 982	\$814	\$168	- \$17
Males	1016	875	+141	1071	951	+120	-21
Females	791	570	+221	898	669	+239	+18
Standard	993	877	+116	1085	977	+112	-4

Non-Standard	578	336	+242	635	387	+248	+6
Mature Workers 30+	963	855	+108	1036	942	+94	-14
Young Workers <30	660	490	+170	745	534	+211	+41
Non-Immigrant <sup>a</sup>	n/a	n/a	n/a	992	817	+175	n/a
Immigrants <sup>a</sup>	n/a	n/a	n/a	931	802	+129	n/a
Non-Aboriginal <sup>a</sup>	n/a	n/a	n/a	996	823	+173	n/a
Aboriginal <sup>a b</sup>	n/a	n/a	n/a	942	724	+218	n/a
N	593,020			645,784			

Source: Authors calculations based on Canadian Labour Force Survey data.<sup>40</sup>

Interestingly, over time we see that despite rising density within these groupings, the union wage advantage has grown amongst the most traditionally vulnerable (i.e., women, non-standard workers and youth). This can be seen in columns 3 and 6 of Table 2 as well as the final column, which measures the change in the wage advantage (or union wage gap) in each period to see if the trend is one of growth in the positive union wage differentials or of decline. The results are abundantly clear: for non-union workers in the most vulnerable categories, a lack of unionisation implies a weekly earnings loss in real terms since 2000 of between \$41, \$18 and \$6 dollars respectively for young workers, females and those in non-standard jobs (see last column in Table 2). Conversely this implies equivalent gains of \$41, \$18 and \$6 for all the

<sup>40</sup> Notes: Weekly earnings are expressed in 2012 dollars using CPI information from: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ46a-eng.htm> Variables indicating Immigrant Status and Aboriginal identity were not available in the Labour Force Survey until 2006 and 2007 respectively. These categories were left out of the analysis. <sup>a</sup> Immigrant and Aboriginal indicators were not available in the Labour Force Survey in the year 2000. <sup>b</sup> Mean wages for the Aboriginal population were computed using a unique Aboriginal weight provided in the Labour Force Survey.

unionised workers in the traditionally disadvantaged sub-groups just mentioned.

The one exception appears to be immigrants. Not only do immigrants earn less than non-immigrants, the presence of unions appears to exaggerate this difference rather than narrow it (e.g., the union differential is \$61 weekly dollars in favour of non-immigrants whereas for non-union workers in the immigrant/non-immigrant category the non-immigrant advantage is only \$15), something not found for all other groups just mentioned. This finding is not a uniquely Canadian phenomenon but has been found in other countries as well.<sup>41</sup>

The raw gaps however could potentially be masking observable differences in the characteristics of union and non-union workers in all relevant groups, such as education or occupational status. As such, we should attempt to control for as many of these observable characteristics as possible before drawing any definitive conclusions. This is what we do in Table 3, which displays the estimated union wage premium, after controlling for individual and other observed characteristics that influence earnings, for the various groups considered in the analysis at four-year intervals from 2000 to 2012.

For ease of interpretation, in Table 3 point estimates are displayed as percent increases in weekly wages for unionised relative to non-unionised workers.<sup>42</sup>

With the exception of young workers -- where the estimated union wage premium rose slightly (0.2 percentage points) between 2000 and 2012 -- estimated union wage premium for all other groups either fell, or in the case of immigrant workers, remained the same, over the time period considered in the study. The decline was largest in absolute terms for Aboriginal workers, where the union wage premium fell 7.3 percentage points from 2008 to 2012. (As noted, data on Aboriginal persons was not available in the Labour Force Survey until 2007). Estimated union wage premia also fell by 6 and 3.9 percentage points for non-standard workers and females respectively.

Despite the declines, however, union wage premia remain the highest among non-standard and young workers at 18.6 and 14.1 percent respectively in 2012 and in every case but that of immigrants (where there is no statistical

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<sup>41</sup> This is a finding also found in Irish data where Irish nationals appear to enjoy greater benefits from union membership than immigrant workers. See T. Turner, C. Cross, and M. O'Sullivan. (2014). Does union membership benefit immigrant workers in 'hard times?'. *Journal of Industrial Relations*. 56(5): 611-630.

<sup>42</sup> It is not correct for point estimates to be automatically multiplied by 100 from dummy variables. This only works for continuous variables. The smaller the coefficient on a dummy variable the closer it is to the percentage change, but this is still only an approximation. We use a well-established formula from Halvorsen and Palmquist (1980) to convert the point estimates of union wage premium from dummy variables to the percentages found in Table 3.

difference), unionised workers in traditionally disadvantaged categories enjoy a higher union wage advantage than their unionised advantaged counterparts. This is important as it speaks to the union role in narrowing the long-standing earnings gaps that exist between traditionally advantaged and disadvantaged groups in society.

As we did with union coverage, in Figure 2 we show this by displaying both levels and trends in union wage differentials by plotting the arithmetic average of the union wage premium for traditionally disadvantaged categories of worker for which we have consistent data from 2000 to 2012 (i.e., females, those in non-standard employment, and youth) versus their traditionally advantaged counterparts (i.e., males, those in standard employment, and older workers). Figure 2 clearly shows the larger wage premium achieved by traditionally disadvantaged labour market groups (top dotted line) over their more advantaged counterparts (bottom dark line) and the maintenance in the differential over time at roughly 10 percentage points.

**Table 3 Estimated Union Wage Premium (%) in Canada, 2000-2012**

	<b>2000 (1)</b>	<b>2004 (2)</b>	<b>2008 (3)</b>	<b>2012 (4)</b>	<b>2012-2000 (4)-(1)</b>
All Employees	10.1%	8.0%	7.0%	6.9%	-3.2%
Males	7.0	5.9	4.9	5.4	-1.6
Females	11.5	8.8	8.5	7.6	-3.9
Standard (FT Perm)	4.0	2.7	1.5	1.7	-2.3
Non-Standard	24.6	20.3	20.3	18.6	-6.0
Mature Workers > 30	8.3	6.4	4.9	4.5	-3.8
Young Workers <30	13.9	12.5	12.5	14.1	+0.2
Non-immigrant	n/a	n/a	7.0	7.1	+0.1

Immigrant	n/a	n/a	6.7	6.7	0.0
Non-Aboriginal	n/a	n/a	6.6	7.0	+0.4
Aboriginal <sup>a b c</sup>	n/a	n/a	15.5	8.2	-7.3
N	593,020	593,208	643,460	645,784	

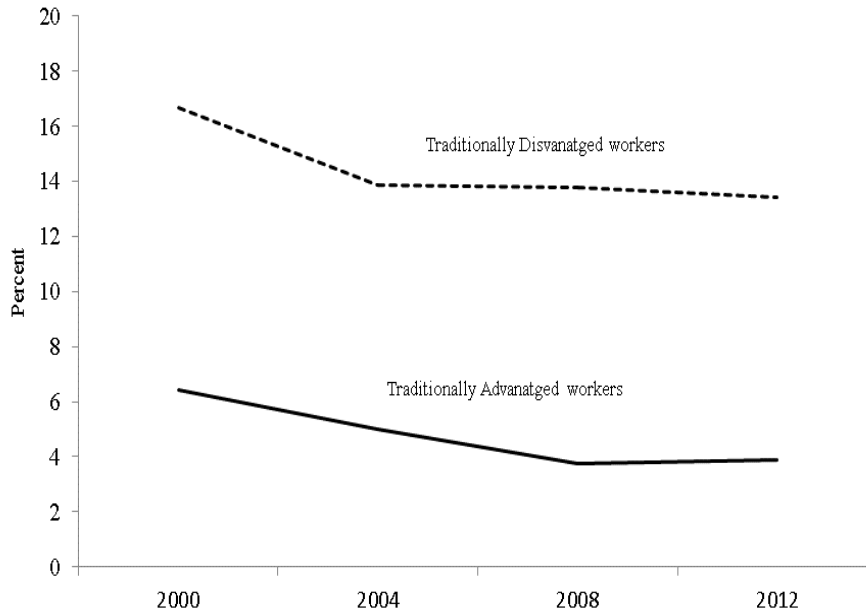
Source: Authors calculations based on Canadian Labour Force Survey data.<sup>43</sup>

What is also important to note from Figure 2 is that *relative* to their traditionally non-disadvantaged counterparts, the decline in the wage premium has been slightly less severe amongst non-standard workers than standard workers and in the case of youth the change in union wage premium between 2000 and 2012 is positive. In other words, on the whole, traditionally disadvantaged workers with access to unionisation are faring relatively better than their traditionally advantaged counterparts.

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<sup>43</sup> Each cell represents the coefficient from a log wage estimate of union coverage expressed as the percentage wage gain for a worker in each category after having controlled for all variables mentioned in section 3. Conversions from point estimates to percentages were based on Halvorsen and Palmquist (1980). <sup>a</sup> Variables indicating Immigrant Status and Aboriginal identity were not available in the Labour Force Survey until 2006 and 2007 respectively. <sup>b</sup> Models for the Aboriginal sub-group were estimated using a unique sampling weight specifically included in the Labour Force Survey to allow for comparisons to be made between Aboriginal and non-Aboriginal populations. <sup>c</sup> Sample sizes for the Aboriginal and non-Aboriginal populations do not sum to the total sample of all workers due to the fact that the Aboriginal identity question was only asked to respondents born in Canada, the United States or Greenland. Respondents born outside of these areas were coded as missing for this variable only.

Figure 2: Union Wage Premium (%) for Traditionally Disadvantaged versus Advantaged Workers in Canada, 2000-2012



Source: Authors calculations based on Canadian Labour Force Survey (LFS) data and Table 3 cell entries<sup>44</sup>.

### 4.3 Implications for Traditionally Disadvantaged Workers

As described above we see that in almost every “dimension” of vulnerability or disadvantage used in the paper, unions appear to have a relatively larger positive impact on workers. For example, unions help those at the bottom of the pay scale much more than those at the top. They also especially help raise wages for: i) females relatively more than males; ii) young workers relatively more than older workers; and iii) workers in non-standard jobs as compared to those working in standard ones. More recent evidence, since 2008, also shows that unions offer earnings boosts for Aboriginals that are greater than the effect for workers overall. In addition, despite the overall share of union coverage remaining roughly constant since 2000, the unionisation rate of those

<sup>44</sup> Note: Traditionally advantaged worker category includes the arithmetic average union wage premium of male, standard employed, and mature workers. Traditionally disadvantaged worker category includes the average union wage premium of female, non-standard employed, and youth workers.

in traditionally disadvantaged groups actually rose, offsetting declines amongst traditionally advantaged groups.

For anyone concerned with the corrosive effects of increasing inequality on society and on the declining purchasing power of consumers required to stimulate private investment and jobs, these findings point to a very well known cure: by improving access to union membership for workers desiring voice and representation (something in keeping with recent Canadian Supreme Court rulings on access to Freedom of Association rights at work)<sup>45</sup>, governments may well be inadvertently solving several other economic and social problems at once. Given the rise in inequality observed across most developed economies, these findings point to the powerful redistributive role that is still being played by organized labour.

Having said this, our findings are subject to the usual set of caveats in empirical work of this kind. First, the one exception in positive associations appeared to be for immigrants where the union wage premium was greater for non-immigrant unionists than immigrant unionists, exaggerating the earnings differential found between the groups already. Second, there are likely strong selection effects into both unionised jobs and into permanent full time work that are not being captured in our estimations. Third, though the LFS has the advantage of providing a large sample and many observed control variables, it does not contain information about non-wage benefits, which is where unions are likely shifting their influence as wage gains become harder to achieve. Finally, our models did not control for the presence of children in the household, a smaller point that could be fixed in future work and which may be significant for our estimates in the male and female models.

## 5. Conclusion

As noted in a recent survey of union wage effects: “Politicians on both sides of the Atlantic have recently called for the removal of bargaining rights from workers in the name of wage and employment flexibility, yet unions often work in tandem with employers for mutual gain based on productivity growth. If this is where the premium originates, then firms and workers benefit. Without union’s bargaining successfully to raise worker wages, income inequality would almost certainly be higher than it is.”<sup>46</sup> We are in agreement

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<sup>45</sup> Adams, Roy J., “Bringing Canada’s Wagner Act Regime into Compliance with International Human Rights Law and the Charter,” *Canadian Labour and Employment Law Journal*, (2016), 19:2 CLELJ 365.

<sup>46</sup> A. Bryson, p.10.



with Bryson's assessment and would add that based on Canadian data at least, unions appear to be mitigating the effects of greater polarization even more strongly for those traditionally seen as most vulnerable in the labour market.

Our data show that despite a general perception of declining bargaining power, unions continue to maintain representation rates overall and even appear to be gaining coverage amongst women, non-standard workers, youth and amongst Aboriginals (see Figure 1). Unions also generate a wage premium in Canada, one which again is relatively larger for traditionally disadvantaged labour market participants (see Figure 2). Taken together, the results of this study clearly suggest that in every dimension of vulnerability or disadvantage used in the paper, unions appear to have a positive impact on workers' earnings that is larger than that of the overall labour force. The findings support the powerful redistributive role that unions can still play in contemporary economies, albeit over a smaller share of the workforce in most countries.

Throughout the study we make the point that we are not testing (nor arguing) whether unions are the sole or "true cause" of higher wages, nor are we trying to ascribe how much of the union premium (based on controls for observable differences) is being captured by true "union effects" as opposed to unobserved differences amongst workers that we simply cannot capture and which may be correlated with unionization (i.e., individual productivity). Rather, we assume that any of these unobserved differences are not systematically related *within* groups of workers in our analysis but rather between individuals in each category (i.e., between young and old workers but not within each age group, after controlling for all observables etc.). In this way then, the differences in any wage premium observed within these groups can be more confidently ascribed to differential union influence.

## Freelance Journalists do not Work ‘for Free’

Richenda Power, Phil Sutcliffe, Magda Ibrahim \*

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**Abstract.** The National Union of Journalists (NUJ) has supported media industry workers since 1907. It classifies an increasingly wide range of activities as ‘journalism’ and its membership profile has changed accordingly. The proportion of freelances to staff continues to rise, reaching 30% of nearly 27, 000 members (over 40% of new members since 2013). Freelances need to know their rights when negotiating contracts, including clauses covering copyright, rates of pay and getting paid on time. The NUJ provides training, support and advice on such issues. It is also committed to Equal Opportunities to enable fair representation and attention to diverse needs. Power reports an analysis of the composition of the London Freelance Branch (LFB) membership, noting patterns of change. The work is a contribution to ensuring appropriate support of BAME, disabled and women members. LFB alone comprises almost 4000 members, from London, SE England, the rest of UK, Europe and worldwide.

**Keywords:** *freelance; journalism; inequality; trade union*

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\* Richenda Power (corresponding author: richendapower@btinternet.com) is a member of the LFB (and its committee) with a background in sociology. Phil Sutcliffe is an NUJ Member of Honour, a member of LFB committee and the NUJ’s Freelance Industrial Council. Magda Ibrahim is one of the two Equality Officers for LFB. She contributed the section ‘Freelances reporting inequality’. Several other London Freelance Branch members and NUJ staff have contributed to this article, in particular, Sonya Thomas, who provided detailed constructive criticism, but any omissions and errors are the lead author’s responsibility.

*“Pay? We usually don't do that, it's your honour” to be published at all.*<sup>1</sup>

A ‘New members’ panel’ held at the London Freelance Branch of the National Union of Journalists on April 11<sup>th</sup> this year, raised the key issue of work being expected for free, whether for interning, moderating websites on a ‘no contract’ basis, or being told ‘it’s your honour’ by editors.

## Introduction

Participatory action research is perhaps what you would expect within a union, a glimpse of which is reported here. The National Union of Journalists comprises numerous branches of members, and appoints a handful of paid officers. Branches elect their committees every year, and members take on voluntary roles, such as chair, secretary, treasurer, equality and training officers. The London Freelance Branch (LFB) committee has been discussing how to ‘refresh the branch’, partly to encourage new members to join and to retain existing members.

Maintaining and increasing membership has been an important issue across all trade unions since the beginning of the 21<sup>st</sup> century. Within LFB, a discussion about this had gone on face to face and in email between committee members and the paid Freelance Organisers, John Toner and Pamela Morton, for some years (2011-2015). One idea had been to design a survey which would encourage engagement by members, getting more people actively involved. Unfortunately one of the key survey design team left the branch, and the design was not completed. In February 2015, committee member Richenda Power volunteered to take a look at that to see whether and what of it could be resurrected, with reference to the record of the discussion. This article results from that starting point, and should be seen as a snapshot of a wider involvement of many people in a constantly developing organisation. Many are making substantial contributions that are actively changing the picture. Every new member who joins is welcomed as another contributor to active participation in the union.

Firstly some key definitions are provided, and a brief outline is given of some of the ways in which the Freelance Organisers have been supporting members. Then a snapshot of the branch is explored together with a report of some of the activities ensuing. Discussion points arise during exploration of the data, on which other union members are already taking action.

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<sup>1</sup> M. Salusbury, *What new members want*, in *The Freelance*, 2016, May [online] Available from <http://media.gn.apc.org/fl/1605want.html> (accessed 30 May 2016).

Who are journalists? The NUJ website displays the following statement:

The NUJ rules state that "[t]he union shall consist of journalists, including photographers, creative artists working editorially in newspapers, magazines, books, broadcasting, public relations and information, and electronic media; as advertising and fashion photographers, advertising copywriters, editorial computer systems workers [...]

The NUJ represents journalists working in a broader variety of roles than those listed in the Office of National Statistics (ONS) category - our members also include photographers, producers, presenters, website managers, content providers, advertising copywriters, designers, social media officers, bloggers, podcasters, press officers, communications officers, photo and video journalists. Some of our members working in magazines, books, Public Relations (PR) and communications don't call themselves journalists but they are still members of our union.<sup>2</sup>

This difference in categorisation makes it difficult to contextualise statistics from the union against ONS figures for patterns in gender, ethnicity and self-employment, for example. Nor is it possible to write comparatively about patterns in membership figures together with findings from such surveys as those of the National Council for the Training of Journalists whose 'nature of communication of the[ir] survey... was (mainly) via employers'<sup>3</sup>, and whose definition of a 'journalist' may also differ. Similar caution should be applied to Thurman et al.'s survey<sup>4</sup> as their sample is taken from Gorkhana, which may operate on a different baseline definition. Also, figures would need to include the Republic of Ireland, as the NUJ, formed prior to the division, includes journalists working and based there.

A basic distinction is drawn between those journalists who are employed (often referred to as 'staff'), and those who are 'freelance', although some freelances may have regular freelance contracts with certain news outlets. No distinction is maintained between those with or without training.

A history of the first century of The National Union of Journalists was published to mark this, in 2007. In their conclusion, Gopsill and Neale wrote: 'The union has been coming to terms with a period of technological change as

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<sup>2</sup> National Union of Journalists, *Welcome to the NUJ*, *The National Union of Journalists website*, 2016 [online] Available from <https://www.nuj.org.uk/about/> (accessed 29 August 2016).

<sup>3</sup> National Council for the Training of Journalists, *Journalists at work. Their views on training, recruitment and conditions*, 2013, National Council for the Training of Journalists, [online] available from [http://www.nctj.com/downloadlibrary/jaw\\_final\\_higher\\_2.pdf](http://www.nctj.com/downloadlibrary/jaw_final_higher_2.pdf) (accessed 29 August 2016).

<sup>4</sup> N.Thurman, A. Cornia and J. Kunert, *Journalists in the UK*, Oxford, Reuters Institute for the study of Journalism, 2016, University of Oxford. [Online] available from <http://reutersinstitute.politics.ox.ac.uk/publication/journalists-uk> (accessed 29 August 2016).

drastic as any it had to weather during the previous century...’ arguing that ‘the need for a union is as strong as ever, to maintain both decent conditions and decent standards of work. It is important that our community remains independent, autonomous and democratic – not just for journalists, but for the whole of society’<sup>5</sup>. Those words seem even more important today. Beyond ‘technological change’, many challenges to press freedom and freedom of expression in general, as well as to workers’ solidarity in trade unions, continue and have to be fought.

### Freedom and Freelance Work

There are benefits and constraints or challenges to being self-employed as a journalist. On the plus side there are several freedoms: the journalist can choose when, where and how to work, on what topic, at what rate and to preserve freedom of expression.

On the other hand, freedom may also be lonely, and result in isolation, poverty, lack of representation and insufficient work (all factors which can be inter-related). In some contexts, using the right to freedom of expression can result in being arrested, imprisoned and fined, or worse.

Challenges to that freedom mean freelances need to know how to negotiate appropriate commissions and get sufficient pay for those (not a ‘zero’, nor an unpaid internship), from commissioning editors, who do not think the ‘honour’ of being published is enough reward or that an unpaid internship is worth it purely for the experience. Even once commissioned, freelances need their contracts honoured so they do not have to wait for months or years to be paid. They should not give their copyright away or have their work sold on without their knowledge or permission, and should not sign to accept personal responsibility rendering them vulnerable to legal action for their contributions. (Some challenges require legal representation, which may be provided through the union’s solicitors.)

Managing such challenges is vastly helped by joining the National Union of Journalists. Then individuals become part of a collectivity of voices and experience of over a century, and gain access to expertise on negotiating contracts, ‘rates for the job’ (compiled regularly from members’ actual reports), copyright, keeping safe from surveillance and accusations of libel, and more.

Being in the union is not just about gaining access to advice, legal services and training, but about making change collectively, to pose challenges to under-

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<sup>5</sup> T. Gopsill and G. Neale, *Journalists. 100 years of the NUJ*, Profile Books, London, 2007, 330-331.

representation of diverse voices in the media, to interrogate and expose upcoming legislation that attempts to impose unfair contracts or undermine copyright or to extend the surveillance of the state so that investigative journalism would become impossible. And, to actively and continually take a stand for press freedom.

### A 'Free for All'?

The union does not include those who have been called 'citizen journalists', as membership requires demonstration of earning a living from journalism. Nevertheless, there is a tension between those, such as 'citizen journalists', who supply material 'for free', and those who are working as journalists. For example, the free large scale supply of readers' photographs to national newspapers has inevitably had an impact on freelance photographers in terms of the availability of commissions.

In the past there had been conflict between 'staff' and 'freelance' journalists, as sometimes 'staff' took on 'freelance' work and were seen as reducing the available work opportunities for freelancers. The union stepped in to address these matters in the past, but this has not been at issue in recent years.

More significant now is an expectation that journalists can supply material in all formats, i.e. 'multimedia'. A 'Robohack' was invented as a model in 1993: 'a prophetic fantasy to illustrate the multi-skilled journalist of the future, ... created for the *Journalist* by photographer/montage artist John Harris'.<sup>6</sup> 'Robohack' has a satellite dish sprouting from the back, a laptop balanced on the right forearm, an old-fashioned reporter's notebook slung round the neck, a mobile phone in the left hand, a mike attached to the left shoulder, and a cine camera to the right eye. Five years earlier the union's General Secretary, Conroy, had made just such predictions. 'It was not appreciated then that one device might perform all these functions, but the point that multiskilled work would blur traditional craft distinctions was spot on' according to Gopsill and Neale<sup>7</sup> in their report of Conroy's attempts to merge several unions at that time.

Being a 'RoboHack' is an expectation so normative now that one of our committee members, David Wilkins, 'a journalist with visual and hearing disabilities [was recently told] on a training course... :

"If you can't do video (or social media) you can't be a journalist any more."<sup>8</sup>

<sup>6</sup> Gopsill and Neale, *op. cit.*, 190.

<sup>7</sup> Gopsill and Neale, *op. cit.*, 190.

<sup>8</sup> Salusbury, *op. cit.*

Clearly the training provider's expectation needs scrutiny and challenge for its ablism, but also for its assumption that every journalist can be appropriately trained to perform well across all media.

There are divisions between interest groups in the union over the provision of trainings for 'everything you can do on an iPhone' for example. The photographers' branch in particular has been fighting such provision, seeing it as undermining their own expertise and knowledge.

So, to summarise, there are threats to survival for professional journalists, both from outside the profession, from 'citizen journalists', and from within, in terms of challenges to ownership and use of specific sorts of production, such as words, photographs or film.

### A 'Collective Ethos in Freelances'

Fiona O'Cleirigh, current chair of the London Freelance Branch of the NUJ, wrote last year on the 'challenges of encouraging a collective ethos in freelances' while citing a number of recent initiatives to support freelances, such as conferences on "New ways to make journalism pay" ... [and] Freelance Salon, a series of networking and training events...<sup>9</sup>

Judging by the increasing proportion of new member applications by freelances to the NUJ in the last few years (more than 40%), it would seem that the value of that 'collective ethos' is being appreciated, although O'Cleirigh points out that people may join for two different reasons: 'to participate in the wider trade union movement...[or for the union's]... role as a professional association'. However, while 'the conflation of the two might lead to confusion over objectives at times, ... both approaches focus on the strength of the collective'.<sup>10</sup>

Freelance Organiser, John Toner, presented a paper on 'Freelance Futures' in 2012, which noted the increasing proportion of freelance journalists in the union, as well as drawing attention to changes in the way freelances work, based on his observations. He proposed that a detailed discussion of the type of services the union provides should occur as 'more freelances will follow the entrepreneur model of running a business' rather than working for one client, say a newspaper, as a 'casual'.<sup>11</sup> There are implications for organisation as well as the consideration of the extent to which a union should assist members in relation to their business.

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<sup>9</sup> F. O'Cleirigh, *We're all in this together*, *The Journalist*, 2015, July/August, 12-13.

<sup>10</sup> F. O'Cleirigh, *op. cit.*, 13.

<sup>11</sup> J. Toner, *Freelance Futures*, discussion paper, National Union of Journalists, London, 2012.

In the past, the phrase ‘Servants without masters’, with its negative connotations, was one way of describing freelance workers. It was used as a subtitle by Gopsill and Neale, above an account of NUJ freelancers opening ‘an email discussion group called “CatHerds”’ because ‘[t]rying to organise individual self-employed journalists into a trade union, it was felt, was like trying to herd cats’.<sup>12</sup> Yet the attempt to ‘organis[e] the unorganised’ has not been confined to freelancers, nor to our union, as Heery reported: ‘It has been argued widely that if trade unions are to experience renewal then they must invest in [this] and align their strategies of interest representation with the needs of women and those in atypical employment’.<sup>13</sup>

And it is the members flowing in that refresh and renew trade unions, bringing in new perspectives and additional value.

### Refreshing the Branch

The note of optimism on which Gopsill and Neale closed their history, claiming the union was growing (‘rose to 41,000 in 2006’<sup>14</sup>) is sad reading retrospectively, since the global recession of 2008, through which membership of most unions shrank considerably. By 2014, overall NUJ membership was down to about 30,000<sup>15</sup> and multiple decisions had been taken to reduce overheads. Discussion about refreshing and renewing the branch took place in this context.

When looking at the LFB committee discussion report and the part-worked survey questionnaire, the first questions arising were to do with the aims of the survey enquiry, e.g.:

- What sort of knowledge is wanted, from whom, why, and to what end?
- Could some of this knowledge be accessed from existing records?
- Could some questions, in future, be asked of new applicants for membership?
- Do we want to target members who never attend branch meetings and find out what their interests are?

These sorts of questions needed answering before deciding on the kind of research design appropriate. Targeting members who don’t attend meetings

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<sup>12</sup> Gopsill and Neale, *op. cit.*, 52.

<sup>13</sup> E. Heery, *Sources of change in trade unions*, in *Work, employment and society*, 2005, vol. 19, no. 1, 91-106.

<sup>14</sup> Gopsill and Neale, *op. cit.*, 331.

<sup>15</sup> M. Stanistreet, *General Secretary’s report*, in *National Union of Journalists. Report to Delegate Meeting, 2014. Eastbourne*. 2014, 10.1



was certainly one hope. However these very members might also be people who don't have time or the inclination to answer standard survey questions that can be analysed statistically. In general, response rates to surveys have been falling, perhaps partly because of the increasing frequency with which surveys are being used online every day. There had been talk of possibly buying in an independent survey company to design one for the branch. However, it can waste time, energy and resources to ask questions that could be answered from analysing existing records, such as:

- a) Membership applications, information from which comprises the database.
  - b) LFB branch meeting and training day attendance records.
  - c) Branch and Freelance Organiser records of requests for help.
  - d) New members lists.
  - e) Lapsing subscriptions that can trigger contact.
- (Use of these resources is reported below.)

a) LFB committee gave the go-ahead to look at what is already regularly analysed, so an interview with Bernard Roche, head of finance and membership for the union, was arranged. This was instructive, as the nature of the records is clearly arranged for tracking membership subscriptions rather than allowing any analyses which might attempt to look at intersectional issues, relating, say, gender and low income, or ethnic minority status and access to training resources. Nor is it possible to conduct comparative analyses across time within that database, as it only displays what is current. (Data protection law applies, so access to the database is restricted to finance and membership personnel.) Regular quarterly statistical analyses are provided by Roche for the union as a whole, and data from ethnicity, gender and disability questions are passed to the Equalities Office for monitoring. The membership application form poses standard questions about ethnicity, and asks 'Do you consider yourself disabled?'. Only very recently has the 'gender' question (M or F?) been altered to include 'Transgender'. That and sexuality questions now accompany the ethnicity and disability questions on monitoring forms used at meetings and training sessions.

b) LFB branch meeting and training day attendance records have not so far been analysed, but could be.

c) Freelance Office records of the main sorts of requests received for help from members were provided, ranked in order from most frequent to least, in descending order of frequency:

Non-payment  
Copyright infringement  
Contractual advice  
Employment rights  
Contractual disagreements  
Copyright advice  
Obtaining a Press Card  
Insurance  
The right to photograph  
Defamation

Non-payment is the issue the new members' panel quoted above highlighted: a perennial issue, for which union clout can make a serious difference. Contract, copyright and defamation law have been topics for branch meetings and frequent articles in *The Freelance*, whose editors are LFB committee members, Mike Holderness and Matt Salusbury. Further information is available on the London Freelance website<sup>16</sup>. Training in numerous aspects of journalism as well as in trade union work is also available. In 'Freelance Futures'<sup>17</sup>, Toner asked whether the range of services should be broadened, for example, to cater for members who self-publish, pointing out that this moves 'away from traditional trade union issues, including the most fundamental of all: representing workers to their employers/clients'.

d) New members' names are read out at each branch meeting, of which there are 11 a year (not August). Since Fiona O'Cleirigh became chair in 2015, she has invited new members at the meeting to speak briefly about their work so this has helped all present to get to know them. Also, since autumn 2015, new members who would like to can have their photograph taken by Hazel Dunlop for publication in *The Freelance* online. This is an additional way of welcoming them and another opportunity to announce their line of work.

e) 'Lapsing' members' information is provided to the officers of the branches once three monthly subscriptions have been missed, so this is an opportunity to speak with a member, and ascertain their reasons for leaving, if that is their intention. Mainly, in the most recent follow up of 'lapsing' members, it turned out that contact details had not been kept up to date, but, of the minority who were contactable, most wanted to stay in the union, which was reassuring.

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<sup>16</sup> London Freelance Branch, National Union of Journalists, home page [online] available at <http://www.londonfreelance.org/lfb/index.html> (accessed 29 August 2016)

<sup>17</sup> J. Toner, *op. cit.*

Contacting members can be useful in terms of gathering information about challenges and constraints people are facing, such as not being able to get childcare to come to evening meetings, or difficulties with maintaining income, in which case advice to request a lower rate of membership can be provided, or welfare officer referral, or pointing to training opportunities.

### The London Freelance Branch

LFB committee suggested requesting a regular breakdown of the branch's statistics, showing how many people are in each of the categories that the application form provides. The first one of these 'snapshots' was provided in August 2015, another in February 2016. A basic descriptive analysis of the August statistics was presented to the branch committee meeting in September 2015, generating a good amount of discussion. A presentation to the Freelance Industrial Council followed in October, particularly to encourage better representation of and support to Black and Ethnic Minority (BAME) members within the union against a background of information coming from published reports about disproportionate numbers of BAME journalists leaving the industry. A summary report of the initial analysis was provided to all LFB members at the Annual General Meeting in January 2016. One of the benefits of talking about this basic statistical information is that it provides a picture of the constitution of the membership and gets people talking about meeting diverse needs.

The 'August snapshot' data enabled us to start with a clearer sense of who our members are. Then we could start to look at how well the committee represents the membership and how relevant are topics and speakers at meetings, for example, in considering diversity issues. The representation of women, BAME, and members with disabilities on committee appears to have increased over the last three years. We could do better in terms of diversity in terms of speakers, which may result from the 'unconscious bias' of people's contacts, such as those Harris and Ogbonna unearthed in their study of shopfloor 'ethnic gatekeeping'<sup>18</sup>.

Total LFB membership last August was 3665, **60%** based in London, **32%** in South East England, the rest across Britain, the republic of Ireland and continental Europe. Freelancers are usually allocated to LFB by the NUJ Membership team, although members can choose to be in, or attend other branches according to their interests e.g. Book or Magazine branch. The

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<sup>18</sup> L. Harris and E. Ogbonna, *Ethnic gatekeeping on the shopfloor: a study of bases, motives and approaches*, in *Work, employment and society*, 2015, vol. 30, no. 1, 59-76.

geographical composition means it is not possible to compare LFB patterns to general London-only statistics. The equality questions on the membership application form provided the following data:

**ETHNICITY:** 78% all 'White' categories; 12% did not answer; 10% all other categories put together, e.g. Asian (of which, 4 categories); Black (3 categories); Chinese (3 categories) and so on, mainly based on the 2011 Census categories (see Appendix 2 for more details). This is lower than expected when compared to the ONS analysis of the 2011 census material on ethnicity and the labour market, which stated that around 'one in five people (19.5% of the population overall) identified with an ethnic minority group'.<sup>19</sup>

**DISABILITY:** Only 0.9 % answered 'Yes' to the question: 'Do you consider yourself to be disabled?'

This is extremely low at 0.9%. Members may have become disabled since joining, yet have not updated the union, and may not have been advised to do so. In the general population, 16% of working age adults, increasing to 45% of adults of over State Pension age, have some form of disability according to the Office of Disability Issues and the Department of Work and Pensions.<sup>20</sup>

Also, question wording can in itself affect answers. One member said that they did not consider their condition to affect their journalism, for example. 1.6% did not answer the question; 97% answered 'No'; 0.5% put 'Rather not say'.

Knowing about particular requirements is essential to successful participation in, for example, branch meetings. Members with visual difficulties need the agenda sent electronically; those with hearing difficulties need induction loops, and speakers need to use microphones consistently; space needs to be kept for wheelchair access and lifts need to work; rest breaks may be necessary for those with 'invisible disabilities'. As the information is not passed to branches, we need to seek this from members in order to be inclusive.

It may be worth revising the way that some questions are asked on the membership application form, as well as reminding members that they can update their data with the membership department. Another issue is that there

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<sup>19</sup> Office of National Statistics, *2011 Census: Ethnicity and the labour market, England and Wales*, 2014, 2 [online] available at <http://www.ons.gov.uk/ons/rel/census/2011-census-analysis/ethnicity-and-the-labour-market/rpt-ethnicity-and-the-labour-market-2011-census--england-and-wales.html>

(accessed 29 August 2016)

<sup>20</sup> Office of Disability Issues and the Department of Work and Pensions, *Disability facts and figures*, 2014 [online] available from <https://www.gov.uk/government/statistics/disability-facts-and-figures> (Accessed 30 May 2016).

are interest and campaigning groups within the union such as '60+', 'Black Members Council', which members can join, but may not realise that this has to be done actively, as the answers to questions on the membership application are only used for monitoring purposes, not for allocating members to such groups. Opportunities to remind members about these matters could be taken at branch meetings, in emails to members and in publications online and in print.

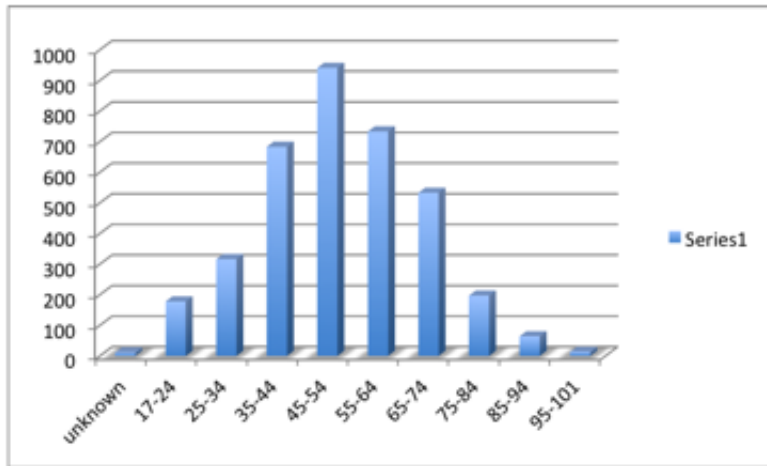
**AGE RANGE:** Age bands have been displayed in age ranges so as to look at any pattern graphically.

Student members may account for most of the members of age 17 to 24. We want to ensure they become full members, and provide well for the needs of those under 40. This is a continuing discussion within the union. Within LFB discussion is being conducted by members who have recently joined since graduating, for example, our vice chair Zaki Dogliani, who is actively involved with the Student Publications Association.

It is possible to wonder whether the proportion of journalists continuing to work beyond the age of 64 is relatively larger than that for the working population as a whole. It could be that journalism is a profession that keeps some people mentally active, healthy and earning. Or it could be that without adequate pensions, they have no choice.

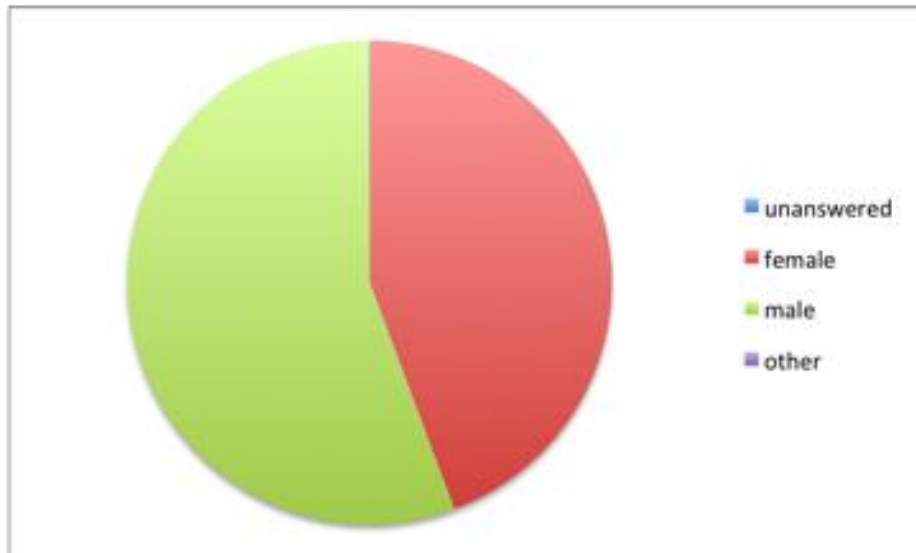
It could be useful to look at the intersection of gender and age patterns in membership, as it might be that people come into the freelance branch when they manage caring in the family, often a female responsibility.

Table 1. London Freelance Branch members, age ranges, August 2015 (n=3665)



### Gender

Table 2. London Freelance Branch, a pie chart representing nearly 56% identifying male, 44% female.



Source: LFB, August 2015

We can ask what this proportion means compared to that in the working population at large, but also we could look at patterns within the freelance sector compared to the rest of the union. The Office of National Statistics (ONS) looked at employment patterns and gender and found that women were less likely to be in self-employment than men, so our sector may be an exception. However, we don't have data about earnings (with the exception that some members will be on lower subscriptions if they request this, but not all will, where gender inequalities are in evidence nationally:<sup>21</sup> this would be worth looking into.

LFB data was again provided in February 2016, showing an overall increase in membership, from 3665 to 3861. Comparing August with February, the highest proportion of new members by region was from Continental Europe at 16%, but this only relates to 4 members more than a previous 25. Both London and the South East of England saw a 5.4% increase, but South West England had a 9.6% increase (from 83, to 91). London based members still form almost 60% of the total, and the South East proportion remains just below 32%.

However, some other changes may be worth noting: of those members classifying themselves as Black (this may be of 'Black/Black British of African origin', or 'Black/Black British of Carriibbean origin', or 'Black/Black British of any other origin'), there has been almost a 30% increase on the previous total (77 in August to 100 in February), a 23% rise of those identifying within the 'Asian' categories, and 14% within the 'Mixed race' categories. Whether this is evidence of shifts in the industry from 'staff' roles to freelance status, or possibly from graduates who have been unable to secure employment, is not possible to say. It would be necessary to make enquiry of these members, which could be done. It could also be useful to compare the London Freelance Branch picture with that of London-based 'staff' membership.

Comparing those who placed themselves within the 'White English' category: there was a decrease of 33 cases, from 2095 in August to 2062 in February, a percentage points change of 1.5%, although still the majority (57% of the total branch membership in August 2015, 53% in February 2016). Again, interpreting this is difficult, as it could be that more people are now choosing to use other White categories, which show increases, such as 'White ...of British origin', '... of Irish...', or '... of Scottish' (NB all except 'Welsh' showed increases). Naturally some 'lapsing' occurs because of death, and it

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<sup>21</sup> Office of National Statistics, *Self employed workers in the UK, 2014* [online] available at <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> (accessed 29 August 2016).

could be that a detailed analysis could be done of the intersection of age and ethnic category, which might be predicted to show a greater proportion of 'White English' with age, in line with the changing picture in the general population.

Certainly, Elizabeth Ingrams, LFB's Membership and New Members' Officer, reports that in terms of who comes to 'New members' meetings, held in a café every three months, youth and diversity of all kinds appear. One might contrast this picture with the hackneyed old white male middle class model of a journalist.

But whether the branch is meeting everyone's needs is a continuing issue. It is good to have a union statement on commitment to equality, but on the ground, detailed enquiry into how things work in practice is essential, within the union as much as within the industry as a whole. As Tunde Ogungbesan, Head of Diversity, Inclusion and Succession at the BBC, put it, on the issue of unconscious bias training: 'Many people who think they get racism and diversity, don't. They need help'.<sup>22</sup>

### **Freelances Reporting Inequality**

(this section is by Magda Ibrahim)

The NUJ's London Freelance Branch equality officers, Magda Ibrahim and Safiullah Tazib have launched a long-term survey into the issues affecting members as part of a drive to define what equality means for journalists in the age of freelancing.

The survey – which is currently running online and as a printed handout questionnaire distributed to members at branch meetings – launched on 14 March 2016, has a mix of defined and open-ended questions to allow members to share their views and experiences of their freelance work.<sup>23</sup>

We are asking respondents to let us know in which areas they may experience discrimination, such as gender, race, religion, sexuality, disability, age or any other area, as well as to describe their experiences and how the NUJ may work towards overcoming the challenges they face.

Overwhelmingly, the responses so far have identified two main areas in which members feel they have experienced discrimination: gender and age, although

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<sup>22</sup> R. Power, *Putting diversity into journalism*, in *The Freelance*, 2016, May [online] Available from [http://www.londonfreelance.org/fl/1605vine.html?i=flindex&d=2016\\_05](http://www.londonfreelance.org/fl/1605vine.html?i=flindex&d=2016_05) (Accessed 31 May 2016)

<sup>23</sup> Equality in the age of freelancing – a survey for NUJ London Freelance Branch members': <http://goo.gl/forms/bp7479nZS5>



disability and sexuality have also been highlighted.

Comments include:

There is a severe lack of women being promoted in my immediate workplace. (female freelance journalist working primarily in the offices of ... [a national] newspaper)

I've experienced sexism in many places - men being paid more and promoted more, men being patronising.

The high cost of childcare in London means that unless you are able to alter working patterns and hours, pay may not even cover the costs.

Suspect that difficulty of finding work may be related to being considered too old to need work - not so! Old people must eat, too.  
Some clients think that freelancers should be grateful for the work they commission. I was asked to provide an exclusive story I had pitched to one client for free as a "gesture of goodwill" for all the work they give me!

[In my case it is with] gender (F), disability... and age that I notice discrimination in the sense of: not always being adequately listened to; suggestions I make not being taken up, or being not noticed or instantly dismissed; meetings being held at places or times that don't suit my capacities.

We plan to run the survey as a year-long project, including the online responses and face-to-face interviews, with the aim of identifying challenges and finding practical ways the NUJ's London Freelance Branch may be able to help overcome the issues.

## Conclusion

It is an exciting time to be involved in journalism, especially with the freedom that being freelance affords, in the ever-broadening field of opportunities that technological change has enabled. At the same time, the potential for feeling isolated and powerless is very great, which is why union membership is essential. To have the privilege of access to the moving picture of LFB membership statistics is an honour. Although far more detailed analysis and contextualisation could be done, it is hoped that a flavour of possibilities and ensuing questions for discussion, reflection and action within the branch has been provided here. Some opportunities to encourage greater involvement of members have been identified:

- altering questions on the membership application form;
- informing members at meetings, by email and in *The Freelance* in print and online about the need to keep details up to date within the membership database (e.g. contact details; disabilities);
- informing members that although they provided information on the application form, they have to actively join groups such as the Black Members Council, the 60+ group, and so on.

Face to face in depth interviewing is time-consuming work necessary to gather the richly detailed information that will help ensure that the branch fulfils its promise to support all freelancers, and this is an example of how union members in voluntary office, Magda Ibrahim and Safiullah Tazib, the LFB equality officers, are participating in enquiry and action. Other initiatives being explored by the committee, for discussion within the branch meetings, are unconscious bias training, and having a facilitated five-year strategy planning session.

This article provides an example of how volunteers working alongside union staff are participating in cycles of inquiry, action, review and further inquiry. It is to be hoped that these very activities, and the reporting of them, here and within union settings and publications may encourage the expression of 'voice' from those who may have felt unsupported and silenced before. It is likely that the very people who may have been inclined to remove themselves from branch or committee involvement, or even union membership, may in fact have most to give in terms of a richer range of perspectives and experiences, to the union itself and to journalism. To reiterate Gopsill and Neale's statement: 'It is important that our community remains independent, autonomous and democratic – not just for journalists, but for the whole of society'.<sup>24</sup> We need only look at current mainstream discourse on the movement of people in and around 'Europe' to see how very necessary this is.

## Appendices

1. The UK standard classification code published by the Office of National Statistics lists a series of roles defined as journalistic. These form the single occupational group of "journalist, newspaper and periodical editors" and include:

- art editor
- broadcast journalist

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<sup>24</sup> T. Gopsill and G. Neale, *op. cit.*, 331.

- columnist
- commentator
- communications officer
- copy editor
- court reporter
- critic
- diarist
- editorial director
- editor
- editorial manager
- feature writer
- freelance writer
- journalist
- listings editor
- leader writer
- foreign correspondent
- newspaper correspondent
- newspaper editor
- news editor
- news writer
- picture editor
- political correspondent
- production editor
- press representative
- publications officer
- radio journalist
- reporter
- sub-editor
- sports writer
- technical
- correspondent
- turf correspondent
- writer

## 2. NUJ Membership by Ethnicity

categories used on the membership database, from the application form:

Any Other Origin
Asian / Asian British of Any Other Origin
Asian / Asian British of Bangladeshi Origin
Asian / Asian British of Indian Origin

Asian / Asian British of Pakistan Origin
Black / Black British of African Origin
Black / Black British of Any Other Origin
Black / Black British of Caribbean Origin
Chinese
Chinese British
Chinese Other
Middle Eastern or North African
Mixed Race of Any Other Origin
Mixed Race of White & Asian
Mixed Race of White & Black African
Mixed Race of White & Black Caribbean
Not Known
White English
White of Any Other Origin
White of British Origin
White of Irish Origin
White of Scottish Origin
White of Welsh Origin

# Wage-Worker, a Universal Civil Status, not Employment Dependency

Jörn Janssen \*

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**Abstract.** In the course of the 20<sup>th</sup> century the remuneration of labour has been fundamentally transformed, whilst remaining still formally based on the payment of wages or salaries for working time in employment. It is commonplace to talk about direct (net) and indirect (gross) wages. Social benefits may or may not be related to wages. Nowadays added-up income and benefits plus social services by far exceed direct gross as well as, even more, net wages and salaries. Given all these provisions, an unconditional basic income for every citizen has become a popular issue. Switzerland has put it to a referendum on 5<sup>th</sup> June 2016. However, as a basic income for everybody does not diminish or compensate for inequalities, ‘Think Network’, a Swiss trade union think tank, has adopted a different strategy based on a ‘General Income Insurance’ (Allgemeine Erwerbsversicherung). A different approach again is that of the French ‘Institut Européen du Salarial’, which advocates salaries paid out of a national wage fund to every adult person according to his/her vocational qualification, whether employed to work or in education. This paper will evaluate various approaches concerning wage relations at EU level.

**Keywords:** *Wage-Worker, a Universal Civil Status, not Employment Dependency*

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\* European Institute for Construction Labour Research. Email address: joern.janssen@btinternet.com

## 1. The Demise of the Employer-employee Relationship

It has become commonplace to invoke the “‘standard’ contract of employment”<sup>1</sup> as an ideal employment relationship in contrast to “Precarious Work and Vulnerable Workers”. First, this ‘standard’ is hardly defined and, if it is, is an ephemeral and most variable form in the development of wage relations under employer-employee relations that have largely ceased to exist. The employers as owners of stable companies have typically become anonymous as holders of shares or financial assets. Hence, the personal employer-employee relationship as the subordination of labour under capital has also lost its real basis. In an increasing number of sectors the dynamic of production has come to depend on indirect employment relations, whether through subcontracting, umbrella companies, agency labour, crowd or self-employment, to mention only the most current forms of labour contracting.

This transformation of the employment relationship was accompanied by a fundamental shift in the form and nature of the wage. For the great majority of wage-workers the direct or ‘net’ wage for working time has become the minor part of the living resources in the wage package, which consist of a variety of indirect components such as social security covering unemployment, holidays, sickness, old age etc. plus a wide range of social services and benefits covered by taxes.<sup>2</sup> In other words, the employment relationship, if we may keep using this term, is embedded in a universal statutory regime supposed to provide a living to everybody irrespective of his/her status of employment. However, the particular conditions of this entitlement to a living are still mediated through an outdated form of individual employment with an employer.

Concerning ‘precarious’ and ‘vulnerable’ conditions, both sides of the employment relationship are equally at risk. We remember that eight years ago the great states had to step in order to prevent the collapse of the global financial system. Social security and financial security are two sides of the same coin.

This present crisis in the relationship between labour and ownership in the distribution of the social product has triggered a number of responses or reactions at various levels, aiming to adapt labour relations to these new conditions. Four particular cases, isolated from each other, will be addressed in this short presentation.

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<sup>1</sup> Introduction to this conference.

<sup>2</sup> Jörn Janssen: *The Form of Wages or the Composition of the Wage Package*, London 1997, unpublished manuscript.

## Responses

- a) On 5 June 2016 the Swiss population was asked in a referendum whether every adult should be entitled to an ‘unconditional basic income (UBI). The voters decided against by a majority of 76.9%. It was, however, symptomatic that this concept, which has been discussed virtually everywhere during the last generation, was for the first time launched in an advanced economy as a matter of a democratic decision. Among other reasons, an unconditional basic income was advocated as a means to liberate citizens from having to work under the control of an employer.<sup>3</sup>
- b) Interestingly, in the same country a think tank linked to UNIA, the largest Swiss trade union, Denknetz<sup>4</sup> – or ‘Think Network – discards the ‘unconditional basic income’ and advocates instead a different approach to achieve “Work without Servitude” – “Arbeit ohne Knechtschaft”<sup>5</sup>. Instead of a universal basic income for everybody, that would not eliminate social inequalities or even enforce them, Think Network advocates a universal income insurance – ‘Allgemeine Erwerbsversicherung’, AEV – which unites all the various social security and benefit components into a comprehensive regime covering the risks of loss of income through motherhood, civil and military service, sickness, accident, unemployment, or invalidity.<sup>6</sup> It is conceived as an insurance for every person capable of gainful employment<sup>7</sup> and would therefore liberate everybody from accepting forced employment or related sanctions.
- c) Another concept to liberate labour from subordination under the arbitrary use of power of an employer is promoted by Bernard Friot<sup>8</sup> and the ‘Institut Européen du Salarial’<sup>9</sup> – ‘European Institute of Wage Labour’ – The fundamental component of the concept is the form of remuneration of labour. Production and services units pay for the use of labour into a social fund. In turn, workers are paid according to their qualification, irrespective of their place of occupation, whether in production and services or in education. Every adult is active either in one of these two

<sup>3</sup> Philippe van Parijs, *The Worldwide March to Basic Income: Thank you Switzerland!*. In Social Europe on 7 June 2016.

<sup>4</sup> [www.denknetz.ch](http://www.denknetz.ch)

<sup>5</sup> Ruth Gurny, Ueli Tecklenburg (Hrsg.): *Arbeit ohne Knechtschaft, Bestandesaufnahme und Forderungen rund ums Thema Arbeit*. Ein Denknetz-Buch aus der edition 8, Zürich 2013.

<sup>6</sup> Ruth Gurny, Beat Ringger, Ueli Tecklenburg (Hrsg.): *Würde, bedingungslos. Wie die Debatte um ein bedingungsloses Grundeinkommen fruchtbar gemacht werden kann*. Ein Denknetz-Buch aus der edition 8, Zürich 2015, p. 124.

<sup>7</sup> *Ibid.* p. 125.

<sup>8</sup> Bernard Friot: *Puissances du salarial*. Nouvelle édition augmentée, La Dispute, Paris 2012.

<sup>9</sup> [www.ies-salarial.org](http://www.ies-salarial.org)

sectors or in retirement. The maximum span of pay differentials is 1 to 6. Two other funds are established to pay for investment and administration. This concept represents a strategic vision rather than a practical programme extending the dynamics of development of labour relations into the 21<sup>st</sup> century.

- d) Finally, we are all witnesses of a development in the last about twenty years which is part of a qualitative shift in wage and, consequently, employment relations. Step by step statutory minimum wages have been enacted in hitherto 22 of 28 EU Member States. The discussion in the European Commission is now about coordinating minimum wages transnationally as a percentage of the average wage rates.<sup>10</sup> Whereas initially minimum wages were regarded as a means to prevent dumping rates below a poverty line, they are now increasingly recognised as pillars in support of the whole wage structures and instruments in international coordination, whilst the coverage rates of collective agreements are on a persistent decline. This evolution indicates above all a shift from employer-employee bargaining and dominant coverage for all workers by agreed rates towards statutory regulation of wages.

### *Wage-Workers' Status, their Share in the Global Social Product*

The term 'labour market', like corresponding expressions in other languages, is still widely used. Accordingly, workers would be supposed to sell their labour power at a market price which is the wage. Conversely, in my introduction I have sketched out how in reality, since the late nineteenth century, the wage has been transformed and become a civil right rather than the result of market forces. Consequently, nowadays the media report the figures of the share of wages in the gross national product - I would propose looking at the wider horizon of the global social product. This is the environment in which our four cases have to be allocated and assessed.

In this environment the 'unconditional basic income' may be regarded as a poor relief updated to the 21<sup>st</sup> century. In this sense it is far from attributing a share of the social product to the individual worker in proportion to his/her contribution to the process of producing and servicing. But it takes into

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<sup>10</sup> Thorsten Schulten, Torsten Müller and Line Eldring: *Prospects and obstacles of a European minimum wage policy*. In Guy van Gyes and Thorsten Schulten: 'Wage Bargaining under the new European Economic Government'. European Trade Union Institute, Brussels, 2015, pp. 327-359.



account that work is provided within as well as outside employment contract conditions.

Think Network takes a rather pragmatic approach which transcends, nevertheless, the framework of traditional social security schemes. Their “income insurance” includes, notably, wage earning during periods outside employment such as three years sabbatical, periods of further education and, of course, during motherhood, sickness, disability, unemployment, and retirement.<sup>11</sup> All these provisions implicitly include the basic income while avoiding the discrimination of those ‘out of work’. According to the calculations of Think Network, because of savings through the simplification in a coordinated insurance, the expenses of this project would not exceed those of the present day social security.

The ‘socialisation of wages’ according to Bernard Friot has its roots in the present regime of ‘cotisations sociales’, contributions to the social funds by the employers of labour. The innovation consists of the inclusion of the direct wage in this package and the identity of the wage earner - ‘salarie’ - independent from employment. Instead of the employer-employee relationship, wage-earning would turn into a civil status.

The statutory minimum wage development is included in this range of varieties in search of new models for organising the distribution of the social product because it also has certain features that represent a break with the ‘standard’ employment relationship. First, its pay levels are set by state government bypassing the labour market in the determination of wage rates. Secondly, minimum wages tend to become a uniform institution open to international or even global coordination corresponding to the global network of production and services. Thirdly, the present debate about determining minimum wages in relation to average rates aims at creating a relationship with existing wage scales, as in France and in Germany. Fourthly, the minimum wage system intends to cover the whole spectrum including ‘precarious work’ and ‘vulnerable workers’ under democratic government.

These four cases have in common that the wage as a share in the global social product is not to be determined as a component part of an employment relationship. It is defined as a right related to the civil status of the wage-worker.

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<sup>11</sup> Ruth Gurny et al. op. cit., pp. 126-9.

### Already Here and Now, or ‘News from Nowhere’<sup>12</sup>

It all depends on how the evidence of present developments is perceived and interpreted. The ‘standard’ employment relationship, the sale of labour on the ‘labour market’ at a price negotiated individually or collectively with the owners of productive assets is about to be a past regime, maintained in Europe mainly through statutory extension.<sup>13</sup> The owners, especially the big ones, have predominantly withdrawn into the sphere of financial capital and claim their share through dividends and interests. Conversely, the direct wage provides an ever smaller part of wage-workers’ living. It is revealing to read the “Policy recommendations” in the ‘ETUI Policy Brief’ on “The meaning of the extension for the stability of collective bargaining in Europe”. ... “European countries need to reconstruct their bargaining systems ... Such reconstruction would not be organised by trade unions and employers’ associations alone but would also need the support of the state.”<sup>14</sup> How far away are we from - or close to - a process of wage determination coordinated with social security and benefits under democratic state authority? Is this a vision from ‘Nowhere’ – in William Morris’ novel the land of a socialist utopia – or just a step forward from ‘here and now’?

Compared with the past, where are we ‘here and now’ looking back to ‘standard’ employment? Was it a regime without ‘precarious work and vulnerable workers’? Is there a good reason for workers to return to direct confrontation with the owners of the means of production? Isn’t it symptomatic that the peak of autonomous collective bargaining coverage almost coincided with top levels of industrial unrest and that both declined with trade union density?

This is not an argument claiming a kind of organic progress in labour relations. But it is an attempt to avoid looking at the present state of society in terms of the past, or seeking remedies against present sufferings in former conditions. The four cases of the debate presented in this paper point to a future of work under democratic state regulation, we may call it also liberated from subordination under ‘precarious’ private ownership and ‘vulnerable’ owners.

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<sup>12</sup> Novel written 1890 by William Morris.

<sup>13</sup> About the present state of coverage by collective wage agreements in the European Union see Thorsten Schulten, *The meaning of extension for the stability of collective bargaining in Europe*, ETUI Policy Brief, No. 2/2016.

<sup>14</sup> ETUI Policy Brief, European Economic, Employment and Social Policy, No. 4/2016.

# Job Guarantee as Model for Strengthening the Welfare State: The Case of the Netherlands

Kees Mosselman and Louis Polstra \*

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**Abstract.** In this article we present the Job Guarantee concept to complement the existing social security system. In the current welfare state, unemployment is high and many people have to rely on unemployment benefits or social assistance. The prognosis is that this will hardly go down in the future. Assuming a natural unemployment rate of 4.25% and an actual medium-term unemployment rate of 5.5 - 6%, the social assistance rate will move towards more or less 5%. That's a substantial financial burden. With Job Guarantee, we make use of the unutilized labor and production capacity and unutilized earning capacity. For the Netherlands we compare the net public costs of the present social assistance system with and without a Job Guarantee program, and we conclude that by changing unutilized labor capacity into production the welfare state is able to compensate for the weakest point, the low reintegration effectiveness of our system of income guarantee.

**Keywords:** *Job Guarantee, welfare state, unutilized labour capacity, structural unemployment, Modern Money Theory (MMT), basic income, full employment policy.*

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\* Kees Mosselman is PhD researcher at Marian van Os Centre of Entrepreneurship Hanze University of Applied Sciences. Louis Polstra is professor Labour Participation at Marian van Os Centre of Entrepreneurship Hanze University of Applied Sciences.  
Corresponding author: Kees Mosselman, [c.a.mosselman@pl.hanze.nl](mailto:c.a.mosselman@pl.hanze.nl)

## 1. Introduction

In March 2016 almost 21.5 million men and women in de EU were unemployed. The unemployment rate was 8.8%. The rates are declining, but there are still a lot of people having no job. Throughout Europe national social security programmes provide cash benefits to replace lost income as a result of unemployment.<sup>1</sup> Some of these programmes are employment-related, some universal and others means-tested. Employment-related programmes are based on periodic payments on length of (self) employment by the employee and/or the employer. In a means-tested programme the household resources are measured against a standard of subsistence needs. Only one who satisfies the means test receives the benefit. In the Netherlands two programmes providing the unemployed people a benefit. The Social Insurance Programme is an employment-related programme. The amount of the benefit depends on the early salary. The duration of the benefit depends on how long someone has worked, with a max of 37 months. If the benefit is less than the social minimum or if the benefit stops, the unemployed person can apply for social assistance, a means-tested supplement.

The unemployment rate in the Netherlands (May 2016) is 6,4%. But in the past employees and employers have misused the Disability Act to receive a higher and permanent benefit for employees who lost their job due to economic crises. After the turn of the century new legislation has blocked this route. Still, a lot of disabled unemployed people are able to work. The expectation is that the number of unemployed (disabled or not) will not decline. This is a burden for the national government and therefore for the welfare state. How to lower the cost of the unemployment benefit programmes? One of the possible solutions is changing both programmes into a job guarantee system (JG). The basic JG concept was developed last century by some post-Keynesian economists in the US and Australia, particularly Hyman Minsky, Randall Wray and Bill Mitchell.<sup>2</sup> A modern JG proposal provides the ability to strengthen both the social and economic foundation of the welfare states.

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<sup>1</sup> International Social Security Association (2014), *Social Security Programs throughout the World: Europe*, 2014.

<sup>2</sup> Minsky, Hyman P. (1986), *Stabilizing an Unstable Economy*, New Haven, CT: Yale University Press; Mitchell, William F. and Martin J. Watts (1997), *The Path to Full Employment*. *Australian Economic Review* 30(4): 433 – 435; Wray, Randall (1998), *Understanding Modern Money: The Key to Full Employment and Price Stability*, Northampton, M.A: Edward Elgar Publishing.

## 2. The Concept of Job Guarantee

The concept Job Guarantee (JG) is developed in the 80's, particularly in the United States and Australia in the post-Keynesian tradition. Major post Keynesians as Hyman Minsky, Randall Wray and Bill Mitchell have made a significant contribution. There is a broad consensus in the literature on the characteristics of the JG concept. Kaboub defines JG as follows: "The government guarantees a real job opportunity for anyone ready, willing and able to work at a fix socially-established basic wage (plus benefits), thus exogenously setting the price of labor" (pg 11).<sup>3</sup>

This JG concept is a specific part of the Keynesian tradition on the comprehensive government task to manipulate macroeconomic incomes and spending by increasing and / or decreasing public spending and / or taxes to reach full utilization of production capacity and to achieve full employment. In the Keynesian tradition unemployment – if higher than the number of vacancies – stands for under-utilization of the labor factor of production. Which, so is the argument, can be raised by increasing public spending or reducing taxes, or using both instruments at the same time. This policy creates a larger government deficit - or a lower government surplus. The increase of public debt would not be inflationary in this approach, because the economy is in a phase of underspending, in which only deflation needs to be feared. In the opposite case with unemployment lower than the number of vacancies there is overspending, a tight labor market and the risk of inflation. In such a situation the government should reduce its spending and / or have to raise taxes in order to restore the economic balance and to avoid inflation.

From the Keynesian point of view, it is understandable that the JG policy got attention in the United States in the 80's when it became clear that the post-war period from 1950 to 1980 of Keynesian government policy to full employment (finally) had come to an end. In almost the entire western world the Keynesian government approach was replaced for a policy combatting inflation. The ambition of full employment through fiscal and monetary policy was released. The new strategy became strengthening the potential of economic growth along neoclassical and neoliberal lines.

The post Keynesians have not accepted the new (neoclassical) policy approach to unemployment. In the Non Accelerating Inflation Rate of Unemployment approach (NAIRU) unemployment is attributed not only and primarily to demand factors but to structural and supply factors. In the NAIRU approach balance on the labor market is achieved at the so-called natural rate of

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<sup>3</sup> Kaboub, Fadhel (2007), *Employment Guarantee Programs: A Survey of Theories and Policy Experiences*, The Levy Economics Institute of Bard College, Working Paper 498.

unemployment, in which case neither inflation nor deflation occurs. This natural rate of unemployment in the country is, according to the neoclassical vision, determined by the structure of the labor market, labor law, social security arrangements, the level of the minimum wage, the tax system and the organization and functioning of labor policy and cooperation between government, employers and employee organizations.<sup>4</sup> In this vision only structural and reform policies can therefore reduce the natural rate of unemployment.

The JG concept has hardly received any attention in the European economic literature. Presumably this has to do with the principle choice made in the West European welfare states for income guarantees in combination with reintegration arrangements in case of involuntary unemployment. Kaboub provides an interesting overview of the economic literature on the unemployment problem.<sup>5</sup> He also discusses the two main JG experiments: Plan Jefes in Argentina and the National Rural Employment Guarantee Act in India. Actually more real life experience with JG is not available.

Mitchell and Muysken criticize the neoliberal politicians and governments and neoliberal orthodox economists.<sup>6</sup> They argue that the release of the full employment policy has resulted in low economic growth, high structural unemployment and the creation and expansion of a social underclass. This policy is described as an attack on the welfare system and a violation of the Universal Declaration of Human Rights. In their proposals, they stress out the possibilities of restoring the full employment approach. First, the governments of the OECD countries should leave the disastrous orthodox neoliberal policy. It is in their view in particular important that fiscal policy can again play a prominent role. Budget deficits of the state are essential if the private sector has a savings surplus. Furthermore, they perform a plea for introducing a JG program as a necessary response to the fixed basic right to decent work. In economic terms they emphasize that it is important to connect strongly the JG concept to the Post Keynesian Modern Money Theory (MMT). In this theory – to our knowledge hardly supported among academic economists in Europe – the financing of public expenditure for the purpose of achieving full employment is not considered a (financing) burden, not an increase of public debt with repayment and interest obligations, but in a sense as "free" money. Condition is that the country has its own international flexible currency. Partly

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<sup>4</sup> Theeuwes, Jules (2011), *Anatomie van de werkloosheid*, TPEdigitaal, jaargang 5(4): 37 – 49.

<sup>5</sup> Kaboub, Fadhel (2007), *Employment Guarantee Programs: A Survey of Theories and Policy Experiences*, The Levy Economic Institute of Bard College, Working Paper 498.

<sup>6</sup> Mitchell, William and Joan Muysken (2008), *Full Employment abandoned: shifting sands and policy failures*, Centre of Full Employment and Equity, Working Paper 08-01, University of Newcastle, Callaghan, Australia.

for this reason, in this theory, the formation of the Eurozone is critically reviewed.<sup>7</sup>

In recent years there has been further theoretical development of the JG concept.<sup>8</sup> JG isn't regarded solely as a Keynesian instrument (combatting cyclical unemployment) but also seen as a supply-side tool to combat structural and long term unemployment. JG can play an important role in maintaining and improving - through training, training-on-the-job and retraining - the work skills and competencies of unemployed. Wisman and Pacitti note that massive government spending, according to a classic Keynesian approach can reduce the economic crisis and unemployment, but that " ...it is far inferior to instituting a comprehensive program guaranteeing employment and the retraining necessary to enable workers to find employment in the regular economy ..." (pg 686).<sup>9</sup> They combine a budget oriented approach by the government, with stimulating demand (job creation) and a structural reinforcing supply policy (training and retraining). Training and retraining of skills is important in a fast technological and social changing labour market. Wisman en Pacitti decline the provision of social assistance if unemployed people refuse a job. In their view the refusal of a guaranteed job is to be considered as an option for voluntary unemployment. De Beer considers that it is unwise to implement an integral solution as job guarantee (or basic income) because of the high costs associated with these systems. He pleads for a compromise of certain elements of basic income and guaranteed jobs for different groups.<sup>10</sup>

### 3. A Historical Analysis of the Dutch Welfare State

In the decades after the Second World War in Europe there was broad political and societal commitment for redesigning the old welfare system. A system that protects citizens from poverty because of age, unemployment or disability. The solid structural economic reconstruction, with help from the Marshall plan, formed the financial base for implementing social security systems all over the Western countries to protect the vulnerable citizens. The welfare state was

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<sup>7</sup> Mitchell, William (2015), *Eurozone Dystopia*, Cheltenham: Edward Elgar Publishing.

<sup>8</sup> Murray, M. and M. Forstater (eds) (2013), *The Job Guarantee – Toward True Full Employment*, New York: Palgrave MacMillan.

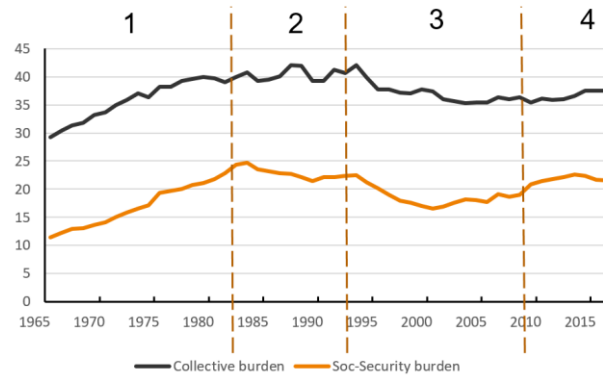
<sup>9</sup> Wisman, Jon D. and Aaron Pacitti (2014), *Ending the Unemployment Crisis with Guaranteed Employment and Retraining*, *Journal of Economic Issues*, vol. XLVIII No. 3: 679 – 705.

<sup>10</sup> Beer, Paul de (2015), *Basisinkomen, basisbaan of gewoon armoede bestrijden?* S&D, jaargang 72, nummer 3: 87 - 93.

born. We will use the Netherlands as an example for the development of social security in Northwest Europe.

In the Netherlands the completion of the welfare state ended with the implementation of the Social Assistance Act (de Algemene Bijstandswet) in 1965 and the Disability Act in 1967. Figure 1 shows the variation of the collective total expenses and conduct of the social security charges for the period 1965-2016.

Figure 1: total collective burden and social security burden (% GDP)

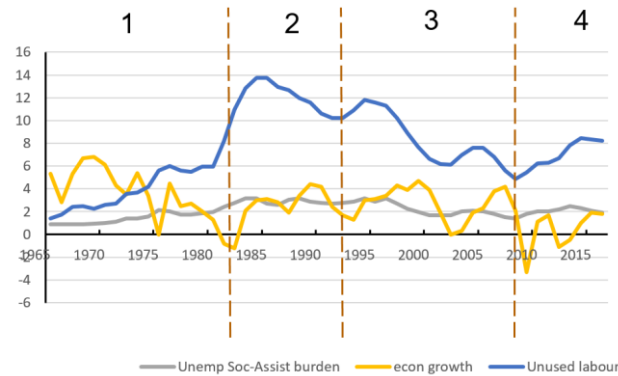


In figure 2 we present the movements of economic growth, the unutilized labour (unemployment and assistance) and the costs of unutilized labour. According to Suyker en Tollenaar (2011) we can distinguish 4 subperiods: <sup>11</sup>

<sup>11</sup> Suyker, Wim en Lotte Tollenaar (2011), Daling collectieve lastendruk zet niet door, Mejudice, 4 april 2011.



Figure 2: economic growth, volume and costs of unutilized labour<sup>12</sup>



- The welfare state has been fully implemented in the first period (1965-1982). In this period the tax burden increases to 9.6% of GDP. Almost entirely responsible for this rise in costs are the social security expenditures. This consequence of the social security system rigged during the reconstruction period was surprisingly not foreseen. For example, the Explanatory Memorandum of the Disability Act refers to a maximum of 250,000 people, while in 1990 the total number of disabled persons with a disability benefit reached nearly 900,000 people! At the preparation of the Social Assistance Act in 1965 politicians assumed a maximum of 2% of the households with a social benefit, which was already in 1969 increased to 3% and increased further. Since then only in economic boom years the percentage of social benefit receivers was between 3-4%.

- In the second period (1982 -1992) a start is made with retrenchment of the social security benefits. Correction of the rising tax burden occurs in the early 80's with the Wassenaar Agreement (1982). The cost of running high unemployment, social assistance and disability were challenged with wage moderation, disengagement of benefits and reconstruction of public spending. During this period, the cuts and economizing the social security lead to a stabilisation of the overall tax burden and to a slight decline in collective social burden (amounting to 3% of GDP).

- The decrease in the tax burden is really initiated, although still modestly, in the period 1992 - 2009. In those years the economy flourishes, except for a

<sup>12</sup> Source: CBS Netherlands Central Bureau for Statistics and CPB Netherlands Bureau for Economic Policy Analysis.

decline in 2002 and 2003, and there are further economizing of the social security system.

- In the fourth period (since 2009) we are faced with the global financial crisis with an obvious, but yet still relatively small increase in the tax burden.

When we look at the course of the unutilized labour percentage in the last half century we see that the fluctuations are almost similar to the unemployment rate, the social security burden and the total collective burden. In the 60s gradually this percentage rises to more or less 2.5% of the labour force. It rises fast to 6% in the 70s, with explosive growth in the 80s. In 1984 the unutilized labour percentage reaches the top of 14%. Due to the combination of economic growth and retrenchment of the social security the percentage slowly declines. In 2008, after the economic top year of 2007 and shortly before the global financial crisis the unutilized labour percentage is the same as in 1975, 5%. The crisis increases the unutilized labour rate to 8% in 2015. So in spite the recent years of economic recovery the unutilized labour hasn't decreased.

With this brief historical analyses of the Dutch welfare state we will explain the two major economic issues of a social welfare system:

- The financial sustainability of the system in terms of tax burden
- The economic viability of the system in terms of working capacity unutilized

The financial sustainability refers to the social and financial support of the active labor force and financial stakeholders for the level and the course of tax burden to finance a social security system.

The challenge for the financial sustainability in the Netherlands (and in other western countries) is to finance the increasing structural cost of a further aging of the population (state pensions and public healthcare costs) without a permanent increase of the total tax burden. The only way is lowering all the other public expenditures, including unemployment and welfare benefits, on a structural basis. That's an enormous challenge!

For recent and very interesting studies on this topic in the Dutch welfare state we refer to De Kam.<sup>13</sup>

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<sup>13</sup> Kam, Flip de (2015), *Het land van belofte. Opbouw, crisis & toekomst van de verzorgingsstaat*, Amsterdam/Antwerpen: Atlas Contact.

#### 4. Unutilized Labour Capacity

Our theme is the other side of the coin of the sustainability of the welfare state and concerns the unutilized labour and production capacity and therefore unutilized earning capacity. This development is an unintended consequence of:

- the arrangements of the social security system; The European systems of social security are based on the principle of income guarantee in the case a person or household has not enough means to live a decent life. Level and duration of the different income guarantee arrangements determine the unutilized labour potential. When there are no arrangements at all everybody of course is forced to supply and accept any kind of labour to provide in an income.
- the structure of the labour market; In each country the unemployment rate fluctuates around a specific structural level. This level is influenced by “ the arrangements of the welfare state, the tax system, labour law, unions and collective bargaining “. <sup>14</sup> Each country has his own constitution of these factors and therefore his own structural level of unemployment.
- the economic policy (of Dutch government and of EU); Structural economic policy serves to strengthen the structural growth and may thus diminish the structural level of unemployment (that is the natural rate of unemployment). Short-term economic policy is used to prevent or combat over- and underutilization, thereby exerting influence on unemployment. It's remarkable to note that the unemployment rate in The Netherlands (but also in other countries) has increased gradually the underlying half century. Some economists explain the cause as a result of deficient structural and cyclical government policy. So Muysken and Mitchell conclude that Western governments after the oil crisis late 70's have deliberately chosen an anti-inflationary policy and thus have deliberately abandoned the existing full employment policy (paradigm shift from Keynesian to neo-liberal policies). <sup>15</sup>
- The more or less exogenous technical and economic developments, as developments in world trade, EU monetary policy, EU budget rules and last but not least the robotisation.

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<sup>14</sup> Theeuwes, Jules (2011), Anatomie van de werkloosheid, TPEdigitaal, jaargang 5(4), pg 43.

<sup>15</sup> Mitchell, William and Joan Muysken (2008), Full employment abandoned: shifting sands and policy failures, Centre of Full Employment and Equity, Working Paper 08-01, University of Newcastle, Callaghan, Australia.

The sum of and the interaction between these characteristics determine the extent of the unutilized labour capacity. The CPB Netherlands Bureau for Economic Policy Analysis has developed three scenarios for the Dutch economy and the impact of these scenarios on unemployment:<sup>16</sup>

- Scenario 1 is full recovery of the economic situation with a growth of 2.5% of the BNP and an unemployment rate of 4.25%
- Scenario 2 is moderate recovery with a growth of 1.5% and unemployment of 4.25% (The unemployment rate of the CPB cannot be lower than the natural rate of unemployment)
- Scenario 3 is a delayed recovery with 0.75% growth and unemployment is 6.5%

Meanwhile economic achievements in 2014 and 2015 and estimates of 2016 and 2017 point out that the delayed recovery scenario may have been too pessimistic. However De Kam and Donders sketch the possibility of very modest economic growth because of a possible continued decline in the growth of labour productivity.<sup>17</sup> Most likely, according to the CPB, the Dutch economy is heading for a medium-term growth of 2% and an unemployment rate of 5.5 - 6%.

In various scenarios the pressure on the financial sustainability of the welfare state expend modestly. If we look in more detail at the categories of expenditure of the government, we see a further aging of the Netherlands until around 2040. Consequences are a permanent structural increase in state pension (AOW) and healthcare costs. To finance these increasing structural cost any other government expenditure, including unemployment and welfare benefits, should be diminished on a structural base.

Assuming a natural unemployment rate of 4.25% and an actual medium-term unemployment rate of 5.5 - 6%, the social assistance rate will move towards more or less 5%. The estimation model of the CPB takes into account the structural increase in social assistance because of young disabled, long-term structural unemployment and increased influx of asylum seekers / refugees with status.<sup>18</sup> At a 5.5% unemployment rate according to the ILO definition, the number of unemployment benefits is about 3% (full benefit of years). So

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<sup>16</sup> CPB Netherlands Bureau for Economic Policy Analysis (20124), Uncertain supply/Fragile demand. Roads to recovery, CPB book 11, The Hague.

<sup>17</sup> Kam, C.A. de, en J.H.M. Donders (2014), Onzekere zekerheden. De Nederlandse verzorgingsstaat op weg naar 2025, Den Haag: Wim Dreesw Stichting voor Openbaere Financien.

<sup>18</sup> G.Roelofs, 2012, Herziening van de WWB raming voor het Centraal Economisch Plan 2012, CPB Achtergronddocument.

we can assume that the unutilized labour rate (with social security benefits) is 8%, which is comparable to the current situation. With a population of about 9 million people in the labour force we are talking about more than 700,000 people.

### 5. A Modern JG Model for a Welfare State

What's the future of the welfare state/mixed market economy? A question asked by many scientists when they facing a substantial growth of unemployment in western societies in combination with the expected and feared consequences for employment of new technological developments. The debate seems to be dominated by supporters of two radical different concepts:

- The BIG concept: a guaranteed and unconditional basic income for everyone
- The JG concept: a guaranteed or basic job with minimum wage for everyone who is willing and able to work.

We reject the concept of BIG because in existing welfare states as the Netherlands there is convincing evidence that conditional guarantee of income on the level of subsistence minimum has substantial negative consequences on the labour supply and therefore on national income.<sup>19</sup> People with unemployment benefits put their job search behaviour in a more active mood when they facing the end of the benefit period. This effect will be enlarged when there are less conditional requirements to receive the benefit. The experiments which the followers of BIG in the modern welfare states want to start, are in our opinion therefore unnecessary. What if, as hardliners will remark, the labour supply must decline because the structural number of jobs declines for reasons of technological developments. They neglect the fact that labour productivity growth is in sustainable decline despite the introduction of ICT on the workplace. In the 60's and 70' the yearly growth of productivity was 3% and since then it is stabilized around 1%. Technological innovations have a great impact in some sectors but on macroeconomic level we see moderate effects till now.<sup>20</sup>

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<sup>19</sup> See labour supply equations in macro econometric models; see in particular CPB Netherlands Bureau of Economic Policy Analysis (2015), *De effectiviteit van fiscaal participatiebeleid*, CPB Policy Brief, 2015-02, The Hague.

<sup>20</sup> Kam, C.A. de, en J.H.M. Donders (2014), *Onzekere zekerheden. De Nederlandse verzorgingsstaat op weg naar 2025*, Den Haag: Wim Drees Stichting voor Openbare Financien, pg 205.

We opt for JG instead of BIG. Job Guarantee stands for offering (by the government) a real job with a legal minimum wage on voluntary basis. Some authors point out that refusing the job is a choice for voluntary unemployment. In that case the government is not obliged to give some sort of income supply. In our view JG has to adjust to the existing social security system of conditional guarantee of income. The adjustments have to compensate the main drawback of the existing system, actually the low reintegration effectiveness. For this purpose, we have to combine specific groups of unemployed or social assistances receivers, the conditional guarantee of income and the (mandatory) acceptance of the 'basic job'. For example, in case someone gets unemployed and gets a benefit he has the opportunity to find a job for a certain period and after that period he will be offered a basic job. Someone with a social assistance benefit is offered the job immediately.

If we want to implement a JG concept in the Netherlands we have to consider the following issues:

- It is important to avoid replacement of employees on the labour market. Therefore, the government reserves the basic jobs only for (semi) public sectors, because these sectors are financed by public money c.q. taxes. An obvious first choice is the care and education sector. Both sectors struggle with limited budgets and a large workload. At a later stage, when sufficient experience is acquired and the approach has been successful, several other public sectors could be involved.
- In the coming decades the cost of healthcare will increase because of the aging population. The need for services by professionals will grow, but also the demand of less skilled staff and volunteers will increase. If it's possible to do the same work cheaper the large tax burden of health care will not so grow rapidly.
- By creating supportive basic jobs in the Education and Health sectors for social assistance recipients and the unemployed who have little or no chance to find a regular job, two objectives could be achieved: cost and effort in the sectors care and education are limited and unutilized labour of assistance recipients and the unemployed is used productively.
- Qualified for the basic jobs are assistance recipients and the unemployed. Integration into the existing social security system of conditional income guarantees means, in our opinion, that assistance recipients with working capacity from the outset have an obligation to accept a basic job and the unemployed - of course, with working capacity - have this obligation only after a certain period in which

unemployment benefit has been received. Mutual agreement between Government, workers and employers has to agree about the length of this period. In an economic sense an unemployed person must be able during a certain period to try to find a new job by himself, because that is the most efficient way. For now we can imagine that unemployed people after a period of one year or less, if the duration of unemployment benefit is less than a year, have an obligation to accept a basic job.

- The organization of the basic jobs should put in the hands of the Work Enterprises of the existing 35 labour market regions in the Netherlands. This cooperation of employers, labour unions and government is already responsible for organizing real jobs for people with a disability. Adapting the organization is obviously necessary because the employers that offer the basic jobs are important partners.
- Warranty Jobs are available at the statutory minimum wage (per hour). This is necessary in order to ensure that the JG employees stay focused on getting a regular job. Moreover, many basic jobs will have a lower productivity than the minimum wage.
- In what way can we approach the expected revenues and projected costs of an JG approach? To this end, we make a comprehensive comparison between the current collective cost of social assistance and the new situation in which at least part of the JG target audience is employed in a JG program.

Let's consider a realistic JG program for The Netherlands.

Starting point is that JG is profitable if the net production of the program exceeds the net extra costs. In this example we compare a situation without JG and a situation with JG for a certain number of social assistance receivers.

Public costs without JG	$n \times (\text{€ } 15.000 \times 1.40)$	$= n \times \text{€ } 21.000$
Public costs with JG	$n \times (\text{€ } 16.000 \times 1.50)$	$= n \times \text{€ } 24.000$
Net extra costs of JG program		$n \times \text{€ } 3.000$
Net production with JG	$n \times (50\% \text{ basic wage})$	$= n \times \text{€ } 8.000$
<b>Net revenue of JG program</b>		<b><math>n \times \text{€ } 5000</math></b>

- n = number of fulltime jobs in the JG program  
 15.000 = amount of social assistance per year  
 1.40 = implementation and reintegration costs without JG  
 16.000 = basic wage in the JG program  
 1.50 = implementation costs in the JG program  
 50% = net added value on average by JG employees

For the purpose of a macro-economic forecast we assume that if we create in year X 100,000 full time basic jobs – 15 % of the unutilized labour in The Netherlands - we realise a production of 800 million and additional costs incurred of 300 million. The end result is a net additional production of 500 million.

That is 0.7% of the Dutch GDP. Care and Education sectors have a total burden of 14.6% of GDP. This would eliminate about 5% of the collective burden of Care and Education by JG approach in this calculation. That's substantial and promising. Obviously it is difficult to assess the implementation and supervision costs in the new situation. This exercise is therefore of course global and simple. It is more intended to indicate that, when adequate implementation figures of a JG system, a net positive result may be expected.

## **6. Conclusion**

After the second world war the western European states have built up a so-called welfare state with decent and civilized social security arrangements never shown before in history.

Since the eighties and especially since the worldwide financial crisis these welfare states are struggling with unexpected high unemployment and social assistance rates. These high unemployment rates on the total labour force unfortunately disguises the fact that particularly the youth and the elderly suffer from high and persistent unemployment.

In this paper we concentrate on a promising economic instrument for combatting unemployment, the JG concept, hardly known in western Europe. Our proposal is to combine the JG programmes with the existing social security system of conditional income guarantee. By changing unutilized labour capacity into production the welfare state is able to compensate for the weakest point of the system of income guarantee and that's the low reintegration effectiveness. At that point we finally have restored the full employment policy.



# The Political Development of Contingent Work in the United States: Independent Contractors from the Coal Mines to the Gig Economy

Eva Bertram \*

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**Abstract.** The meaning and salience of employee status in the United States and the “regulatory void” that defines the independent contractor designation, reflect decisions made by state and federal legislatures, courts, and bureaucratic agencies. Their decisions, over time, have allowed and sometimes facilitated the growth of nonstandard work and the expansion of an unregulated zone of contingency. The issues raised in current legal and political struggles over the role of independent contractors in the “gig economy” are therefore more old than new; they are the latest iteration of a century-long conflict over the boundaries of the U.S. employment relationship.

**Keywords:** *Contingent Work, Non-standard Work, Independent Contractors, Gig Economy, U.S. Employment Relationship.*

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\* Eva Bertram is Associate Professor of Politics at the University of California Santa Cruz.  
Email: ebertram@ucsc.edu.

*By some measures, 40 percent of U.S. workers will be in nonstandard jobs by the year 2020. These could be a series of part-time roles, or as a freelance contractor working via a technology platform such as Uber [. . .] the great question is therefore how do you regulate these working arrangements?*<sup>1</sup>

## 1. Introduction

The past four decades have seen major transformations in the character of work and the structure of the labor market in the United States. One of the most distinctive trends is the growth of nonstandard work arrangements. The scholarly literature has emphasized the role of increased globalization and technological change in driving the spread of contingent work.<sup>2</sup> As employers adopt workforce strategies that increase their flexibility and lower their costs, nonstandard work arrangements have become more common, and the commitment to regular full-time employment has declined.<sup>3</sup> Debate continues over the degree of choice and range of options available to business leaders facing increased global competition.<sup>4</sup> More recent studies have begun to address the fissuring and fragmenting of employment relations by businesses,<sup>5</sup> and the larger societal impact of work arrangements that are not simply part-time, short-term, or low-wage, but insecure and precarious.<sup>6</sup>

With a few important exceptions, however, scholars have had little to say about the role of politics and state institutions in the rise of contingent work.<sup>7</sup> Yet

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<sup>1</sup> “Regulating the Gig Economy,” The World Bank, December 22, 2015.

<sup>2</sup> See Barry Bluestone and Bennett Harrison, *The Great U-Turn: Corporate Restructuring and the Polarizing of America* (New York: Basic Books, 1988).

<sup>3</sup> See for example Katherine V.W. Stone and Harry Arthurs, eds., *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russell Sage Foundation, 2013).

<sup>4</sup> Eileen Appelbaum, Annette Berhardt, and Richard J. Murane, eds., *Low-Wage America: How Employers Are Reshaping Opportunity in the Workplace* (New York: Russell Sage Foundation, 2003); Paul Osterman, *Securing Prosperity* (Princeton, NJ: Princeton University Press, 2001); and Paul Osterman and Beth Shulman, *Good Jobs America: Making Work Better for Everyone* (New York: Russell Sage Foundation, 2011).

<sup>5</sup> David Weil, *The Fissured Workplace* (Cambridge, Mass.: Harvard University Press, 2014).

<sup>6</sup> See for example Arne L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s to 2000s* (New York: Russell Sage Foundation, 2011); Miriam Cherry, “Beyond Misclassification: The Digital Transformation of Work,” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016); Guy Standing, *The Precariat* (London: Bloomsbury, 2011); and Leah F. Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford, UK: Oxford University Press, 2010).

<sup>7</sup> Exceptions include George Gonos, “The Contest over ‘Employer’ Status in the Postwar United States,” *Law and Society Review* Vol. 31, No. 1 (1997): 81-110; Annette Bernhardt, “The Role of Labor Market Regulation in Rebuilding Economic Opportunity in the United States,” *Work and Occupations*, Vol. 39, No. 4 (2012): 354-75; and Jamie Peck and Nik Theodore,

most nonstandard work arrangements require a permissive legal and regulatory environment if they are to become widespread: actions are needed by judicial, legislative, and bureaucratic bodies. Understanding current trends in nonstandard employment, in short, requires attention to the political development of the employment relationship as it has evolved over time.

I argue that with major expansions in nonstandard work in the 1970s and 1980s – and continuing today in the “gig economy” – the U.S. is witnessing a stealth deregulation of the labor market through the rise of contingent work. For the most part, laws are not being passed to roll back existing regulations. Yet increasing numbers of workers, across a range of sectors and occupations, are not covered by the core labor laws and social protections that regulate the labor market.

This is not simply the familiar story of the long decline of the postwar model of employment relations – with its commitment to stable, long-term employment – and the emergence of more fluid and flexible workplace relations.<sup>8</sup> Rather, the spread of contingent work has begun to hollow out the employment relationship itself. The laws and institutions designed to govern that relationship are still in place, but new and larger cohorts of workers skirt the boundaries of the employment relationship or fall outside of it altogether, and into what one labor and employment law scholar calls the “regulatory void” of contingent work.<sup>9</sup> Part-time workers, for example, are technically employees but may not qualify for unemployment benefits or employer-provided pensions. Temporary agency workers find themselves in a triangulated relationship in which their “employer” may be the temp agency and the company that uses their services a “customer” of the agency. Both groups of workers fall short of the standards needed to secure full labor protections. Other workers are entirely unprotected, as nonemployees.

Under what circumstances can a worker not be an employee be eligible for core legal protections? Apart from various statute-specific exclusions, there are three primary routes.<sup>10</sup> Some workers may be judged to be too high up in the company’s management and supervisory hierarchies to warrant employment protections themselves. Others may be working in “noneconomic” rather than

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“Politicizing Contingent Work: Countering Neoliberal Labor Market Regulation from the Bottom Up?” *South Atlantic Quarterly*, Vol. 111, No. 4 (2012): 741-61.

<sup>8</sup> See for example Stone and Arthurs, *op. cit.*

<sup>9</sup> Stephen F. Befort, “The Regulatory Void of Contingent Work,” *Employment Rights and Employment Policy Journal*, Vol. 10 (2006).

<sup>10</sup> See Noah D. Zatz, “Working Beyond the Reach or Grasp of Employment Law,” in Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, eds., *The Gloves-Off Economy: Workplace Standards at the Bottom of America’s Labor Market* (Champaign, IL: Labor and Employment Relations Association, 2008).

employment relationships. Employers have argued that certain students, trainees, and prison laborers, for example, are not employees because their activities are guided by nonfinancial, nonmarket goals. Both of these have at times been wrongly applied to exclude workers from employee status.<sup>11</sup> The third category, however, is the most sweeping and salient today: workers may be classified as independent contractors rather than employees.

In the U.S. context, the boundarylines governing employment status are at once highly malleable, ambiguous, and consequential: the implications of which side of the employee/nonemployee line one falls are enormous. The U.S. system of labor rights and social protections includes a patchwork of laws at the federal and state levels; virtually all restrict coverage to those defined as employees. These include the Fair Labor Standards Act (FLSA), which ensures a minimum wage and overtime compensation; the National Labor Relations Act (NLRA), which protects employees' right to organize unions and to bargain collectively; and the Social Security Act, which requires employers to administer and contribute to payroll taxes for employees' Social Security and Medicare coverage, as well as the federal-state Unemployment Compensation program. Additional protections include equal employment opportunity laws, worker compensation statutes, laws governing employer-provided benefits, and workplace health and safety regulations under the Occupational Safety and Health Act (OSHA).

Coverage under these laws falls along a continuum. At one end are employees in traditional, full-time jobs; they qualify for most protections. At the other end are independent contractors, who are excluded from coverage under the NLRA, FLSA, worker's compensation, and equal employment opportunity laws, and do not benefit from employer contributions to Social Security, Medicare, or unemployment insurance. Coverage for workers in the middle of the continuum varies by statute, jurisdiction, and particular circumstances. Domestic workers, for example, many of whom are part of the contingent workforce, are statutorily excluded under the NLRA and OSHA. Temporary workers and contract company workers are covered under the FLSA, but their status under other statutes varies by circumstances: many contingent workers find that they are not able to access coverage because they work for a small firm, or they do not meet eligibility requirements regarding numbers of hours worked, duration of employment, or earnings.<sup>12</sup>

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<sup>11</sup> *Ibid.*, 36-7.

<sup>12</sup> See Sandra E. Gleason, ed., *The Shadow Workforce: Perspectives on Contingent Work in the United States, Japan, and Europe* (Kalamazoo, MI: Upjohn Institute for Employment Research, 2006), 311 and Chapter Six; United States General Accounting Office, "Contingent Workforce: Size, Characteristics, Earnings and Benefits," April 2105; and National Domestic Workers Alliance, "Employment Protections for Domestic Workers: An Overview of Federal Law."

The implications are significant, and reach beyond the challenges experienced by workers in particular sectors. The spread of contingent work – particularly on the heels of the Great Recession – has contributed to higher levels of inequality as companies replace regular full time or hourly work with on-demand work. Heavier reliance on part-time workers, together with increased outsourcing of jobs globally, has helped contribute to wage stagnation and declining prospects for the middle class.<sup>13</sup> A 2014 study for the Federal Reserve Bank of Chicago identified a close link between slow growth in real wages “and marginally attached labor force participants, particularly those working part time involuntarily for economic reasons”<sup>14</sup> – a description that fits many contingent workers today, from temp workers to many independent contractors in the gig economy.

In the analysis that follows, I develop three main claims. First, the U.S. employment relationship is an evolving legal and political construct. In particular, the meaning and salience of employee status, and the regulatory void that defines the independent contractor designation, reflect decisions made by state and federal legislatures, courts, and bureaucratic agencies. Second, their decisions, over time, have allowed and even facilitated the growth of nonstandard work and the expansion of an unregulated zone of contingency. And third, the issues raised in current legal and political struggles over the role of independent contractors in the gig economy are more old than new; they are the latest iteration of a century-long conflict over the shape of the employment relationship.

I chart the political origins and evolution of the current boundaries of the employment relationship, with a particular focus on the distinction between independent contractors and employees. This historical perspective demonstrates how the independent contractor category – used by employers for a century to escape employment obligations – was constructed piecemeal by courts and legislatures over time. I begin with current data and debates over contingent work in the U.S. and a brief comparative perspective, then turn to history to shed light on recent political struggles over Uber and other leading companies in the on-demand economy.

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<sup>13</sup> Steven Greenhouse, “Our Economic Pickle,” *The New York Times*, January 12, 2013.

<sup>14</sup> Daniel Aaronson and Andrew Jordan, “Understanding the Relationship between Real Wage Growth and Labor Market Conditions,” Federal Reserve Bank of Chicago, Essays on Issues, No. 327 (October 2014).

## 2. Contingency and its Consequences

Until recently, reliable data on the size and characteristics of the contingent workforce were difficult to find. The U.S. Department of Labor's Bureau of Labor Statistics (BLS) began to survey this segment of the workforce only in 1995, in a nationwide Contingent Work Supplement to the BLS monthly Current Population Survey. The survey was repeated on a number of occasions, providing the first time-series data, through 2005.<sup>15</sup> In 2015, in response to congressional requests for updated information, the U.S. Government Accountability Office (GAO) released an analysis of the contingent workforce updating a comprehensive report first released in 2000, and drawing on a number of more recent national surveys and reports.<sup>16</sup>

Despite differences over how to define nonstandard or contingent work, most analysts would agree that core contingent workers include on-call workers, day laborers, temporary workers (whether hired through temp agencies or directly), and contract company workers. According to the GAO, these "core contingent" workers comprised 7.9 percent of the labor force in 2010 (up from 5.7 percent in 1999). Many analysts also include in their definition of the contingent workforce a broader set of workers, including independent contractors, self-employed, and part-time workers. Workers within these categories reflect a wider range of skills, occupations, industries, and employment stability. But they share the experience of not having full access to the benefits and protections traditionally provided through full-time, regular work arrangements. Using its broad definition, the GAO estimated the size of the contingent workforce at 40.4 percent of the entire labor force in 2010. This marked a substantial increase, up from 35.3 percent in 2006, and 29.9 percent in 1999.<sup>17</sup>

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<sup>15</sup> United States General Accounting Office, "Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce," June 2000, 6; and US GAO, 2015, *op. cit.*, 3. Since 2012, the BLS has requested funding to conduct the survey every two years. The BLS commissioner announced in March 2016 that the Department of Labor would fund a one-time update of the CWS in March 2017, even as the administration sought congressional approval of funding for regular updates. See U.S. Department of Labor, Bureau of Labor Statistics, "Why This Counts: Measuring 'Gig' Work," Commissioner's Corner, March 3, 2016.

<sup>16</sup> US GAO, 2015, *op. cit.*, 2.

<sup>17</sup> US GAO, 2000, *op. cit.*, 4 and 14 (for figures); and US GAO, 2015, *op. cit.*, 12 (for figures), and 11 for their rationale for using a broader definition of contingent work, following the Department of Labor's Wage and Hour Division's "focus more broadly on the employer-employee relationship" rather than the specific job-term. Despite extensive attention to gig-economy companies such as Uber, they account for a small share of the contingent workforce, and of its growth. For a caution against overstating the importance of companies in the gig

Several categories of the contingent workforce have shown a significant uptick in recent years. The largest increases (measured in numbers of workers) over the first decade of the 2000s were among independent contractors (from 6.3 to 12.9 percent of the overall workforce, a doubling), and part-time workers (13.2 to 16.2 percent). Though they represent a smaller share of the workforce, two other categories grew rapidly as well: agency temps (0.9 to 1.3 percent, an increase of nearly fifty percent), and contract company workers (0.6 to 3.0 percent, a five-fold increase).<sup>18</sup> Economists Lawrence Katz and Alan Krueger identified similar trends in a large contingent work survey they conducted in late 2015, noting substantial growth between 2005 and 2015 in the number of people who report working as independent contractors, on-call workers, temporary help workers, and contract company workers.<sup>19</sup>

The data on contingent work reveal systemic disparities in pay and benefits received by contingent workers in contrast to their counterparts in regular employment. The GAO found that contingent workers earned 10.6 percent less on an hourly basis than standard workers in 2012, even after controlling for geography, demographics, union membership, occupation and industry, and educational level.<sup>20</sup>

The gap in pay increased when the effects of the limited work hours of most contingent workers were factored in.<sup>21</sup> Partly as a consequence, core contingent workers were more than three times as likely to be in families with low incomes (33.1 percent, compared to 10.8 percent of standard workers).<sup>22</sup> And they were more than twice as likely to be in families with incomes below the federal poverty line (15.2 percent, compared to 6.2 percent of standard workers).<sup>23</sup> The GAO estimated that contingent workers were less likely to be covered by a private health insurance plan than standard workers (61 to 77.9 percent), and much less likely to have a work-provided plan (21.4 to 53.1

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economy, see Lawrence Mishel, “Uber is Not the Future of Work,” *Atlantic Monthly*, November 16, 2015.

<sup>18</sup> US GAO, 2000, *op. cit.*, 14; and US GAO, 2015, *op. cit.*, 12

<sup>19</sup> Lawrence F. Katz and Alan B. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995 -2015,” March 29, 2016.

<sup>20</sup> US GAO, 2015, *op. cit.*, 5.

<sup>21</sup> Contingent workers made 16.7 percent less on a weekly basis, and 12.9 percent less on an annual basis, even when controlling for the effects of part-time or part-year work. Without those controls for working hours (i.e. actual earnings), contingent workers brought in 27.5 percent less weekly, and 47.9 percent annually. US GAO, 2015, *op. cit.*, 6.

<sup>22</sup> Other contingent groups reported substantial levels of low family income as well: 18.8 percent of independent contractors, and 19.5 of part-time workers said their family earnings were under \$20,000. This was nearly twice the percentage of standard workers reporting low family incomes. The survey was from 2010. US GAO, 2015, *op. cit.*, 18.

<sup>23</sup> US GAO, 2015, *op. cit.*, 31, based on 2012 data.

percent).<sup>24</sup> Contingent workers were also 67.6 percent less likely to participate in a work-based retirement plan than standard workers.<sup>25</sup>

Survey data analyzed by the GAO reveal important information about the demographic characteristics of contingent workers. Contingent workers were generally younger than standard full-time workers, with the exceptions of independent contractors and self-employed workers. The gender distribution of contingent workers varied widely by category. In 2010, for example, 72.1 percent of part-time workers were women (up from 70.1 percent in 1999). Women also outnumbered men in agency temp and direct hire temp positions in 1999. But by 2010, the group that the GAO calls “core contingent” had become predominantly male: 61.5 percent were men, and 38.8 percent women.<sup>26</sup>

In terms of race and ethnicity, 47.9 percent of the core contingent group were white, compared to 70.1 percent of standard full-time workers. Some 19.3 percent were Black, compared to 13.4 percent of full-time workers; and 29.2 percent of core contingent workers were Hispanic, compared to 13.0 percent of full-time workers. In terms of educational attainment, 83.7 percent of the core contingent group had only a high school diploma or less, compared to 55.4 percent of full-time workers. Only 11.0 percent of the core contingent workforce had a bachelor’s degree, and 2.4 percent a graduate degree, compared to 20.0 and 9.4 percent of full-time workers.<sup>27</sup>

### 3. Contingency in Comparative Context

Contingent work is not new, nor is its recent expansion limited to the United States. Casual or informal work has always been present, particularly on the margins of certain sectors. Since the 1970s, however, it has assumed new forms and increased in reach and scope, as the impact of globalization and rapid technological change generate major shifts in work organization across the developed world. “The nature and pace of changes occurring in the world of work, and particularly in the labor markets, have given rise to new forms of employment relationship which do not always fit within the traditional parameters,” notes Giuseppe Casale, then-Director of the Labor

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<sup>24</sup> US GAO, 2015, *op. cit.*, 30, based on 2011 surveys.

<sup>25</sup> US GAO, 2015, *op. cit.*, 29.

<sup>26</sup> US GAO, 2000, *op. cit.*, 46; and US GAO, 2015, *op. cit.*, 68.

<sup>27</sup> Both the independent contractor and part-time categories remained largely white, though less so than in the past. By 2010, white workers accounted for 75.3 percent of independent contractors (down from 84.8 in 1999), and 72.0 percent of standard part-time workers (down from 78.5 in 1999). *Ibid.*



Administration and Inspection Programme of the International Labor Organization.<sup>28</sup> The political and policy response to these developments has varied across countries, and most face continuing challenges. Yet a sharp distinction exists between the reaction in much of Western Europe and the U.S. response.

Most European systems of labor law and social protections, like the U.S. system, rest on a historically-rooted dichotomy between what is often called “subordinate employment” and “autonomous work.” Labor law exists to protect workers in positions of subordinate employment – those whose choices are fewer and whose bargaining position is weaker within the employment relationship. Those engaged in autonomous work are considered independent, not in need of such protection; their concerns are dealt with through civil or commercial rather than labor law.<sup>29</sup>

As globalization began to alter existing employment arrangements, European systems adopted varying changes in laws and regulations. Although debates continue over the appropriate response to an evolving challenge,<sup>30</sup> the European response to date has included two general approaches: creating new categories of workers, in order “to broaden the rules for subordinate employment to include those self-employed workers who are in a state of economic dependence;” and extending certain protective measures “beyond the circle of subordinate workers.”<sup>31</sup> In Italy, for example, the concept of “quasi-subordinate workers,” who are self-employed but deserving of some employee-like protections, has existed under law for three decades.<sup>32</sup> Germany debated and developed a broader legal framework for such work, incorporating a category of “workers similar to employees” into labor legislation beginning in 1953.<sup>33</sup> The United Kingdom has more recently introduced a category of worker “which lies somewhere between (subordinate) employee and self-employed person.”<sup>34</sup> France has opted instead to extend labor laws in other ways, to accommodate changes in the employment contract.<sup>35</sup>

The U.S. system, however, still retains only two categories. According to a 1999 report from the U.S. Department of Labor, “No legal meaning attaches

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<sup>28</sup> Giuseppe Casale, ed., *The Employment Relationship: A Comparative Overview* (International Labour Organization, 2011), 3.

<sup>29</sup> Adalberto Perulli, “Subordinate, Autonomous, and Economically Dependent Work,” in Casale, *ibid.*, 137-38.

<sup>30</sup> See for example, *ibid.*, for debates in Italy, France, Germany, and the United Kingdom, as well as within European Community law.

<sup>31</sup> *Ibid.*, 182-83.

<sup>32</sup> *Ibid.*, 165.

<sup>33</sup> *Ibid.*, 170.

<sup>34</sup> *Ibid.*, 172.

<sup>35</sup> *Ibid.*, 168.

to such descriptions as dependent contractor, permanent employee, regular employee, temporary employee, and the like. There are only employees entitled to a modest suite of rights, and independent contractors entitled to fewer.”<sup>36</sup> The explanation lies in part in the origins and political development of the two categories, within the context of the U.S. employment relationship.

#### 4. Political Origins and Early History

The distinction between “employees” (who are protected under contemporary labor and social protections) and “independent contractors” (who are not) has its origins in the pre-industrial political economy. Just as the modern employer-employee relationship was constructed on the master-servant relationship of the pre-industrial era, the term “independent contractor” is linked to early notions of an “independent calling.” The term was used to indicate that such a worker was at liberty to work for multiple clients – perhaps as a skilled artisan or craftsman – rather than serve a single master.<sup>37</sup>

On occasion, courts were asked to address the distinction beginning in the mid-19th century, often to clarify whether an employer could be held liable if a worker’s negligence caused harm to others. The question courts generally asked was whether and to what degree the employer had control over the worker’s actions.<sup>38</sup> In what came to be accepted as the common-law “control” test of employment status, if a court found that the employer had the right to control in detail how work was carried out, then the worker was judged to be an employee. If not, the worker was considered an independent contractor, and the employer was not held responsible for his or her actions.<sup>39</sup>

With the spread of industrialization and more complex forms of wage labor came the earliest forms of Progressive Era social and labor legislation, generally at the state level and often industry-specific. Between 1911 and 1917, for example, workers’ compensation laws were passed in thirty-seven states. The new protections raised the stakes of the employee/independent contractor

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<sup>36</sup> Jeffrey Sack, Emma Phillips, and Hugo Leal-Neri, “Protecting Workers in a Changing Workworld: The Growth of Precarious Employment in Canada, the United States, and Mexico,” in Casale, *op. cit.*, 260.

<sup>37</sup> Richard R. Carlson, “Why the Law Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying,” *Berkeley Journal of Employment and Labor Law*, Vol. 22, No. 2 (2001): 301-3. See also Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* (New York, N.Y.: Greenwood Press, 1989), Part II.

<sup>38</sup> Carlson, *op. cit.*, 304.

<sup>39</sup> Befort, *op. cit.*, 249; and Robert Sprague, “Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit into Round Holes,” *A.B.A. Journal of Labor & Employment Law*, Vol. 31, No. 1: 53.

distinction. Employers were now responsible for certain workplace injuries suffered by their employees, but not by independent contractors they hired. Yet the line distinguishing the two was not always clear, and the language of the new laws was vague. Not surprisingly, some employers proved quick to exploit the ambiguity.<sup>40</sup>

Some courts recognized the potential for employers to evade their obligations by calling their employees contractors. In a prominent 1914 case, the Lehigh Valley Coal Company claimed that one of its miners, who was seeking compensation for a workplace injury, was actually an independent contractor, in part because he was free to employ and supervise his own “helpers.”<sup>41</sup> The judge was not persuaded. He challenged the company’s contention that it “is . . . not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors.”<sup>42</sup> Judge Learned Hand noted:

It is true that the statute uses the word “employed,” but it must be understood with reference to the purpose of the act, and where all the conditions of the relations require protections, protections ought to be given. It is absurd to class such a miner as an independent contractor. [...] He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company’s only business.<sup>43</sup>

Judge Hand led the way in enlisting a wider range of factors to determine employee status, including the degree of economic dependence between employees and employers (which came to be called the “economic realities” test), and where relevant, the larger purpose of a protective statute. Similar moves to elevate the economic dependence test emerged sporadically, but the control test remained the main determinant of employment status, particularly in worker compensation cases around the country.<sup>44</sup>

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<sup>40</sup> Linder, *op. cit.*, 176; and Carlson, *op. cit.*, 304-11. The laws were designed to protect those who were dependent on and subordinate to an employer; but not independent contractors, “who were thought of as autonomous entrepreneurs rolling the dice for themselves and not in need of regulatory intervention.” Befort, *op. cit.*, 252-53.

<sup>41</sup> Carlson, *op. cit.*, 311-13.

<sup>42</sup> Cited in Marc Linder, “What is an Employee? Why It Does, But Should Not, Matter,” *Law and Inequality*, Vol. 7 (1989): 175.

<sup>43</sup> *Ibid.*, 176. See *Lehigh Coal Co. v. Yensavage*, 218 F. 547 (2d Cir. 1914).

<sup>44</sup> Judge John Wood in New York in 1914, and the California state legislature in 1917, employed the economic realities test, but both were quickly reversed. Linder, *The Employment Relationship*, *op. cit.*, 177-79. As one legal historian noted, “Judge Hand’s underlying fear may have been that if the mining company’s transformation of this large workforce from ‘employee’ to ‘independent contractors’ succeeded, then the nation’s basic industries might

Despite occasional court actions on workers' status, the issue posed little concern in the early 20<sup>th</sup> century, in part due to the limited reach and scope of Progressive Era social and labor protections. All this changed abruptly with the avalanche of New Deal legislation, passed as part of President Franklin Delano Roosevelt's response to the Great Depression in the early 1930s. As sweeping new protections were written into federal law, the stakes were transformed overnight.

Three measures in particular changed the equation for both workers and employers. The National Labor Relations Act (NLRA) or Wagner Act, established the right of employees to organize through unions and to bargain collectively with their employers. Passed in 1935, the Act created a new National Labor Relations Board (NLRB). Its members, appointed by the president (and confirmed by Congress), were charged with enforcing laws related to bargaining and unfair labor practices.

The Social Security Act of 1935 provided federal social insurance protections for workers, including a federal retirement program (Social Security). Payroll tax contributions to the program were split between employers and employees. Independent contractors and self-employed workers were responsible for both halves of that contribution. The Act also created the federal-state unemployment system, which pays benefits to qualifying employees when they become unemployed. Independent contractors and self-employed workers are generally not covered by unemployment insurance, and companies that hire them are not required to contribute to state unemployment funds on their behalf.

The Fair Labor Standards Act (FLSA) followed in 1938. It set the first federal minimum wage, required overtime pay for eligible employees who worked more than forty hours a week, and required employers to keep records of the hours worked and wages earned by their employees.<sup>45</sup>

In the years following the New Deal, the nation saw a surge in labor organizing and unionization. The end of World War II brought more labor activity and a sustained period of unprecedented economic growth. In this context, the employment relationship in the United States grew more robust than at any point before or since. A new standard was set, of stable, long-term employment for a single employer, backed by adequate wages and health and pension benefits.

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cease to be 'employers' at all, while still continuing their businesses with the very same unprotected workers in their service." Carlson, *op. cit.*, 312.

<sup>45</sup> For a description of these and other federal laws "designed to protect workers," see US GAO, 2000, *op. cit.*, 49-56.

The first signs of this “standard employment relationship” emerged in the early decades of the twentieth century, as large employers sought to foster long-term attachment among by employees.<sup>46</sup> The spread of the model was accelerated by the expansion of unions, particularly industrial unions, in the New Deal and postwar period. In order to gain advantages in the tight labor markets of the era, even nonunion firms such as IBM, Dupont, and Exxon modeled their workforce policies on those of their unionized competitors. They constructed internal labor markets, respecting seniority in hiring and layoffs, and they paid wages and provided benefit packages that were competitive with their unionized counterparts. Many of the country’s largest and most profitable companies, unionized or not, sought the advantages of employee loyalty and a highly-trained workforce, and adopted workforce policies that set a standard of secure and stable employment for the broader labor market.<sup>47</sup> By the postwar period, the core features of the standard employment relationship included “an implicit promise of job security and employer-provided health and pension benefits,” as well as “predictable promotions and wage growth opportunities.”<sup>48</sup>

The combined effect of the booming economy, new federal protections, and higher levels of unionization was to boost wages and increase economic equality. Hourly wages in the private sector rose steadily, at a clip of more than 2.5 percent a year for the three decades following World War II, including for those at the bottom of the wage scale.<sup>49</sup> The share of workers covered by work-based pensions rose from 15 percent in 1940 to 25 percent in 1950, and continued to increase to a peak of 46 percent in 1980.<sup>50</sup> Work-based health insurance coverage grew even faster, from 10 percent in 1940 to 51 percent in 1950.<sup>51</sup> It was, in short, a very good time to be a worker in the United States – if you were an employee.

The significance of a worker’s employment status had never been higher: only employees were covered by the new laws. Yet the New Deal legislation did little to clarify the distinction between employees and independent contractors. Each of the New Deal laws contained its own definition of the “employee” who would be covered under the statute. The definitions varied; none was

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<sup>46</sup> Katherine V.W. Stone, “The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective,” in Stone and Arthurs, *op. cit.*, 63-4.

<sup>47</sup> Paul Osterman, *Securing Prosperity* (Princeton, NJ: Princeton University Press, 2001), Chapter 2; and Stone, *ibid.*, 64.

<sup>48</sup> Stone *Ibid.*, 58-63.

<sup>49</sup> Lawrence Mishel, Josh Bivens, Elise Gould, and Heidi Shierholz, *The State of Working America, 12<sup>th</sup> Edition* (Ithaca, NY: Cornell University Press, 2012), 181.

<sup>50</sup> “Employee Benefits,” *Congressional Quarterly Researcher*, February 2000, 74.

<sup>51</sup> *Ibid.*, 76.

clear and some were simply circular. The Fair Labor Standards Act, for example, specified that “employee” would “include any individual employed by an employer.”<sup>52</sup>

The failure to render a single definition was compounded by a fragmented approach to administration: multiple federal agencies were charged with administering the various new labor and social insurance protections. The Bureau of Internal Revenue determined who was an employer, who an employee, and who not, for purposes of federal payroll taxes. The National Labor Relations Board (established by the NLRA) decided which workers were employees, and therefore under the NLRA’s protections for organizing and collective bargaining. The Department of Labor determined which workers, as employees, were covered by the wage and hour regulations of the FLSA. And the Social Security Board determined which employers and employees were required to contribute to and eligible to receive Social Security (and later, Medicare).

New Deal social and labor legislation did more than disperse decisionmaking on employee status, however. In several cases, the laws inscribed longstanding social hierarchies into the new framework of protections. Even as they sought to “level the playing field” between employees and employers, lawmakers wrote some workers, including those in some of the nation’s most precarious and vulnerable occupations, out of the legislation altogether. The National Labor Relations Act, Fair Labor Standards Act, and Social Security Act introduced groundbreaking rights and protections, but excluded agricultural and domestic workers.<sup>53</sup> In each case, the move was explicitly political, reflecting concessions to win the votes of southern lawmakers determined to retain the racial hierarchies that defined the southern economy.<sup>54</sup>

Meanwhile, the courts continued to make determinations regarding employee status, faced with a longer roster of protective statutes but no clearer guidance on the question. In a 1944 case (*Hearst v. NLRB*), Supreme Court Justice Wiley Blount Rutledge drew attention to the issue: “Few problems in the law have given greater variety of application and conflict in results than the cases

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<sup>52</sup> Linder, *The Employment Relationship*, *op. cit.*, 185. See Charles J. Muhl, “What is an Employee? The Answer Depends on the Federal Law,” U.S. Bureau of Labor Statistics, *Monthly Labor Review*, January 2002: 3-11.

<sup>53</sup> The Social Security Act, which originally covered about half the workforce, also did not include farm and domestic workers (nor those who were self-employed, or who worked for government or the nonprofit sector). These groups were covered under subsequent program expansions. Larry DeWitt, “The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act,” *Social Security Bulletin*, Vol. 70, No. 4, 2010.

<sup>54</sup> On the exclusions from the Social Security Act, see for example Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, Mass.: Harvard University Press, 1998).

arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” The Court ruled that “in doubtful situations,” the more inclusive criteria used by Judge Hand decades earlier should apply, with the definition of employee “determined broadly by underlying economic facts rather than technically and exclusively by previously established legal classifications.” In *Hearst*, four Los Angeles newspapers were required under the NLRA to bargain with a union of their newspaper vendors. The papers had claimed that the vendors were independent contractors, rather than employees, and therefore the NLRA’s legal obligation did not apply. The Court rejected the claim, arguing for advancing the NLRA’s purpose by extending protections rather than limiting them. The word “employee,” the Court asserted, “takes its color from the statute and must be read in light of the mischief to be corrected.”<sup>55</sup> Additional Supreme Court rulings in 1947 applied the same logic to the question of who should be covered under Social Security, setting in motion plans to extend coverage to additional groups of workers.<sup>56</sup>

In 1947 and 1948, however, a Republican-controlled Congress (the first since the New Deal) pushed back hard against the pro-labor trajectory of recent court and legislative decisions, with a series of moves to constrain the expansion of labor and social protections. Most significant was the Labor Management Relations Act of 1947 (Taft-Hartley), designed to limit the growing power of organized labor. It included, for the first time, language that explicitly excluded anyone “having the status of an independent contractor” from coverage under the NLRA.<sup>57</sup> In addition, the House Report accompanying the legislation leveled a blistering attack on the Supreme Court and NLRB for using a broader, more inclusive test to determine employee status, and instructed the Board to limit its determinations to narrower common-law “control” factors. In 1948, Congress passed two additional measures – overriding vetoes from President Truman – that prohibited extension of Social Security coverage to certain groups of workers (“door-to-door salesmen,” “home workers,” news vendors), and ordered that the Social

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<sup>55</sup> NLRB v. Hearst Publ’ns, Inc. 322 U.S. 111 (1944).

<sup>56</sup> Wilbur J. Cohen and James L. Calhoun, “Social Security Legislation, January-June 1948,” *Social Security Bulletin* Vol. 11, No. 7 (July 1948): 3-12.

<sup>57</sup> Micah Prieb Stoltzfus Jost, “Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach,” *Washington and Lee Law Review*, Vol. 68 (2011): 321; and Noah D. Zatz, “Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment,” *ABA Journal of Labor and Employment Law*, Vol. 26, No. 2 (Winter 2011): 280.

Security Act's definition of "employee" not include individuals who would be considered independent contractors under common-law "control" rules.<sup>58</sup>

In the post Taft-Hartley period, courts largely returned to the narrower control test of employee status, sometimes citing the congressional intent expressed in Taft-Hartley. The NLRB also shifted focus to the narrower "right to control" test in drawing the line between employee and independent contractor status.<sup>59</sup>

The 1960s and 1970s brought more liberal Congresses and a series of new protections and expansions in coverage under existing laws. FLSA protections, for example, were extended to some farmworkers and government employees in 1966, and to many domestic workers in 1974. Regularly employed farm workers and domestic workers had received Social Security coverage in 1950.<sup>60</sup> Significant new workplace rights were legislated, beginning with the Civil Right Act of 1964. Title VII of the Act protected job applicants and employees from discrimination on the basis of race, color, sex, religion, or national origin. Protections from discrimination against older applicants and employees on the basis of age were legislated in 1967. New requirements that employers provide employees with a hazard-free workplace were enacted in 1970, under the Occupational Safety and Health Act. And in 1974, the Employee Retirement Income Security Act required employers and employee organizations to meet certain standards in their benefit plans.<sup>61</sup>

As the advantages of employment status mounted, however, the distinction between independent contractor and employee grew more problematic for many workers. The new protections in most cases again applied only to workers who were employees. In some cases, whether employees were protected depended on how long they had worked for a particular employer, or how many employees the business had. (Employees of small businesses are excluded from some protections.) Independent contractors, and in many cases other self-employed workers, largely remained outside the system.

## 5. The Rise of Contingency

Beginning in the mid-1970s, employers responded to a series of sharp economic downturns and falling profits by cutting labor costs, using now-

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<sup>58</sup> "Social Security," *CQ Almanac, 1948, 4<sup>th</sup> edition*, 143-46, Washington, D.C., Congressional Quarterly, 1949.

<sup>59</sup> Zatz, *op. cit.*, 281; Jost, *op. cit.*, 322-33.

<sup>60</sup> Patricia P. Martin and David A. Weaver, "Social Security: A Program and Policy History," *Social Security Bulletin*, Vol. 66, No. 1, 2005.

<sup>61</sup> US GAO, 2015, *op. cit.*, 64-5.



familiar strategies of downsizing, outsourcing, and off-shoring.<sup>62</sup> All of the conditions were now in place for the expanded use of independent contractors and other contingent employees as a core part of this strategy. The financial costs and legal burdens of hiring employees had grown exponentially as a result of New Deal laws and new antidiscrimination and health and safety regulations of the 1960s and 1970s. Hiring independent contractors, in contrast, remained inexpensive, simple, and unregulated. The distinction between employees and independent contractors remained ambiguous in ways employers could use to their advantage. The main pieces of federal protective legislation explicitly limited their protections to employees, but left the definition unclear. Courts varied in their interpretations, but typically left significant latitude to employers by imposing the narrow criteria of the control test.

In 1978, Congress took steps that further facilitated the increased reliance on independent contractors. Citing business complaints over the Internal Revenue Service (IRS) enforcement of employee classification rules, lawmakers passed Section 530, a tax bill provision that made it more difficult to hold employers accountable for misclassifying their employees as independent contractors. “Lawmakers at the time envisioned that a laissez-faire regulatory approach to contract hires would give employers a temporary breather from rules,” according to *Congressional Quarterly*. But the “temporary breather” became permanent in 1982, and remained on the books despite repeated initiatives to remove it.<sup>63</sup>

The legislation took the unusual step of prohibiting the IRS from issuing new regulatory guidance on how to define independent contractors, leaving the agency to respond to requests for rulings on a case-by-case basis. In a move that further lowered incentives for strict adherence to the law, Section 530 also created a “safe harbor” for employers using independent contractors. It specified that if companies meet certain conditions, they cannot be held liable for “federal employment taxes, penalties and interest,” even if the IRS finds that they have misclassified employees as independent contractors.<sup>64</sup>

With government effectively stepping aside, opting not to limit or regulate the rise of the contingent workforce, the primary remaining obstacle to a widespread embrace of nonstandard work was the rules and practices of the

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<sup>62</sup> Bluestone and Harrison, *op. cit.*; and William J. Baumol, Alan S. Blinder, and Edward N. Wolff, *Downsizing in America* (New York: Russell Sage Foundation: 2003).

<sup>63</sup> Richard Rubin, “IRS Keeps Forced Silence on Defining Contractors,” *Congressional Quarterly Weekly Report*, 30 June 2008: 1752.

<sup>64</sup> These include a) a record of consistency in treating their workers as independent contractors, b) compliance with 1099 reporting requirements, and c) having a “reasonable basis” for categorizing the workers as independent contractors. William Hayes Weissman, “Section 530,” National Association of Tax Reporting and Professional Management, February 28, 2009, 6.

standard employment relationship, with its commitment to internal labor markets, adequate compensation and benefits, and stable, long term employment. That model, however, faced serious threats by the 1970s.

The legal and institutional framework undergirding the American version of the standard employment relationship had always been weak, far weaker than its European counterparts, particularly given the absence of any basic legal right to employment security. The United States is “practically unique among industrialized countries for having no statutory or constitutional protections for job security,” notes legal historian Katherine Stone. The U.S. model of standard employment relations thus emerged “not as a set of legally imposed obligations, but as a widespread social practice.”<sup>65</sup> For years, industry leaders poised to profit from increased use of contingent workers particularly in the temp sector had targeted the assumptions behind the standard employment relationship through a massive public relations initiative aimed at employers. The PR effort complemented a decades-long campaign to win legal and regulatory reforms favorable to the temp industry.<sup>66</sup>

Although temporary workers existed in a contingent category distinct from independent contractors, the argument pitched to employers for hiring workers on an as-needed basis, without assuming the full legal and financial obligations of the standard employment relationship, applied to both groups, and indeed, to most contingent workers. Detailed in Erin Hatton’s study of the rise of the temp industry, the marketing of contingency included advertisements designed to persuade business leaders to abandon longstanding ideas about the benefits of loyal and stable employment relations. Uniforce, a New York temp agency, released an ad in 1970 titled “They’re Drinking Up the Profits.” Three workers were featured in conversation around a water cooler. The ad read:

They’re not thirsty. They’re bored. Not enough to do. Those sounds you hear are profits gurgling down the drain in salaries, overhead and all those extra payroll expenses and employee benefits. That’s what happens when you’re staffed up to handle peak volume business. Modern management stops the profit drain with UNIFORCE guaranteed temporaries. Creatively used to augment a permanent nucleus in peak periods. It’s the one way to make sure you have all the people you need only when you need them.<sup>67</sup>

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<sup>65</sup> Stone, “The Decline,” *op. cit.*, 58-63.

<sup>66</sup> For a detailed examination of the protracted political and public relations campaigns by the temp industry to create the legal framework and public climate that would fuel the industry’s growth, see Gonos, *op. cit.*

<sup>67</sup> Erin Hatton, *The Temp Economy: From Kelly Girls to Permatemps in Postwar America* (Philadelphia, Pa.: Temple University Press, 2011), 69-70.

Kelly Services went further in underscoring the advantages of shedding responsibility for permanent employees, and added a gendered dimension in its 1971 ad:

Never takes a vacation or holiday.  
Never asks for a raise.  
Never costs you a dime for slack time. (When the workload drops, you drop her.)  
Never has a cold, slipped disc or loose tooth. (Not on your time, anyway.)  
Never costs you for unemployment taxes and social security payments. (None of the paperwork, either!)  
Never costs you for fringe benefits. (They add up to 30% of every payroll dollar.)  
Never fails to please. (If our Kelly Girl employee doesn't work out, you don't pay. We're that sure of our girls.)<sup>68</sup>

By the 1980s, employers confronting increased competition were retreating from the standard employment relationship in large numbers, reflected in large-scale restructuring of company workforces through outsourcing and subcontracting, as well as strategies to cut costs by reducing positions and pay, requiring workers to cover more of their health care premiums, and converting from defined benefit to defined contribution retirement plans. In the 1990s, these trends were compounded by an additional source of pressure: investors increasingly judged companies by their quarterly performances, pressuring managers to make workforces more lean and efficient. This expectation accelerated attempts to cut labor costs.<sup>69</sup>

In various configurations – from the use of temps and independent contractors in-house to contracting out services – employers began to rely more heavily and consistently on nonstandard work arrangements. Because they constituted the outer rings of a company's workforce, absorbing the ebbs and flows in demand, the contingent workforce was often the first to contract in size during downturns and the first to expand during recoveries.<sup>70</sup> But the institutional structures needed to maintain this workforce – from a friendly regulatory environment to temporary staffing agencies to increased public acceptance – remained in place through cyclical economic shifts. And over

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<sup>68</sup> Cited *ibid.*, 51. Hatton also addresses the gender dimensions of “Kelly Girl” services.

<sup>69</sup> Eileen Appelbaum, “Reducing Inequality and Insecurity: Rethinking Labor and Employment Policy for the 21<sup>st</sup> Century,” *Work and Occupations* Vol. 39, No. 4 (2012): 312-13.

<sup>70</sup> See, for example, Jamie Peck and Nik Theodore, “Flexible Recession: The Temporary Staffing Industry and Mediated Work in the United States,” *Cambridge Journal of Economics* Vol. 31 (2006): 175 and 178, for evidence that the temporary staffing industry, which employed just 2.5 percent of the U.S. labor force, accounted for more than a quarter of job losses in the 2001 recession, then added positions at a much faster rate in the subsequent slow recovery.

time, even as various categories of contingent workers remained a small share of the overall U.S. workforce, their numbers were growing. The number of workers placed by temporary work agencies, for example, doubled in the 1980s, and again in the 1990s.<sup>71</sup>

The increased use of independent contractors was reflected in part in the rise of misclassification cases, in which employers knowingly or mistakenly misclassified their workers as independent contractors rather than employees. Cases of misclassification arose in virtually every major industry by the late 1980s. Those most affected included “farmworkers, construction workers, nurses and other health workers, janitors, casual and temporary retail employees, forestry workers, truck drivers, taxi drivers, carpet layers, and wholesale or door to door salespeople.”<sup>72</sup>

The trend was growing in the more skilled segments of the labor market as well, including in industries long known for adherence to the principles of the postwar standard employment relationship. In order to combine an affordable smaller “core” of regular employees with a sheddable team of contingent workers, some employers hired contractors on a semi-permanent basis; these workers became known as “permatemps.” Employers were not legally obligated to pay temp workers hourly wages equivalent to those of regular employee counterparts. And despite the “temp” label, there was nothing in the law that specifically restricted employers to hiring temp workers for temporary periods.

In many cases, independent contractors worked alongside regular employees, conducting the same labor, indistinguishable other than their employment status, and with it, their respective rights under the law and degree of protection under various social programs. Sometimes companies were caught and held accountable. Microsoft wrongly classified a large number of its workers as “independent contractors” in the 1990s. These workers “performed the same work as employees, during the same working hours at the same worksite and in the same work teams under the same supervisors,” yet Microsoft refused to include them in employee benefit and pension plans, and avoided paying unemployment and Social Security taxes on their compensation until the Ninth Circuit Court ruled in 1996 that the workers were in fact

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<sup>71</sup> Mishel, Bernstein, and Schmitt, *The State of Working America: 1998-99*, 248-50; Mishel, Bernstein and Shierholz, *The State of Working America, 2008/2009*, 255-56; and USDL, Bureau of Labor Statistics, “The Employment Situation: April 2016,” Table B-1.

<sup>72</sup> Marc Linder, “The Involuntary Conversion of Employees into Self-Employed: The Internal Revenue Service and Section 530,” *Clearinghouse Review* Vol. 14 (1988): 14.

employees.<sup>73</sup> Four years later, Microsoft spent \$97 million to settle a longstanding lawsuit, this time for its misuse of permatemps.<sup>74</sup>

The core of the contingent work strategy – whether using temp workers, permatemps, or independent contractors – was expressed bluntly by one of AT&T’s corporate leaders. As the company once known for its tradition of “jobs for a lifetime” moved abruptly to shed 40,000 of its 300,000 employees in 1996, one of the vice presidents for human resources explained: “People need to look at themselves as self-employed, as vendors who come to this company to sell their skills [ . . . ] In AT&T, we have to promote the whole concept of the work force being contingent, though most of the contingent workers are inside our walls.”<sup>75</sup>

Federal action on the issue was limited. Congress issued periodic reports on misclassification, but failed to put the issue on the policy agenda in a sustained way.<sup>76</sup> A blue-ribbon commission appointed by President Clinton on the Future of Worker-Management Relations addressed the problem, among others, in 1994. The commission argued for “making the single definition of employee for all workplace laws based on the economic realities of the employment relationship.”<sup>77</sup> But the recommendation was never put into practice. Meanwhile, the courts, if anything, were moving in the other direction. A Supreme Court ruling in 1992 (*Nationwide Mutual v. Darden*) directed that unless federal programs and protections explicitly included a broader definition of “employee,” the narrower common-law control test should be used.<sup>78</sup> The lack of federal action and inconsistent enforcement by the courts deepened what Stephen Befort has called the “regulatory void” into which contingent workers fell in growing numbers.

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<sup>73</sup> Carlson, *op. cit.*, 297 and 298, footnote 13; and Robert W. Wood, “Defining Employees and Independent Contractors,” ABA Business Law Section, May/June, 2008.

<sup>74</sup> Steven Greenhouse, “Technology; Temp Workers at Microsoft Win Lawsuit,” *The New York Times*, December 13, 2000.

<sup>75</sup> Edmund L. Andrews, “Don’t Go Away Mad, Just Go Away: Can AT&T Be the Nice Guy as It Cuts 40,000 Jobs?” *The New York Times*, February 13, 1996.

<sup>76</sup> See for example “Contractor Games: Misclassifying Employees as Independent Contractors,” House Committee on Government Operations, October 16, 1992.

<sup>77</sup> U.S. Commission on the Future of Worker-Management Relations, Final Report, 1994, 12.

<sup>78</sup> Befort, *op. cit.*, 250. Carlson argues that *Darden* asserted the primacy of the “control” test, but then described that test in a way that included hallmarks of the “economic realities” approach. Carlson, *op. cit.*, 344. See *Nationwide Mut. Ins. Co. v. Darden*, 503, U.S. 318 (1992).

## 6. Conflicts in the Gig Economy

The contingent workforce saw another wave of expansion in the late 1990s and early 2000s. Triggered in part by large-scale advances in information technology, it began when restrictions on the use of the Internet (previously available to government and academic researchers only) were lifted in 1991, and private businesses and the public were able to go on-line. A rapid increase in digital commerce followed, leading to the dot-com boom and the growth of Internet retailers highly attuned to fluctuations in consumer demand. The transformation of cell phones into “smart” phones in the late 1990s accelerated the trend: people could now connect to the Internet, and buy and sell, from virtually anywhere they could get cell service.<sup>79</sup>

The digital marketplace mushroomed as the country entered a severe recession from 2007 to 2009, followed by a slow and painful recovery. Companies that used the Internet and cell phones to link customers with the sellers of goods and services launched in large numbers: in 2008 and 2009, Uber, Airbnb and Taskrabbit began operations.<sup>80</sup> When the recession triggered massive job losses, many full-time workers tried to make ends meet on short-term work in the digital economy.<sup>81</sup> The growing on-demand market was heralded by many as a tremendous source of entrepreneurial opportunity, flexibility, and freedom derived from open access.<sup>82</sup> It has been called the “on-demand economy”, the “gig economy,” the “sharing economy;” perhaps the most accurate label is the “1099 economy,” which refers to the tax form required of the army of independent contractors who do much of the work of the new digital companies.<sup>83</sup>

From the standpoint of employment relations, the emerging gig economy fits squarely into the long history of contingent work and its struggles – albeit in a new and accelerated form.<sup>84</sup> The gig economy has generated two main types of work, as Valerio De Stefano has pointed out, including in a recent study for the

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<sup>79</sup> Kevin Kelly, “We Are the Web,” *Wired*, August 13, 2005; and “The Gig Economy: Is the Trend Toward Non-Staff Employees Good for Workers?” *Congressional Quarterly Researcher*, March 18, 2016: 278.

<sup>80</sup> “The Gig Economy: Is the Trend Toward Non-Staff Employees Good for Workers?” *Congressional Quarterly Researcher*, March 18, 2016: 279.

<sup>81</sup> *Ibid.*, 275.

<sup>82</sup> For examples of how gig-economy companies describe their work as transformative, and a description of the experience of working for those companies, see Sarah Kessler, “Pixel and Dime: On (Not) Getting by in the Gig Economy,” *Fast Company*, March 18, 2014. See also *ibid.*, 279.

<sup>83</sup> See Justin Fox, “The Rise of the 1099 Economy,” *Bloomberg View*, December 11, 2015.

<sup>84</sup> See, for example, Dean Baker, Center for Economic and Social Policy Research, “The Sharing Economy Must Share a Level Playing Field,” February 11, 2015.

International Labor Organization.<sup>85</sup> The first, “work on demand via app”, includes basic activities such as cleaning, transportation, and errand-running, which are coordinated through apps managed by companies such as Uber, Taskrabbit, and Handy, but are performed locally. The second, “crowdwork” (sometimes called crowd-sourcing), allows workers to perform tasks through online platforms such as Crowdfunder, Clickworkers, and Amazon Mechanical Turk.<sup>86</sup> Crowdwork platforms are ideally designed for “microtasks,” small, quickly-executed tasks that require little supervision. Tasks can range from content creation (summarizing a document, transcribing a recording), to tagging photos, to locating information online.<sup>87</sup> Typically operating only online, these platforms link users of services with an unlimited number of workers worldwide.

As different as the two types of digitally-based gig work are (with one enlisting dogwalkers, delivery people, and drivers, and the other relying solely on an on-line workforce), they share several features that heighten both the advantages to employers and the challenges faced by workers. One shared feature is “the idea of distributing work to an indistinct ‘crowd’ of operators,” rather than to an in-house workers or even an identifiable team of contracted workers. Access to the labor pool is immediate and continuous, allowing quick and precise matching of demand and supply and limited transaction costs for companies. Companies’ labor costs are also extremely low, for both market and nonmarket reasons: competition among workers is intensive and rapid – and for tasks performed online, global, including workers from countries with low prevailing wage rates. And because gig economy workers are overwhelmingly hired as independent contractors, their access to labor and social protections is limited: the companies that hire them avoid any financial obligation to provide workers with Social Security contributions, sick pay, or even minimum hourly wages.<sup>88</sup> Employers of independent contractors are not even subject to the FLSA requirements to track hours and wages; they need only report on total payments to them.

Control of workers’ performance in the gig economy raises additional concerns. Generally exercised through “automated rating and review

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<sup>85</sup> Valerio De Stefano, “The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowdwork, and Labor Protection in the ‘Gig Economy,’” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016). The following discussion is based in part on De Stefano’s excellent research and analysis on these issues.

<sup>86</sup> *Ibid.*, 462.

<sup>87</sup> Janine Berg, “Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers,” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016): 545.

<sup>88</sup> De Stefano, *op. cit.*, 463.

mechanisms” that gather customer feedback on individual workers, control costs companies little, yet enables close and continuous management of workers, often tied directly to the threat of termination: platforms can “exclude ‘poor performers’ by simply deactivating the profile of – and therefore terminating the relationship with – workers that fall below a certain average rating.”<sup>89</sup>

The evidence that gig work belongs squarely in the troubling category of contingent work is reflected in recent surveys by the International Labor Organization. Like “non-gig” contingent work, gig work entails high levels of uncertainty and risk. There is no job security, and the threat of job loss via email hangs over workers dependent on their gig income. Working hours are uncertain, as are income flows. Surveys of crowdworkers by the ILO indicate that for a sizable number of workers, gig income is essential, and not simply a desirable source of extra funds. Nearly 40 percent of those surveyed relied on crowdwork as their main source of income; another 35 percent used the funds to supplement income from other employment.<sup>90</sup> Wage and income levels are also often low. U.S. Amazon Mechanical Turk (AMT) workers surveyed earned an average of \$5.55 an hour, based on total earnings divided by total hours worked (paid and unpaid).<sup>91</sup> In addition, independent contractors in the gig economy must cover their own healthcare and retirement costs.

In many respects, gig work exacts a more extreme form of the consequences of contingency described earlier. Perhaps most important is the fact that technology enables businesses to access an “extremely scalable workforce, [which] in turn grants unheard levels of flexibility for the businesses involved. Workers are provided ‘just-in-time’ and compensated on a ‘pay-as-you-go’ basis; in practice they are only paid during the moments they actually work for a client.”<sup>92</sup> As the CEO of Crowdfunder put it:

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<sup>89</sup> Some of these risks are heightened for crowdworkers. One of the leading platforms, Amazon Mechanical Turk, for example, allows customers “to reject tasks already completed, and thus decline payment, without offering any explanation, whilst still retaining the work already done.” The way in which the platforms operate not only lowers the administrative and management costs of platforms, which can effectively outsource “key HR functions to their own customers,” it also creates significant risk and uncertainty for workers who depend on a certain platform (such as Uber) for income and may have invested their own funds to begin work (by buying supplies or leasing a car that meets requisite standards). Valerio De Stefano, “The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowdwork, and Labor Protection in the ‘Gig Economy,’” *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016): 463-64.

<sup>90</sup> Berg, *op. cit.*, 566.

<sup>91</sup> *Ibid.*, 557.

<sup>92</sup> De Stefano, *op. cit.*, 476.



Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don't need them anymore.<sup>93</sup>

Not surprisingly, the impact on workers is acute uncertainty. One AMT worker surveyed by the ILO explained:

It's an extremely unstable existence. I cannot say to myself, I'm going to log in from 9 to 5 today and do enough work to make X amount of dollars. Sometimes there is work to do and sometimes there isn't. So it becomes right time, right place, and fighting other workers for the better paying tasks/work if/when they are available. If you want to be successful, you can't stop. You can't log out.<sup>94</sup>

Gig work, in short, may be the newest form of contingent labor, but it rests on classic characteristics of nonstandard work. And like earlier forms of contingent work, its expansion requires alignment or accommodation with existing labor laws and social protections. As coal companies did at the outset of the 20<sup>th</sup> century, and temp agencies did at the century's end, leading gig companies are pushing to redefine the boundaries of the employment relationship to categorise certain workers as non-employees, exploiting the ample ambiguities and opportunities in the existing framework of protections. The front line of the conflict is in the courts, where the labor practices of gig companies have generated a wave of litigation. Once again the central issue is whether workers in the platform-based gig economy are employees or independent contractors.<sup>95</sup>

Lawsuits have been filed against a range of companies, from Handy (housecleaning services) and Crowdfunder (crowdwork platform) to Instacart (grocery delivery), Washio (drycleaning delivery) and Grubhub (restaurant delivery). In many cases, workers claim employee status and argue that their employers have violated wage and hour rules (such as failure to pay minimum wages) under the federal FLSA or state statutes; companies generally insist that the workers are not employees eligible for FLSA protections, but are independent contractors.<sup>96</sup>

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<sup>93</sup> Cited in *ibid.*

<sup>94</sup> Cited Berg, *op. cit.*, 561,

<sup>95</sup> Miriam Cherry, "Beyond Misclassification: The Digital Transformation of Work," *Comparative Labor Law and Policy Journal* Vol. 37, No. 3 (Spring 2016): 2 (in manuscript version).

<sup>96</sup> *Ibid.*

Cases involving the ride-hailing services Uber and Lyft have drawn the most attention. Both companies have argued that they are essentially technology companies offering platforms to match drivers with customers. The U.S. District Court in the Northern District of California rejected the argument, in separate cases. “[I]t is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one,” the court said, observing that Uber “does not simply sell software; it sells rides.”<sup>97</sup>

A class-action suit on behalf of Uber drivers filed in California maintained that the drivers are employees because:

They are required to follow a litany of detailed requirements imposed on them by Uber, and they are graded, and subject to termination, based on their failure to adhere to these requirements . . . However, based on their misclassification as independent contractors, Uber drivers are required to bear many of the expenses of their employment. . . California law requires employers to reimburse employees for such expenses.<sup>98</sup>

In many such cases, the tests for employee status provide ambiguous guidance about the boundaries in the employment relationship and the distinction between employees and independent contractors. The difficulties of applying the control test – by assessing whether the companies have the authority to closely control workers’ activities – are a case in point. On the one hand, many on-demand companies devote significant resources to quality control, often providing detailed rules and instructions to workers. Companies like Uber “use customer ratings to maintain almost a constant surveillance over workers, with consumers deputized to manage the workforce.”<sup>99</sup> On the other hand, drivers are free to decide whether and when to show up for work, suggesting a measure of independence.

With some factors tilting toward employee status and others toward independent contractor status, judges have expressed frustration. In *Cotter v. Lyft*, District Court Judge Vince Chhabria noted that the jury “will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th century for classifying workers isn’t very helpful in addressing this 21st century problem.”<sup>100</sup> The indeterminacy of the tests for employee status is real. But it is by no means a 21st century problem. Indeed, the court’s statement in another case that “Uber would not be a viable business entity without its drivers”<sup>101</sup> sounds remarkably

<sup>97</sup> De Stefano, *op. cit.*, 489-90.

<sup>98</sup> *Congressional Quarterly Researcher*, 2016, *op. cit.*, 282.

<sup>99</sup> Cherry, *op. cit.*, 6; and discussion in De Stefano, *op. cit.*, 491-92.

<sup>100</sup> Cited Cherry, *op. cit.*, 7.

<sup>101</sup> De Stefano, *op. cit.*, 490.

similar to Judge Hand's comment a century earlier in reference to a coal miner whom the company claimed was only an independent contractor: "By him alone is carried on the company's only business."<sup>102</sup>

By 2016, Uber was taking steps to limit any possible damage to its business model through lawsuits, by settling the major class-action claim, and requiring drivers to agree to settle future disputes through arbitration rather than in the courts. As part of the settlement reached in April, Uber agreed to pay "up to \$100 million in reimbursement damages to nearly 400,000 drivers," but did not give ground on the question of whether they were employees. In August, a federal judge found the settlement insufficient and refused to approve it, saying it was "not fair, adequate, and reasonable," given the billions of dollars at stake if the drivers were ruled to have been employees.<sup>103</sup> The future of the case was thrown into further uncertainty when a federal court ruled in September that private arbitration agreements were enforceable in a separate class-action case brought by Uber drivers over the issue of background checks.<sup>104</sup>

As litigation continues in the courts, Uber (and to a lesser degree Lyft) has waged an intensive lobbying effort to create a supportive regulatory environment for its operations at the state and city levels. Uber's strategy is bold. The company identifies potential markets and launches operations in towns and cities with little notice or regard for state or local laws and regulations. It works quickly to build a customer base, then mobilizes its base to respond to challenges by local government. Uber may send alerts to riders, for example, urging them to sign a petition to state officials seeking to block or regulate the company's operations. The company claims that hundreds of thousands of riders have done so in particular regulatory battles, and that it can gather hundreds of electronic signatures a minute when necessary.<sup>105</sup>

At the same time, Uber deploys its sizable team of lobbyists – at least 161 by one estimate, with a presence in at least 50 U.S. cities and states – to create the necessary regulatory changes. By the end of 2014, Uber was operating in 138 American cities, 110 more than a year earlier. Officials in 17 cities and states had bent to Uber's wishes, approving measures that allow the company to operate.<sup>106</sup>

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<sup>102</sup> Cited Linder, "What is an Employee?" *op. cit.*, 176.

<sup>103</sup> Mike Isaac, "Judge Overturns Uber's Settlement with Drivers," *The New York Times*, August 19, 2016.

<sup>104</sup> Mike Isaac, "Ruling Tips Uber Drivers Away from Class-Action Suits," *The New York Times*, September 7, 2016.

<sup>105</sup> Rosalind S. Helderman, "Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network," *The Washington Post*, December 13, 2014.

<sup>106</sup> Helderman, *op. cit.*

Uber and Lyft have also pressed hard at the state level, spending almost \$900,000 combined on lobbying in the 2015-2016 legislative session in California alone. They have successfully stymied potential new regulations. When Assemblywoman Lorena Gonzalez introduced a bill to allow Uber and Lyft drivers (and other gig workers) to collectively bargain for pay and benefits, the companies pushed back. In an April hearing, Gonzalez said, “I know that these companies don’t want to be regulated. . . they’ve complained through every single bill through this Legislature that somehow we’re impeding the progress of innovation if there are any kind of guidelines.” Gonzalez has since withdrawn the bill.<sup>107</sup>

Uber has encountered some obstacles, including occasional organized opposition from its own drivers. Drivers in the Dallas area rebelled at a new demand by the company to pick up another category of riders; the company backed down after a three-day standoff at its headquarters. “We started realizing we’re not contractors; we’re more like employees,” insisted one driver.<sup>108</sup>

The issues regarding working conditions, insurance requirements, and other regulatory concerns are many. But the highest stakes question – in the courts and in statehouses – remains the status of the companies’ workers. A determination that drivers are employees could increase costs for the companies by an estimated 30 percent or more (to cover payroll taxes, unemployment insurance, and mileage).<sup>109</sup> Uber has lobbied lawmakers at the state level to pass “model codes” for the regulation of on-demand transportation companies like itself. Although the codes cover a range of issues, Uber’s model legislation includes language saying that its workers are independent contractors.<sup>110</sup>

Like employers in years past, Uber is spending hundreds of millions of dollars to create a regulatory environment that will sustain a new model of employment relations, in which workers who share many of the same vulnerabilities as regular employees are nonetheless considered “independent” under the law. The question echoes across the on-demand economy. A recent article in *Fast Company* warned: “Lose this workforce structure – either by a wave of class-action lawsuits, intervention by regulators, or through the collective action of disgruntled workers – and you lose the gig economy.”<sup>111</sup>

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<sup>107</sup> Liam Dillon, “Uber and Lyft are Winning at the State Capital – Here’s Why,” *Los Angeles Times*, May 7, 2016.

<sup>108</sup> *Congressional Quarterly Researcher*, 2016, *op. cit.*, 282.

<sup>109</sup> Dillon, *op. cit.*

<sup>110</sup> Cherry, *op. cit.*, 18. Cherry notes that provisions of local transportation statutes may not be determinative regarding employee status.

<sup>111</sup> Cited in *Congressional Quarterly Researcher*, 2016, *op. cit.*, 282.

The gig economy occupies a very thin slice of the U.S. workforce to date, and the challenges faced by gig workers do not encompass the problems of wage stagnation, underemployment, and economic insecurity confronted by much of the traditional labor force. Yet the challenges underway and the changes sought by Uber and others have the potential to be transformative, altering the basic terms of the already attenuated employment relationship in ways that reverberate across the larger landscape of contingent work.

### **7. Conclusion: The Politics of Reform**

The widespread use of contingent work arrangements has produced a quiet deregulation of significant expanses of the U.S. labor market. One effect is that millions of the country's most vulnerable workers cannot gain access to many basic social and labor protections and supports. This is not simply a consequence of globalization and technological innovation making jobs more flexible and insecure. It is also the result of how contingent labor has been constructed politically, in legislatures and courts, over decades. The consequences emerge particularly sharply in the case of independent contractors – a group that includes some of the nation's most vulnerable, as well as some of its most advantaged, workers – whose status as “employees” or “nonemployees” is a central issue in current political struggles over the gig economy.

The larger political and policy questions posed by the conflict over the employment relationship have begun to draw the attention of policy analysts. Proposals for reform have taken two main forms.

One approach is to redefine the employment relationship, generally by expanding the number of categories. As described earlier, legislatures in a number of countries have created a category of “dependent contractors,” to address the circumstances of workers who are not legally employees under traditional rules, but are economically dependent on their employers and therefore in need of the legal and social protections afforded to legal employees. In countries such as Canada, Germany, the Netherlands, and Sweden, employment laws apply to dependent contractors as if they were employees in some regards, and treat them as non-employees in other respects. In Germany, for example, the middle category of “employee-like persons” is not afforded traditional employee protections under the country's laws regarding working time or protection against dismissals. But they are protected

by statutes that provide the right to collective bargaining, set health and safety standards for the workplace, and protect against sexual harassment.<sup>112</sup>

Some legal scholars have called for the creation of a similar “dependent contractor” status in the United States, to extend to currently uncovered workers a set of employee protections that advance broader social purposes, such as anti-discrimination laws (under Title VII of the Civil Rights Act), workplace health and safety protections (under OSHA), and the right to organize (under the NLRA).<sup>113</sup> One proposal for redrawing the lines in employment law that has garnered recent attention in the U.S. comes from two academics and former Obama administration officials, Seth Harris and Alan Krueger. They argue for establishing an “independent worker” category, specifically for those working in the “online gig economy” [who] do not fit easily into the existing legal definitions of ‘employee’ or ‘independent contractor’ status.” They propose extending to these workers protections and benefits including “civil rights protections, tax withholding, and employer contributions for payroll taxes,” as well as the right to unionize and bargain collectively, though not under the umbrella of the NLRA.<sup>114</sup>

Critics of this approach have argued that many workers who are now considered independent contractors should simply be afforded the full range of employee protections and rights— including an NLRA-backed right to bargain collectively, minimum wage and overtime rules, workers’ compensation, and unemployment insurance – which would not be extended to “independent workers” under the Harris and Kreuger proposal.<sup>115</sup> Some argue that state and federal labor and social legislation should designate a broad range of 1099 employees, or workers in certain on-demand sectors, as “statutory employees” for the purposes of these protections. The statutes would then apply regardless of how a worker’s employer characterizes the employment relationship.<sup>116</sup>

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<sup>112</sup> Stephen F. Befort, “The Regulatory Void of Contingent Work,” *Employment Rights and Employment Policy Journal*, Vol. 10 (2006): 254.

<sup>113</sup> *Ibid*, 255.

<sup>114</sup> Seth D. Harris and Alan B. Krueger, “A Proposal for Modernizing Labor Laws for Twentieth Century Work: The ‘Independent Worker,’” The Hamilton Project, December 2015, Abstract.

<sup>115</sup> Ross Emswiler and Lawrence Mishel, “Uber Business Model Does not Justify a New ‘Independent Worker’ category, Economic Policy Institute, March 17, 2016.

<sup>116</sup> This approach is already applied to specific groups of workers under federal Social Security law. A number of state worker’s compensation and unemployment insurance programs also automatically cover certain categories of workers, regardless of whether they are otherwise considered contractors or employees. Rebecca Smith and Sarah Leberstein, “Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy,” National Employment Law Project, September 2015, 10.

A second reform approach is to regulate nonstandard work. The European Union and other OECD countries have created specific standards and regulations that apply to nonstandard jobs. The EU has adopted directives addressing part-time work (1997), fixed-term work (1999) and temporary agency work (2008). The directives generally establish that nonstandard workers must be treated the same as regular employees in terms of basic working and employment conditions, “unless different treatment is justified on objective grounds.” Specific directives state that nonstandard workers must have equitable access to training opportunities and information about vacancies in permanent or full-time positions, and that information about the use of non-standard work must be made available to workers’ representatives.<sup>117</sup>

A broader review of the 32 countries in the OECD (in 2014) suggests a range of regulatory options that might be considered in the U.S. Eleven countries, for example, impose restrictions on the use of “fixed-term contracts” that seek to limit them to genuinely temporary circumstances. In the majority of countries, there is a cumulative limit on fixed-term contracts (usually 2-4 years), and in about half, there are limits on the duration or renewals of temp agency contracts. The United States, by contrast, is one of only three countries (along with Canada and Israel) that have “no regulation at all on the cumulative duration or renewals” of such contracts.<sup>118</sup>

Policy approaches in Europe and elsewhere thus offer a range of reform strategies that might be pursued in the United States to address the eroding terms of the employment relationship and the challenges facing the contingent workforce. As this study makes clear, however, it is the political debate and struggle over labor market conditions and reforms that will determine whether any of these approaches are pursued, and in what form.

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<sup>117</sup> *Social Europe Guide: Labour Law and Working Conditions*, European Commission, 2014, 38-9.

<sup>118</sup> About half the OECD countries also had restrictions on seasonal contracts, “project work contracts” or “temporary work agency” contracts. *Ibid.*, 160-64.

# Insecure Work and Well-being: The Experience of Learning Support Officers in the Education Sector

Christian Bombig \*

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**Abstract.** Despite the growing body of research into insecure work, debate still rages about its impacts upon the well-being of workers. This research goes beyond existing quantitative research to explore the human experience of Learning Support Officers (LSO) / Teaching Assistants in the Australian education sector. LSOs, the majority of whom are women, continue to be employed in part-time, fixed-term positions at a rate up to five times higher than that of the general population. This research applies a phenomenological methodology to explore insecure employment and its impact on well-being. For LSOs, the precariousness of their employment exposes them to financial risk, limits their access to training and impacts broadly upon their well-being. Regardless of how unavoidable risk is in a modern economy, this research distils the essence of the human experience of insecure work and calls for changes to employment policies and practices to minimise its negative impacts.

**Keywords:** *Insecure work, education, well-being*

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\* Senior Adviser to the Minister for Suburban Development in the State Government of Victoria, Australia. Email: christianbombig@gmail.com



## 1. Introduction

Work is critical to human existence in a capitalist society. It occupies over half the waking hours of most adults in Australia, gives our lives meaning and provides the vast majority of us with the income required to subsist. Work in Australia, and its regulatory framework, evolved concurrently with social welfare policy to become what Francis Castles<sup>1</sup> described as the ‘wage earners welfare state’. Since the 1980s however, the social contract between citizen and this welfare state has been refashioned by the rise of individualization<sup>2</sup> and the emergence of a ‘risk society’<sup>3</sup>.

These risks vary from the unexpected, such as illness, to the planned, such as taking out a mortgage. In Australia, the State has traditionally provided protection against the most unpredictable and severe risks such as unemployment by providing welfare. In addition to this, further employment security was provided through the standard employment relationship (SER). Historically the Australian SER was as much a social contract as an actual contract, reinforcing the role of the ‘male breadwinner’ as full-time worker and sole provider for his family<sup>4</sup>. This social contract was a product of the ‘Federation Settlement’<sup>5</sup> and characterised by the employee submitting to the employer’s authority in return for job security and a wage substantial enough for the needs of the employee and his dependents. In addition to this ‘job for life’, the contract evolved to include other ‘risk minimising’ conditions of employment such as personal leave to protect against illness or penalty rates to compensate for working unsociable hours.

In the 1980s Australia began to deregulate its economy and dismantle the cultural, political and social mechanisms that had till then protected its citizenry and promoted the SER. Since then, we have labelled employees outside of the SER, like casuals<sup>6</sup> and fixed-term<sup>7</sup> employees, as ‘insecure’. It is appropriate to

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<sup>1</sup> F. Castles, *The Wage Earners Welfare State Revisited*, *Australian Journal of Social Issues* 29/2, 1994.

<sup>2</sup> U. Beck, *Risk Society : Towards a New Modernity*, Theory Culture & Society; London: Sage, 1992, 260 p.

<sup>3</sup> U. Beck, *Risk Society Revisited: Theory, Politics and Research Programmes*, *The risk society and beyond: Critical issues for social theory*, 2000b, 211-29.

<sup>4</sup> B. Howe, *Weighing up Australian Values : Balancing Transitions and Risks to Work and Family in Modern Australia*; Sydney: UNSW Press, 2007, 207 p.

<sup>5</sup> Australian Centre for Industrial Relations Research Training *Australia at Work: Just Managing?*, Sydney, 1999

<sup>6</sup> Commonly, a casual employee is someone who works irregular hours and days and receives a loading of between 20% - 25% of the hourly wage as compensation for entitlements such as personal leave. H. Buddelmeyer, D. Mcvicar, and M. Wooden, *Non-Standard “Contingent” Employment and Job Satisfaction: A Panel Data Analysis*, *Industrial Relations: A Journal of Economy and Society*, 54/2, 2015, 256-75..

note that not all changes to the SER need be considered negative. For instance, greater flexibility in working hours has created employment opportunities for women to be able to enter the workforce and balance career and family in circumstances<sup>8</sup> where respectful and reciprocal relationships exist between employer and employee<sup>9</sup>.

The proliferation of insecure employment in Australia has not been uniform. Recent studies such as the *Staff in Australia's Schools Report* 2007<sup>10</sup> and 2013<sup>11</sup> record an increase in the use of fixed-term contracts in the education sector, with contract and casual employment increasing from 10% to 15% for secondary teachers and 17% to 22% for primary teachers. Yet these reports provide little insight into how insecure employment affects a teacher's well-being, nor do they shed light on how fixed-term employment is utilised in other occupational categories such as a Learning Support Officer (LSO)<sup>12</sup>. As fixed-term employment rises, a limited understanding of its impacts is concerning, particularly when major investments are being made to improve the quality of education. Currently, no published research exists into impacts of insecure employment on LSOs, who are predominantly women and who contribute significantly to equitable access to education in Australia. Therefore, this research seeks to further explore the phenomenon of insecure employment and its impacts upon the well-being of LSOs.

By using the descriptive methodology of transcendental phenomenology<sup>13</sup> it is proposed that a deeper insight into the human biography of insecure

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<sup>7</sup> Workers in fixed-term employment often have the same entitlements as ongoing workers but are only employed for a determined period of time.

<sup>8</sup> B. Howe, *Weighing up Australian Values : Balancing Transitions and Risks to Work and Family in Modern Australia*, B. Pocock, N. Skinner, and P. Williams, *Time Bomb: Work, Rest and Play in Australia Today*; Sydney: UNSW Press, 2012.

<sup>9</sup> B. Pocock, R. Prosser, and K. Bridge, *The Return of 'Labour-as-Commodity'? The Experience of Casual Work in Australia, Reworking*, 2005, 459.

<sup>10</sup> Australian Government Department of Education, Employment and Workplace Relations. *Staff in Australia's Schools 2007: Main Report on the Survey*, [http://research.acer.edu.au/tll\\_misc/3/](http://research.acer.edu.au/tll_misc/3/), 2008

<sup>11</sup> Australian Government Department of Education, Employment and Workplace Relations. *Staff in Australia's Schools 2013: Main Report on the Survey*, [http://research.acer.edu.au/tll\\_misc/20/](http://research.acer.edu.au/tll_misc/20/), 2014

<sup>12</sup> With the endorsement of most of the participants in this research, and for clarity, the term LSO refers to those working as classroom/teaching/learning aides or assistants in primary or secondary education. The role and duties of a LSO vary dramatically and often include: integrating children with special needs, managing student behaviour, reinforcing and explaining key concepts in the relevant subject areas and diagnosing and providing targeted support to improve educational outcomes.

<sup>13</sup> C. Moustakas, *Phenomenological Research Methods*; Thousand Oaks, CA: SAGE Publications, Inc., 1994, 25-43.

employment will be achieved. The transcendental aspect of this form of phenomenology requires that the issue is re-examined anew, before examining it from various perspectives and ultimately distilling the experience to its very essence. This study expands existing knowledge in several ways. First, by application of theory, it explores the impacts of insecure employment on the eudaimonic, multidimensional well-being of LSOs. Second, it uses an innovative methodology by combining Clark Moustakas<sup>14</sup> transcendental phenomenology with other qualitative research methods, such as focus groups. This approach will allow for an understanding of how LSO's experience insecure work and recognise the complexity of well-being, an objective not easily achieved through quantitative research.

For the purposes of this research, well-being is a state both subjective and holistic. Such an interpretation is suited to phenomenological analysis because it reflects the constructivist nature of research<sup>15</sup> and that the process of inquiry is inherently subjective. What follows gives an overview of the Australian education sector, before exploring existing and relevant literature on both the phenomenon of insecure employment and the concept of well-being. An explanation of the phenomenological methodology will then be provided, showing how it has been applied in combination with other qualitative research techniques. The results of the research will then be organised and summarised, allowing for in-depth discussion and interpretation. This research will conclude by distilling the phenomenon of insecure employment as it is experienced by LSOs, comment on what has been learned and identify employment policies and practices that may reduce any negative impacts of insecure employment upon the well-being of LSOs.

## **2. The Australian Context:**

### ***The Changing Nature of Employment in the Education Sector***

This research seeks to shine a spotlight on the human experience of fixed-term employment. It also acknowledges the changing nature of education in Australia and the accompanying changes to employment. Over the last two decades, the definition of a 'professional' teacher has changed, and regulatory bodies like the Victorian Institute of Teaching have been established to monitor teaching standards so they will satisfy community expectations. Simultaneously, government reporting requirements designed to measure and

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<sup>14</sup> Ibid.

<sup>15</sup> A. Bryman, *Social Research Methods*; Oxford: Oxford University Press, 2012.

compare student progress and school performance<sup>16</sup> have proliferated, exemplified by the National Assessment Program-Literacy and Numeracy (NAPLAN) test<sup>17</sup>. Additionally, there has also been an increased recognition of specialist expertise and a rise in the number of people employed in these roles. This is particularly the case in support services, where the introduction of student well-being co-ordinators and Non English Speaking Background practitioners reflects a better understanding of the factors that improve educational outcomes<sup>18</sup>.

In Victoria, 63% of students are enrolled in government schools, 23% in Catholic schools and 14 % in independent schools<sup>19</sup>. Approximately 68%<sup>20</sup> of employees are ongoing in the education sector; however this last figure is generic and, therefore, one can only infer possible employment trends from other occupations within the sector. As this research focuses on LSOs in Catholic and Victorian government schools (VGS) it is important to establish the frequency of fixed-term employment in these sectors. In the 2014 Victorian Department of Education and Early Childhood Development Annual Report<sup>21</sup> summary data suggests that approximately 39% of LSOs employed in VGSs are employed on a fixed-term basis, compared to 32%<sup>22</sup> in Victorian Catholic schools. The frequency of fixed-term employment amongst LSOs is four to five times higher than the general Australian population which was 7.25%<sup>23</sup> in 2014.

In addition to the changes to employment in the education sector, one should bear in mind the process by which children with special needs have been integrated into main stream education and what factors may have influenced

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<sup>16</sup> Victorian Auditor-General *Improving Our Schools: Monitoring and Reporting*, Melbourne, 2007

<sup>17</sup> NAPLAN results are used to compare individual student progress and aggregated to provide international comparisons such as those made in the Program for International Student Assessment (PISA) (DEECD 2012).

<sup>18</sup> Victorian Auditor-General *Improving Our Schools: Monitoring and Reporting*,

<sup>19</sup> Independent Schools Victoria, *School and Student Numbers*, <<http://www.is.vic.edu.au/independent/facts/numbers.htm>>, 13/09, 2015

<sup>20</sup> This figure was derived by combing the number of employees in the education sector who do not receive entitlements (casuals) 17.7%, reported by the Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013*, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6310.0/>>, 11/06/15, 2014a, with the percentage of employees in the education sector on fixed-term contracts 14.6%, reported in Australian Bureau of Statistics *Forms of Employment* 2014b

<sup>21</sup> The Department of Education and Early Childhood Development. *The Department of Education and Early Childhood Development Annual Report*, Melbourne, 2014

<sup>22</sup> This is an approximated amount based on unpublished IEU Victoria Tasmania membership data.

<sup>23</sup> Melbourne Institute of Applied Economic and Social Research., 'Hilda Survey Annual Report', (Melbourne: The University of Melbourne, 2014), Online resource (volumes).

the initial use of contracts. Consistent with the disability normalisation principle of the 1970s the Australian government introduced funding to assist with the integration children in 1974-75<sup>24</sup>. Throughout the 1990s this 'mainstreaming' increased, changing the nature of support provided in schools<sup>25</sup>. It appears that LSOs were initially employed on contracts because funding was linked to student numbers and issued annually, and that the transition from unpaid parent helper to paid employee engendered two attitudinal norms that enabled the use of contracts. First, any support for these children would be better than none, even if it was precarious; and second, the work was previously unpaid so any method of paid employment would be better than none.

There are two elements of the funding arrangements for students with disabilities that promote the use of fixed-term employment. The first element is the identified funding deficiency in the quantum of funding provided to support children with special needs<sup>26</sup> which makes investment in well-paid secure employment a financial risk for schools. The second is the mechanism used to allocate this funding. Currently, funding is linked directly to the child which means that the funding will move to a different school if the child does, potentially resulting in an excess number of LSOs.

So, why research the impacts of insecure employment on the well-being of LSOs? Australia values quality education, spending over \$81 billion<sup>27</sup> on it nationally in 2013-14. However, in working towards an inclusive system that reduces the risks associated with disability by providing support to children, we have at the same time conferred new risks on those providing the support. This paradox is rarely discussed and, while there is some research into the impacts of the new risks on teachers and principals<sup>28</sup> (S. Beltman et al. 2011; P. Riley 2014) insufficient research<sup>29</sup> exists in relation to LSOs.

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<sup>24</sup> C. Forlin, *Inclusive Education in Australia Ten Years after Salamanca*, *European Journal of Psychology of Education*, 21/3, 2006/09/01 2006, 265-77.

<sup>25</sup> Ibid.

<sup>26</sup> D. M. Gonski, *Review of Funding for Schooling: Final Report*; Australia: Department of Education, Employment and Workplace Relations, 2011.

<sup>27</sup> Australian Bureau of Statistics, *Government Expenditure on Education in Australia*, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/5518.0.55.001>>, 2/08/15, 2015

<sup>28</sup> S. Beltman, C. Mansfield, and A. Price, *Thriving Not Just Surviving: A Review of Research on Teacher Resilience*, *Educational Research Review*, 6/3, 2011, 185-207, *Australian Principal Occupational Health, Safety & Wellbeing Survey. 2011 - 2014 Data*, Melbourne, 2014

<sup>29</sup> The only references that can be found regarding LSOs and insecure employment are contained in two submissions to the Independent Inquiry into Insecure Work in Australia made by the Australian Education Union (AEU) Australian Education Union Tasmanian Branch *Aeu South Australian Branch Submission to Independent Inquiry into Insecure Work in Australia*, 2012

### 3. Literature Review

It is central to this research to understand both insecure employment and the concept of well-being. The absence of literature pertaining to LSOs and insecure work means that one must go to the more general body of research into: 1) the sociological approach to understanding insecure employment as a 'risk', and the contemporary international discourse around risk and work; 2) insecure employment as it understood in the Australian context; and 3) what constitutes well-being. Finally, we will also comment on existing research including a quantitative well-being index, two studies of fixed-term employment and job satisfaction, and one study into the well-being of school principals.

#### 3.1 Risk and Contemporary International Discourse about Work

It was Anthony Giddens<sup>30</sup> who first proposed that risk is an essential part of progress and that modern political economies need to re-allocate risk in order to generate wealth. The re-allocation of these 'new risks' associated with the human pursuit of knowledge<sup>31</sup> is relevant to understanding insecure employment. The interrelatedness between risk and individualism<sup>32</sup> (U. Beck and E. Beck-Gernsheim 2002b) is particularly evident when employees are made to bear the risks associated with employment. Ulrich Beck describes this as the "*individualisation of social risks*"<sup>33</sup>. The spread of this form of individualisation has created a 'precarious' class of employee<sup>34</sup> in nearly every sector of the global economy, from the creative industries to the service industries. Andrew Ross<sup>35</sup> uses the 'dot.com' boom of the 1990s to illustrate aspects of neoliberalism that promote the acceptance of risk by the individual in order to accelerate success. He contends that a 'go out an' get 'em at all

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<sup>30</sup> A. Giddens, *The Third Way : The Renewal of Social Democracy*; Malden, Mass.: Polity Press, 1999a, x, 166 p.

<sup>31</sup> A. Giddens, *Runaway World : How Globalisation Is Reshaping Our Lives*; London: Profile, 1999b, 104 p.

<sup>32</sup> U. Beck and E. Beck-Gernsheim, *Individualization : Institutionalized Individualism and Its Social and Political Consequences*, Theory, Culture & Society; London ; Thousand Oaks, Calif.: SAGE, 2002a, xxv, 221 p.

<sup>33</sup> *Ibid.*, at 39.

<sup>34</sup> A. Ross, *Nice Work If You Can Get It : Life and Labor in Precarious Times*, Nyu Series in Social and Cultural Analysis; New York: New York University Press, 2009, viii, 264 p, G. Standing, *The Precariat : The New Dangerous Class*; London: Bloomsbury Academic, 2011, ix, 198 p.

<sup>35</sup> A. Ross, *Nice Work If You Can Get It : Life and Labor in Precarious Times*.

costs' mindset permeated the Silicon Valley creative industries, an attitude actively promoted by policy makers. More recently, Christian Fuchs<sup>36</sup> has re-examined precariousness and risk in the creative industries through a critical theory case study of Google that provides a contemporary analysis of the 'good jobs, bad jobs' concept referred to by Ross<sup>37</sup>. Fuchs<sup>38</sup> juxtaposes two very different experiences of insecure work in Silicon Valley, that of software engineers and that of manufacturing workers. While both categories of worker are employed precariously, the manufacturing worker in the 'bad job' is engaged without the status or entitlements that accompany the highly valued software engineer occupying the 'good job'. The flexibility of individual contractual arrangements is commented upon by Beck<sup>39</sup> and Guy Standing<sup>40</sup> and it is in their analysis that they both agree it is only the professional class that can afford to enter and exit the workforce as need dictates.

### ***3.2 Insecure Employment in Australia***

The most recent and comprehensive investigation into insecure employment in Australia was the Independent Inquiry into Insecure Work, chaired by Prof. Brian Howe. The inquiry defined insecure work as "*provid[ing] workers with little social or economic security and little control over their working lives.*"<sup>41</sup> This definition, and the associated indicators<sup>42</sup> reflect that insecure employment extends beyond a narrow view that it is merely another mode of employment, like part-time or full-time. Moreover, it incorporates the many impacts it can have upon an individual's social and economic security. Historical context plays a

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<sup>36</sup> C. Fuchs, *Digital Labour and Karl Marx*; New York: Routledge, 2014, xv, 403 pages.

<sup>37</sup> 'good jobs, bad jobs' was a concept first devised by A. L. Kalleberg, *Good Jobs, Bad Jobs: The Rise of Polarized and Precarious Employment Systems in the United States, 1970s-2000s*: Russell Sage Foundation, 2011, 312.

<sup>38</sup> C. Fuchs, *Digital Labour and Karl Marx*.

<sup>39</sup> U. Beck, *The Brave New World of Work*; Malden, Mass.: Polity Press, 2000a, v, 202 p.

<sup>40</sup> G. Standing, *The Precariat : The New Dangerous Class*.

<sup>41</sup> Australian Council of Trade Unions *Lives on Hold: Unlocking the Potential of Australia's Workforce-the Report of the Independent Inquiry into Insecure Work in Australia*, Melbourne, 2012

<sup>42</sup> The inquiry determined the following indicators of insecure work:

- 1) *unpredictable, fluctuating pay;*
- 2) *inferior rights and entitlements, including limited or no access to paid leave;*
- 3) *irregular and unpredictable working hours, or working hours that, although regular, are too long or too few and/or non-social or fragmented;*
- 4) *lack of security and/or uncertainty over the length of the job;*
- 5) *and lack of voice at work on wages, conditions and work organisation.*

particularly important role in how we define insecure work in Australia. Both Paul Smyth's concept of the 'Australian way' and John Buchanan's notions of the 'Federation settlement' and the 'Post-War Social Settlement' describe the unique development in tandem of social and industrial policy in Australia<sup>43</sup>. This interrelatedness is a significant consideration in the work of Ian Watson, Iain Campbell, Chris Briggs<sup>44</sup>, Barbara Pocock<sup>45</sup>, Howe<sup>46</sup>, and Jens Zinn<sup>47</sup>. Of the many distinct developmental phases described by Smyth it is the 'Harvester judgement' of 1907 that shaped industrial relations for over a century when it established a minimum wage sufficient for "*the normal needs of the average employee, regarded as a human being living in a civilised community*"<sup>48</sup>. The introduction of a 'living wage'<sup>49</sup> in this post-federation period was the beginning of the Industrial Award system, which was both a centralised mechanism for fixing wages and a regulatory framework protecting against 'labour commodification'<sup>50</sup>. The two subsequent phases of social and industrial policy development, the 'post-war' period and the 'Accord', further institutionalised the standard employment relationship through the pursuit of full employment<sup>51</sup> and the establishment of new social contract or Accord, between unions and the Federal government<sup>52</sup>. Up until the Accord, Australian workers had enjoyed increasing employment security and improved conditions of employment. However, the rise of

<sup>43</sup> Australian Centre for Industrial Relations Research Training *Australia at Work: Just Managing?*, P. Smyth, *Closing the Gap? The Role of Wage, Welfare and Industry Policy in Promoting Social Inclusion*, *Journal of Industrial Relations*, 50/4, 2008, 647-63.

<sup>44</sup> I. Watson et al., *Fragmented Futures : New Challenges in Working Life*, Annandale, N.S.W.: Federation Press, 2003, xix, 236 p.

<sup>45</sup> B. A. Pocock and J. M. Buchanan, *Social Exclusion and the Australian Labour Market: Reconfiguring Inequality in Work and Care*: Peter Lang Publishing, 2003.

<sup>46</sup> B. Howe, *Weighing up Australian Values : Balancing Transitions and Risks to Work and Family in Modern Australia*.

<sup>47</sup> J. O. Zinn, *Introduction: Risk, Social Inclusion and the Life Course*, *Social Policy and Society*, 12/2, 2013, 253-64.

<sup>48</sup> H. B. Higgins, *Ex Parte H.V. McKay*, Commonwealth Court of Conciliation And Arbitration, 1907

<sup>49</sup> *Waltzing Matilda and the Sunshine Harvester Factory* (2012) (Fair Work Australia) 1 streaming video (35 min.) : sd., col.

<sup>50</sup> B. Pocock, R. Prosser, and K. Bridge, *The Return of 'Labour-as-Commodity'? The Experience of Casual Work in Australia*.

<sup>51</sup> H. C. Coombs, *From Curtin to Keating: The 1945 and 1994 White Papers on Employment: A Better Environment for Human and Economic Diversity?* ; Canberra: North Australia Research Unit, Australian National University, 1994.

<sup>52</sup> P. Smyth, 'The Historical Context for Action ', in Alison McClelland and Paul Smyth (eds.), *Social Policy in Australia : Understanding for Action*, 2nd edn.; South Melbourne Oxford University Press, 2010b, xvi, 304 p.



neoliberalism in the 1980s triggered a phase of market deregulation<sup>53</sup> which would inevitably reduce the role of the SER as a key element of social and industrial policy. For the purposes of this research, it will suffice to acknowledge that the process of deregulation has continued to the present day. Poignantly, understanding the historical evolution of secure employment allows one to identify where and how security has been removed from the employment relationship, and the extent to which conditions of employment that protect workers against risks have been eroded, which in turn leads us to a consideration of the impacts such changes may have on the well-being of workers.

### 3.3 Well-being

The term ‘well-being’ is often used, but rarely understood in all of its complexity. Aristotelian in origin<sup>54</sup>, well-being referred to the pursuit of *Eudaimonia* - the self-realising process one experiences while striving towards virtue. Carol D. Ryff<sup>55</sup> asserts that a eudaimonic interpretation of well-being is a more accurate rendition of the term than a ‘hedonistic’ well-being centred around the pursuit of happiness. Psychologists Richard M. Ryan and Edward L. Deci’s paper ‘*On Happiness and Human Potentials: a review of research on hedonic and eudaimonic well-being*’ (2001) provides a comprehensive review of two distinct yet related schools of thought on well-being: subjective well-being (SWB) and psychological well-being (PWB).

Hedonic psychology assesses SWB by measuring life satisfaction, positive mood and the absence of negative mood, whereas the eudaimonic view, as expressed by Ryff<sup>56</sup>, assesses PWB by measuring autonomy, personal growth, self-acceptance, purpose in life, environmental mastery, and positive relations with others<sup>57</sup>. This multidimensional element of PWB<sup>58</sup> is also reflected in Amartya Sen’s capability approach, which defines well-being in terms of the

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<sup>53</sup> P. Kelly, *The End of Certainty*; Sydney: Allen & Unwin., 1994.

<sup>54</sup> C. D. Ryff and B. H. Singer, *Know Thyself and Become What You Are: A Eudaimonic Approach to Psychological Well-Being*, *Journal of happiness studies*, 9/1, 2008, 13-39.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> R. M. Ryan and E. L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*, *Annual Review of Psychology*, 52/1, 2001, 141-66.

<sup>58</sup> C. D. Ryff and B. H. Singer, *Know Thyself and Become What You Are: A Eudaimonic Approach to Psychological Well-Being*.

freedom to do something or be someone<sup>59</sup>. Sen uses the term ‘functionings’ to describe various activities and states that make up one’s well-being such as a healthy body or an education, and ‘capabilities’ as the freedom one has to obtain them<sup>60</sup>. Sen also proposes that well-being is the self-evaluation of one’s state of wellness. Sen’s<sup>61</sup> work shares commonalities with the eudaimonic interpretation of well-being as it includes having regard for others, confirming that functionings and capabilities are not solely related to one’s own freedom and agency but also to that of others. A strength of Sen’s approach is that it encompasses the social, economic and political nature of human existence<sup>62</sup>, mirroring the spheres of influence that defined the evolution of work in Australia. Therefore, it is the combination of Ryff’s and Sen’s work that shapes the idea of well-being used in this research.

### 3.4 Existing Research

A significant body of international research into the impacts of insecure employment on a worker’s PWB is splendidly summarised Nele De Cuyper et al.<sup>63</sup>. In Australia, such research tends to focus on specific dimensions that contribute to well-being, such as job satisfaction or the impact on work and family balance<sup>64</sup>. It is impractical to provide a comprehensive summary of all published work on insecure employment and well-being; however, key pieces of research will be commented upon.

Three prominent general studies are: the Australian Work and Life Index (AWALI); the Household Income Labour Dynamics in Australia (HILDA);

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<sup>59</sup> A. Giddens, *The Third Way : The Renewal of Social Democracy*, E. C. Martinetti, *A Multidimensional Assessment of Well-Being Based on Sen's Functioning Approach*, *Rivista internazionale di scienze sociali*, 2000, 207-39.

<sup>60</sup> S. Alkire and S. Deneulin, 'The Human Development and Capability Approach', in Severine Deneulin (ed.), *An Introduction to the Human Development and Capability Approach* (Hoboken: Taylor and Francis, 2012), 1 online resource (377 p.), Australian Council of Trade Unions *Lives on Hold: Unlocking the Potential of Australia's Workforce-the Report of the Independent Inquiry into Insecure Work in Australia*,

<sup>61</sup> A. Sen, 'Capability and Well-Being', in Daniel M. Hausman (ed.), *The Philosophy of Economics : An Anthology*, 3rd edn.; New York: Cambridge University Press, 2008, vii, 527 p.

<sup>62</sup> P. Smyth, *Closing the Gap? The Role of Wage, Welfare and Industry Policy in Promoting Social Inclusion*.

<sup>63</sup> N. De Cuyper et al., *Literature Review of Theory and Research on the Psychological Impact of Temporary Employment: Towards a Conceptual Model*, *International Journal of Management Reviews*, 10/1, 2008, 25-51.

<sup>64</sup> H. Buddelmeyer, D. Mcvicar, and M. Wooden, *Non-Standard "Contingent" Employment and Job Satisfaction: A Panel Data Analysis*, B. Pocock, N. Skinner, and R. Ichii, *Work, Life and Workplace Flexibility: The Australian Work and Life Index 2009*, Accessed July, 1, 2009, 2010.

and the Australian Unity Well-being Index (AUWI)<sup>65</sup>. One benefit of using large datasets is the generalisability of the results, HILDA being a good example. Its longitudinal design<sup>66</sup> has allowed researchers to record the consequences of life events as they occur, a limitation of other cross-sectional research<sup>67</sup>. Methodologically however, the structured nature of the survey and interview tools limits participant responses to a predetermined set of statements in interviews and self-completed questionnaires<sup>68</sup>. The consequence of this completely structured approach is that it becomes devoid of reflexivity and genuine participant interaction. In relation to well-being, the HILDA survey uses participant perceptions of their physical and mental health to infer SWB; for example the most recent publication of *'Household Income and Labour Dynamics in Australia: Selected findings from waves 1 to 12'*<sup>69</sup> proposes that 'life satisfaction' is greater for those living in smaller communities. While HILDA provides insight into well-being, it does so from a hedonic point of view. This sentiment is further emphasised by the press release that accompanied the publication of the report that replaced the technical term of 'life satisfaction' with 'happiness', also consistent with hedonistic interpretation<sup>70</sup>.

Analysis and interpretation of HILDA data by Prof. Mark Wooden and Dianna Warren in 2003 observed that those employed on fixed-term contracts are not a homogenous group and that there is a positive correlation between fixed-term employment and job satisfaction<sup>71</sup>. They state that case-study research conducted into insecure work "remains unconvincing"<sup>72</sup> as it is selective and incapable of measuring job quality. Interestingly though, Wooden and Warren also acknowledge that job quality is hard to measure objectively and that for the purposes of their research 'job satisfaction' is suitable proxy for

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<sup>65</sup> AUWI was discontinued in 2013.

<sup>66</sup> Melbourne Institute of Applied Economic and Social Research, The University of Melbourne *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 12*, Melbourne, 2015a

<sup>67</sup> M. Wooden and N. Watson, *The Hilda Survey and Its Contribution to Economic and Social Research (So Far)\**, *Economic Record*, 83/261, 2007, 208-31.

<sup>68</sup> Ibid.

<sup>69</sup> Melbourne Institute of Applied Economic and Social Research, The University of Melbourne *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 12*,

<sup>70</sup> University of Melbourne, *Major Cities Create Unhappy Australians: A Snapshot of Our Nation Revealed*, <<http://newsroom.melbourne.edu/http%3A//newsroom.melbourne.edu/news/HILDA2015>>, 27/72015, 2015

<sup>71</sup> M. Wooden and D. Warren, *The Characteristics of Casual and Fixed-Term Employment: Evidence from the Hilda Survey*: Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2003.

<sup>72</sup> Ibid., at 2.

‘utility at work’<sup>73</sup>. Equating job satisfaction with utility is problematic, particularly in this context, as it is used to infer that jobs that have a higher degree of utility constitute ‘good jobs’. The HILDA interview asks participants how satisfied they are with: pay, job security, work itself, hours of work, ability to balance work and non-work commitments, and overall satisfaction<sup>74</sup> and allows researchers to comment on latent unobserved measures such as job dissatisfaction. That said, the Likert scale used in the HILDA interview instrument limits the participant’s ability to explain what it is about their job security or wages that they are in fact dissatisfied with. Matthew B. Miles and A. Michael Huberman<sup>75</sup> comment on this inability to describe ‘how’ and ‘why’ an outcome occurs and conclude that it is a limitation of the quantitative method. In 2007 Wooden and Nicole Watson revisited the HILDA data and queried the suitability of measuring job quality based on job satisfaction. They suggest that “*rather than measuring overall worker well-being, job satisfaction may be a measure of how well present well-being compares with expected well-being at some previous date*”<sup>76</sup>. While a quantitative methodology does measure the outcome of the employee’s experience of fixed-term employment on a single dimension of well-being, it cannot elucidate the processes leading to such an outcome or examine in sufficient detail the numerous dimensions required for a eudaimonic interpretation.

In addition to HILDA and AWALI, the Australian Unity Well-being Index sought over the ten years of its operation to establish a national well-being index that reflected both societal and personal well-being<sup>77</sup>. Furthermore, it proposed that positive well-being is an abstract concept that is both non-specific and highly personalised to the individual<sup>78</sup>. The study used the Comprehensive Quality of Life (ComQoL) scale to measure personal well-being. The scale was devised by identifying 64 variables used in existing quality of life measurements across the disciplines of sociology, psychology and

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<sup>73</sup> Wooden and Warren base their decision to use ‘job satisfaction’ as suitable proxy for ‘utility at work’ based on the 1997 British research conducted by Andrew E. Clark’s entitled *Job satisfaction and Gender: Why are Women So Happy at Work ?*

<sup>74</sup> Hilda ( *Living in Australia*) *Continuing Person Questionnaire (Cpq) W15m*, <<https://www.melbourneinstitute.com/hilda/doc/questionnaires/q15.html>>, 13/09/15, 2015b

<sup>75</sup> M. B. Miles and A. M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*; Thousand Oaks, Calif.: Sage, 1994.

<sup>76</sup> M. Wooden and N. Watson, *The Hilda Survey and Its Contribution to Economic and Social Research (So Far)\**, at 19.

<sup>77</sup> R. A. Cummins et al., *Developing a National Index of Subjective Wellbeing: The Australian Unity Wellbeing Index*, *Social indicators research*, 64/2, 2003, 159-90.

<sup>78</sup> *Ibid.*

medicine<sup>79</sup> and ordering them into the following seven domains: standard of living; health; achieving; personal relationships; how safe you feel; community connect, and future security<sup>80</sup>.

In 2013, the AUWI included a number of work-related variables, allowing researchers to examine the relationship between work and well-being. The study examined participants employed in paid work engaged on a full-time, part-time and casual basis, however, there is no evidence in the report to suggest that the researchers tested for a statistically significant reduction in personal well-being for those employed on a casual basis.

Research from the United Kingdom examines the relationship between insecure forms of employment and well-being based on data collected from the British Household Panel Survey<sup>81</sup>. The research measured the impact of insecure employment on four domains of well-being: mental health, general health, life satisfaction and job satisfaction. Specifically these domains were measured by using a mental health indicator<sup>82</sup>, an assessment of perceived general health, a subjective determination of life satisfaction, and a subjective indication of job satisfaction. This study found no correlation between insecure employment and well-being, although it did confirm a negative correlation between insecure employment and job satisfaction. Interestingly, these findings are inconsistent with those reported by Wooden and Warren<sup>83</sup> and while they are suitable for comparison, one must be cautious about the generalisability of the findings as they are derived in the context of the British welfare state, which is markedly different from Australia's.

### ***3.5 Impacts of Employment on Well-being in the Education Sector***

The Australian Principals Occupational Health and Safety (OH&S) and Well-being Survey is a longitudinal study designed to assess the well-being of school Principals and Deputy or Assistant Principals. The research reports that lack of

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<sup>79</sup> R. A. Cummins et al., *Validity Studies the Comprehensive Quality of Life Scale (Comqol): Instrument Development and Psychometric Evaluation on College Staff and Students, Educational and Psychological Measurement*, 54/2, June 1, 1994 1994, 372-82.

<sup>80</sup> Australian Centre on Quality of Life, School of Psychology, Deakin University. *Part A: The Report. Australian Unity Wellbeing Index Survey 30. The Wellbeing of Australians: Social Media, Personal Achievement, and Work.*, Melbourne, Australia, 2013a

<sup>81</sup> The HILDA survey was based on the British Household Panel Survey M. Wooden and D. Warren, *The Characteristics of Casual and Fixed-Term Employment: Evidence from the Hilda Survey.*

<sup>82</sup> The mental health indicator was derived from the General Health Questionnaire (GHQ).

<sup>83</sup> M. Wooden and D. Warren, *The Characteristics of Casual and Fixed-Term Employment: Evidence from the Hilda Survey.*

professional support, insufficient professional development (PD), high work demands, and occupational violence all contribute to poor well-being<sup>84</sup>. Similarly to HILDA, data was collected on the families of the participants in order to provide a broader context and like the AUWI, it uses a set of self-assessed quality of life indicators. Uniquely, this research considers aspects of OH&S theory regarding risk removal and minimisation<sup>85</sup> however, it does not identify whether or not principals are employed on a fixed-term basis and what impacts this may have.

Evidently, Australian studies have focused more on well-being than on insecure employment, and, while these post-positivist approaches are useful, they are methodologically constrained in their ability to measure eudaimonic multidimensional well-being. In addition, an absence of transcendental phenomenological research, particularly for specific occupations, leaves many questions unanswered about the human experience in this area of inquiry.

#### 4. Methodology

Insecure work is a complex phenomenon and further complicated by the need to explore its impacts upon a multidimensional notion of human well-being<sup>86</sup>. Methodologically, it is important to ask ontological questions about the reality of human experience and epistemological questions about the research techniques used to validate them<sup>87</sup>. If the constructivist proposition that “*individuals seek understanding of the world in which they live and work*”<sup>88</sup> is accepted, then the subjective meaning of an experience must be both appreciated and respected when devising an appropriate methodology.

The raw data for this research was gathered in ten semi-structured in-depth interviews with LSOs. However, in order to increase internal consistency and reliability, a secondary data gathering and validation mechanism, namely a focus group, was conducted after the interview phase. Importantly, having two sets of data and linking them back to existing research allows us to improve validity by triangulating the results<sup>89</sup>. In addition, this research contains a

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<sup>84</sup> *Australian Principal Occupational Health, Safety & Wellbeing Survey. 2011 - 2014 Data*,

<sup>85</sup> *Ibid.*

<sup>86</sup> E. Bardasi and M. Francesconi, *The Impact of Atypical Employment on Individual Wellbeing: Evidence from a Panel of British Workers*, *Social science & medicine*, 58/9, 2004, 1671-88.

<sup>87</sup> J. W. Creswell, *Research Design : Qualitative & Quantitative Approaches*; Thousand Oaks, Calif.: Sage Publications, 1994, xix, 228 p.

<sup>88</sup> J. W. Creswell, *Qualitative Inquiry and Research Design : Choosing among Five Approaches*, 3rd edn.; Los Angeles: SAGE Publications, 2013, xxi, 448 p. at 8.

<sup>89</sup> *Ibid.*

detailed step-by-step methodology to improve its reliability and consistency<sup>90</sup>. Demographic data was collected to promote internal consistency, as well provide the necessary reference data for future quantitative research to test the generalisability of the findings. Purposive criterion sampling<sup>91</sup> was used to identify the ten interviewees and the five focus group participants. Two key characteristics: 1) LSO and; 2) Fixed-term employee, were provided to the three unions who agreed to assist with this research, the Australian Education Union (AEU) and the Community and Public Sector Union (CPSU) who both represent LSOs in VGS and the Independent Education Union (IEU) who represent LSOs in Catholic and independent schools. Sampling based on select criteria was considered appropriate, as the objective of this research is to explore the human experience of fixed-term employment. It was envisaged that the interview sample would be approximately representative<sup>92</sup> of the portion of education delivered by the government and non-government sectors. Unfortunately, this was not achieved due to the limited availability of participants, resulting in interviews only being conducted with LSOs from Catholic schools. This limitation was partially offset as the focus group consisted of mostly LSOs from VGS.

#### 4.1 Interviews

On commencement of the interview, participants were provided with an overview of the process, given a copy of the consent form and given an opportunity to ask any questions. The structured part of the interview consisted of demographic questions and specific questions that introduced the various dimensions of well-being. During the interview, participants were asked a series of questions to clarify, explain, explore and challenge the statements they made<sup>93</sup>.

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<sup>90</sup> Ibid.

<sup>91</sup> J. W. Creswell, *Qualitative Inquiry and Research Design : Choosing among Five Approaches*, 2nd edn.; Thousand Oaks, Calif.: Sage Publications, 2007, xvii, 395 p. A. Bryman, *Social Research Methods*. J. Ritchie, J. Lewis, and G. Elam, *Designing and Selecting Samples, Qualitative research practice: A guide for social science students and researchers*, 2003, 77-108.

<sup>92</sup> J. Ritchie, J. Lewis, and G. Elam, *Designing and Selecting Samples*.

<sup>93</sup> R. Legard, J. Keegan, and K. Ward, 'In-Depth Interviews', in Jane Ritchie et al. (eds.), *ibid.*; Thousand Oaks, Calif.: Sage, 2013.

## 4.2 Focus group

The focus group consisted of five participants, three from VGS and two from Catholic schools, selected using the same sampling and recruitment process as the interview phase. At the start of the focus group the participants were given an overview of the process and a copy of the consent form. Prior to group discussion, demographic data was collected via the Participant Questionnaire so that comparisons could be made to interviews. During the hour-long focus group discussion was guided to ensure that a) insecure employment and; b) dimensions of well-being were discussed.

## 4.3 Phenomenology

Consistent with the phenomenological research design described by John W. Creswell<sup>94</sup> the participant responses were subsequently coded to identify the key themes. As indicated, analysis will be influenced by Clark Moustakas<sup>95</sup> 'transcendental phenomenological' approach, one which moves through four distinct phases in order to distil the 'essence' of the phenomenon<sup>96</sup>. This form of phenomenology was favoured over 'Realist' or 'Existential' phenomenology because its methodological processes seek to separate the experience of the observer from the observed.

The four phases are: 1) The creation of the '*Epoche*', a process designed to identify potential researcher bias and separate the experience of the researcher from that of the participant; 2) The process of phenomenological reduction, whereby the participant's experience is presented in textural account that describes the experience in rich, adjective-laden language. In this phase, the concept of 'horizontalisation' is also introduced, requiring the researcher to acknowledge the limitless nature of experiences and to treat them all equally; 3) The process of 'imaginative variation', where the key structural elements of the experience are identified and examined from alternate perspectives, roles and functions; and 4) The synthesis of essence and meaning. It is this final inductive phase of the phenomenological process that results in the "*intuitive integration of the fundamental textural and structural descriptions into a unified statement of the essences of the experience of the phenomenon as a whole*"<sup>97</sup>.

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<sup>94</sup> J. W. Creswell, *Qualitative Inquiry and Research Design : Choosing among Five Approaches*.

<sup>95</sup> C. Moustakas, *Phenomenological Research Methods*.

<sup>96</sup> A concept derived from the earlier work of philosopher and scientist Edmund Husserl in *ibid.* A. Bryman, *Social Research Methods*.

<sup>97</sup> C. Moustakas, *Phenomenological Research Methods* at 100.



In this research, the creation of the ‘*Epoche*’ is a reflexive process and undertaken in recognition that a researcher, no matter how careful, invariably influences the way in which knowledge is constructed<sup>98</sup>. As the author is an employee of IEU, the bracketing out of his experiences<sup>99</sup> was particularly appropriate during the interview and phenomenological reduction phases. Evidence of this is provided for in a methodical and reflexive interview procedure and the presentation of data in the form of excerpts which lend varying degrees of support to the hypothesis that insecure work has a negative impact on well-being.

In this research, this reduction process has been hybridised with Creswell’s<sup>100</sup> data analysis procedure, together with the coding steps posited by Renata Tesch’s qualitative coding method<sup>101</sup>. The coding process consisted of three stages. First, an initial reading of the transcripts and the annotating of codes in the margins to reflect participants’ experiences. Second, the organisation and the consolidation of these codes in a coding book (Appendix 2). The final phase of the coding was the re-examination of all transcripts and the re-coding of their content in a manner consistent with the coding book. The coding book has been converted into a thematic network (Figure 3) to depict how the themes and sub-themes of the participant’s experience interact with various dimensions of well-being.

In this research, the power imbalance between the researcher and participant is particularly evident in relation to the control of knowledge. All reasonable efforts were undertaken to ensure that the research was conducted in an ethical manner. Numerous safe-guards were used to protect the well-being of participants; steps were taken to minimise the power imbalances; and strategies were implemented to avoid potential conflicts of interest.

This research elicited many responses from employees that could be considered critical of their employer and, if attributed to them in an identifiable way, could have a significant adverse impact upon their re-employment. To protect against this both the interviews and the focus group were conducted offsite to reduce the probability of participants being identified by their employer during the data gathering stage. The reporting stage was just as critical in relation to the protection of identity, it is for this reason that the report uses pseudonyms to protect the anonymity of the

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<sup>98</sup> M. Guillemin and L. Gillam, *Ethics, Reflexivity, and “Ethically Important Moments” in Research*, *Qualitative inquiry*, 10/2, 2004, 261-80.

<sup>99</sup> The author’s role at the IEU has on occasion required him to represent fixed-term employees who are dissatisfied with their employment status.

<sup>100</sup> J. W. Creswell, *Qualitative Inquiry and Research Design : Choosing among Five Approaches*.

<sup>101</sup> *Ibid.*

participants and does not link those pseudonyms to data that could subsequently be used to identify them.

Very early in the design of this research it also became evident that a potential conflict of interest could arise between an IEU member participant and the author in his capacity as an employee of the IEU. As an organiser, it is part of his role to represent the interests of members in a specific group of schools. To avoid this potential conflict, the participant identification process was designed to ensure that participants were not nominated from the author's allocation of schools. Further to this, undertakings were given that in the event a conflict arose the IEU would, if requested, appoint an alternate representative for the participant.

## 5. Results

From the data collected by this research it is evident that each participant's experience of fixed-term employment is different and that these differences can be divided into two distinct categories. The first difference is that of the participant's 'dominant experience'<sup>102</sup>. The second difference is the 'phenomenological experience', which describes the degree of interaction that their experience of fixed-term employment has had on various dimensions of well-being. The results section will firstly provide a textural account of five of the participants' dominant experiences. In line with the eudaimonic definition of well-being, these experiences have been selected because they highlight the impacts of insecure employment on worth, respect, relationships and agency. This will then be followed by a summary of the participant collective phenomenological experience as represented in a thematic network<sup>103</sup>. Finally, before moving to the textural accounts of the dominant experiences, a summary of demographic information is provided to contextualise the participants.

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<sup>102</sup> The dominant experience is defined as the part of the participant's narrative to which they have attributed the most relevance or emphasised in the most detail.

<sup>103</sup> J. Attride-Stirling, *Thematic Networks: An Analytic Tool for Qualitative Research*, *Qualitative research*, 1/3, 2001, 385-405.

### 5.1 Summary Table of Demographics – Interviews

Figure 1

**5.1 Summary table of demographics – Interviews** **Figure 1**

Age	Gender	Relationship Status	Dependents	Highest Qualification	Education Sector	Type of School	Employment Method	Years Employed Current	Years as Ed Support	Employment Fraction	Avg. Hours per Week	Job Class	Avg. Weekly Wages* Gross
59	Female	Partnered	0	Cert III	Catholic	Primary	Fixed-term 12 months	8	8	.52	20	Cat B ES2.2	\$498.47
47	Female	Partnered	1	Cert III	Catholic	Secondary	Fixed-term 12 months	1.5	1.5	.6	22.8	Cat B ES2.1	\$553.99
58	Female	Single	0	Cert IV	Catholic	Primary	Fixed-term 12 months	15	13	.85	32.5	Cat B ES2.1	\$784.21
51	Female	Partnered	2	Cert III	Catholic	Primary	Fixed-term 12 months	11	15	.52	20	Cat B ES2.1	\$480.12
47	Female	Partnered	3	Cert III	Catholic	Primary	Fixed-term 12 months	12	12	.43	16.5	Cat B ES2.1	\$397.02
62	Female	Single	0	Cert IV	Catholic	Secondary	Fixed-term 12 months	9	15	.8	30.4	Cat B ES2.3	\$785.34
25	Male	Partnered	0	Cert III	Catholic	Primary	Fixed-term 12 months	7	7	.39	15	Cat B ES2.1	\$360.09
56	Female	Partnered	2	Cert IV	Catholic	Primary	Fixed-term 12 months	12	12	.52	20	Cat B ES3.5	\$588.70
54	Female	Partnered	0	Cert IV	Catholic	Secondary	Fixed-term 12 months	8	9	.8	30.4	Cat B ES2.3	\$785.34
50	Female	Partnered	2	Cert IV	Catholic	Secondary	Fixed-term 12 months	5	8	.8	30.4	Cat B ES2.4	\$808.68

\* Average weekly wages calculation = (annual salary as per classification / 52.18) x employment fraction

\* Average weekly wages calculation = (annual salary as per classification / 52.18) x employment fraction

### 5.2 Summary Table of Demographics – Focus Group

Figure 2

**5.2 Summary table of demographics – Focus group** **Figure 2**

Age	Gender	Relationship Status	Dependents	Highest Qualification	Education Sector	Type of School	Employment Method	Years Employed Current	Years as Education Support	Employment Fraction	Avg. Hours per Week	Job Class	Avg. Weekly Wages* Gross
31	Female	Single	0	Cert IV	VGS	Primary/Secondary	Fixed-term 24 months	2	2	.8	30.6	ES 1-2	\$642.62
34	Female	Partnered	2	Diploma	VGS	Primary	Fixed-term 7 years	1	3	.63	24	ES 1-3	\$527.91
53	Female	Partnered	3	Secondary School	VGS	Primary	Fixed-term 7 years	2	3	.79	30	ES 1-3	\$661.99
53	Female	Partnered	3	Secondary School	Catholic	Primary	Fixed-term 12 months	12	12	.42	16	Cat B ES2.3	\$412.31
64	Female	Single	0	Secondary School	Catholic	Primary	Fixed-term 12 months	8	8	.79	30	Cat B ES2.3	\$775.53

\* Average weekly wages calculation = (minimum classification annual salary / 52.18) x employment fraction

\* Average weekly wages calculation = (minimum classification annual salary / 52.18) x employment fraction

### 5.3. Textural Account of Dominant Experience

Consistent with transcendental phenomenology, the following textural account describes the experiential and structural elements of the phenomena such as, how it actually feels to be financially insecure. Importantly, it respects the language of each participant and is designed to promote understanding and empathy with those who have experienced the impacts of insecure work. Furthermore, it reminds us that social science research is more than the analysis of quantitative data, it is an encounter with real people and their experiences.

#### *Maria*

Maria's experience is a conflicted one; she has concerns, but doesn't have the confidence to raise them and while personally satisfied with her job, she was not satisfied with the amount of support the children she worked with were receiving. Ultimately, there is a sense that she does not feel valued for her contribution:

...everything ties into that feeling of not feeling worth anything, you know the PDs and not being involved in PSGs [planning support groups]; all that sort of thing just makes us feel like we're babysitters.

Maria's tone of voice reflects the frustration she feels and the examples she articulates reinforce the depth of her professional knowledge and the considered nature of her commentary.

#### *Christine*

Having worked in both the Catholic and government sectors, as well as both primary and secondary settings Christine has a well-developed understanding of what it takes to be a successful LSO. Christine loves her job and values the close relationship between LSOs and students; in her words, "*by their success, you've got success*". Christine has faced numerous challenges during her time as an LSO, but her narrative is punctuated by the loss of her contract and reduction in hours five years ago.

"It gets very nasty at the end ... five, six years ago the CEO said we had too many people here, and it had to be a cull. I was five days. I lost a day. Two people lost their jobs. We all had to interview...It was just nasty. You couldn't really talk to people... People...taking sides; created divisions, although we tried not to. It just wasn't nice. We supported each other, but it wasn't to the

full extent of what the support was before all this nasty business was going on because we all had to go for our jobs.

[It made me feel] Yuk. I'm not a good person in that situation. I lost a day, and ...this is my income. I haven't got a partner who we supplement incomes like the others... I live on what I've got."

Though generally positive throughout the interview, Christine exhibited a sense of lingering trauma from the contract non-renewal process. In the colloquial tradition of understatement, the term *'yuk'* was perfectly used to emphasise the offensive nature of the process and the results that she had experienced.

#### *Matthew*

Matthew has been working as a LSO for seven years and is studying to be a teacher. He gets joy from "*seeing the children succeed*" and satisfaction from his "*interactions with his co-workers*". Matthew recognised that seeing so many of his colleagues not have their contracts renewed has impacted upon him.

...last year was particularly hard...the boss just said to us, we're not going to be able to employ all of you. All the LSOs were in the room and they were just looking around at each other. It was just sort of a heart-dropping moment ... I just felt uneasy and anxious...putting my union hat on for a minute. We lost about seven fixed-term support staff and there was some people with families, I found that very hard to take, to see them leave with their children and partners. I found that harder on me than my own issues because I don't have any dependents or anything or I didn't have a partner at that time....

As he recounted the details of these events, there was a tension in his voice accompanied by an air of disappointment and sense of helplessness.

#### *Debra*

Debra "*love[s] the variety*" of her job as she works both in the classroom with children and as a Library Technician. What she is less thrilled about is the low wage she is paid for the hours she works combined with the insecurity of not knowing whether she'll be employed from one year to the next.

Well, yeah, I didn't buy myself a home for about three or four years specifically for that reason ... I decided in the end just to take the plunge....What do you do? If it happens, it happens. If it means I've got to leave this place, and get a full-time job at a supermarket, that's what I've got to do.... It's more the insecurity of not knowing that you have a job from year to year. You know, I just put myself into a 20 year loan and to think every year, jeeze, where do I go now? It's more well, if I

don't get the job or don't get the hours, I'd have to then start looking, which just puts pressure on your private life.

Debra was clearly apprehensive at the start of interview, reinforced by the shortness of her answers and her closed body language. While this excerpt describes her dominant experience, Debra repeatedly referred to the financial strain that she attributed to her work being lowly paid.

*Helen*

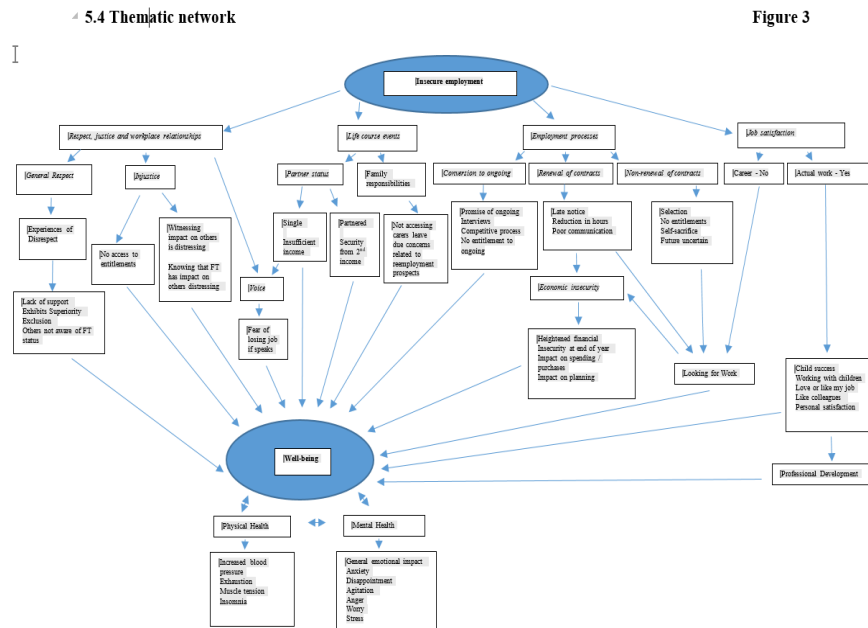
Helen loves her work with the students and enjoys the challenges presented by specialising in Maths support. Ironically, the work value of this specialist knowledge is not recognised by her employer; in fact her employer reduced her classification level causing her significant distress.

...they decided that to make it all equitable, that all the learning support officers should be a level 3 so they downgraded me...to say that we're all the same is ludicrous because we all bring different skills...I was told if you don't sign it, you don't have a job, so it doesn't really leave much for negotiation.... That caused a lot of stress because I don't think I signed the contract and I didn't know whether I had a job over the whole Christmas break. I was distressed. I was crying. It was a terrible time, the uncertainty of it all ...I just felt a bit rejected, actually,...worthless.

Unfortunately, Helen's experience has left her feeling that her contribution to the school is not recognised or valued. The inflection in her voice that accompanied her use of the term 'ludicrous' demonstrates that to this day she resents this experience and views it as an injustice

### 5.4. Thematic Network

Figure 3



### 6. Discussion

Considering the wealth of data gathered it would be impossible to examine each participant’s experience of insecure employment individually, therefore the discussion of results will be managed in the following manner. First, commentary will be provided on two dominant experiences to contextualise them within the broader phenomenon of insecure employment and eudaimonic well-being. Second, select examples will be presented from the data depicted in the thematic network (Figure 3), highlighting how the various themes and sub-themes are organised. To conclude, Moustakas’ process of ‘imaginative variation’ will be applied to one of the sub-themes, allowing consideration of the experience from the alternate perspectives of different actors. It is posited that this multi-faceted approach will allow for the exploration and interpretation of participant experiences.

### 6.1 Contextualising Dominant Experiences

Debra's and Matthew's dominant experiences have been selected for analysis as they reflect key themes pertaining to insecure work and eudaimonic multidimensional well-being. Debra's experience exhibits significant examples of financial insecurity, a theme reflected by the rise and fall of the SER in the Australian narrative, while Matthew's experience relates to the impact that insecure work has upon others, a concept fundamental to eudaimonic well-being.

Debra delayed her decision to purchase a home for four years after separating from her husband because she felt financially insecure. This is significant, as home ownership has been and continues to be part of 'the Australian dream'. The status and security provided by home ownership is recognised by Castles<sup>104</sup> as part of the 'working man's welfare state' playing a dual role of financial investment and protection against the risk of homelessness. In Debra's case, home-ownership can be defined as a risk towards her well-being for two reasons: one, because Debra's employment is insecure and she acknowledges that there is no "*knowing that you have a job from year to year*"; and two, she is a single woman over the age of 50 in part-time employment. In Debra's case, the SER that guaranteed employment security and a living wage substantial enough to afford home ownership does not exist. It is also tangible to propose that her occupation has not been a beneficiary of centralised wage fixing and the Award system that created the 'Harvesterman'<sup>105</sup> as those who work as LSOs are predominately part-time, insecurely employed and female. It is this fact that gives rise to the proposition that insecure employment in this occupation is gendered and therefore has unequal impact upon women.

The impacts of Debra's experience upon her well-being is further compounded by her age and the variability of her part-time hours. In her words "*I just put myself into a 20 year loan and to think every year, jeeze, where do I go now?... the whole thing of not being an ongoing employee is struggling to realize that you... may not have the hours the following year. You may not even have a job*". For Debra this means that exposure to the risks of unemployment or under-employment will continue well past her retirement age, even though she works another job on the weekends.

Matthew's dominant experience occurred when seven of his colleagues did not have their contracts renewed. This experience impacted on Matthew's well-being in two ways. First, it impacted on him directly by making him feel "*uneasy*

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<sup>104</sup> F. Castles, *The Wage Earners Welfare State Revisited*.

<sup>105</sup> J. Buchanan et al., 'Beyond Flexibility: Skills and Work in the Future', (Sydney: NSW Board of Vocational Education and Training, 2000).



*and anxious*” when he and his colleagues were notified by the employer that many of them would not be required the following year. Matthew said he found this process distressing because “*there was some people with families*” who had lost their jobs and while it was possible that he would not have his own contract renewed, he was more concerned about the impact that the contract nonrenewal would have on others. This reinforces the proposition that not only is well-being multidimensional, but it is also eudaimonic<sup>106</sup>. As proposed by Ryff in her definition of PWB, well-being is influenced by relationships with others and in Matthew’s experience it was the knowledge that his colleagues were insecure in their employment and that it may have negative flow-on effects for their families as well “*that was particularly hard*” for him.

Matthew’s dominant experience is pertinent because it shows us that well-being cannot be conflated with individual happiness. It is also important because employment insecurity relates to another dimension identified by Ryff’s PWB, mastery of one’s environment. The second impact on Matthew was a reduction in hours of employment resulting from the contract renewal/non-renewal process. He recalls “*We just got hours cut back and at the end of every year, we get the same old sort of talk from the boss, you know; less money, less employment. It wasn’t a massive surprise. It’s just disappointing that it still happened*”. In this example, Matthew’s feelings of ‘disappointment’ relate to his inability to exercise control over his income. Effectively, his employment insecurity translates to financial insecurity which directly impacts upon his well-being by limiting his capacity to master his environment.

### **6.2 Relationships within the Thematic Network (Figure 3)**

The coding process, essential for the ‘horizontalisation’ and organization of the data, did not provide any information about the nature of the interactions between insecure employment and its various impacts upon the dimensions of well-being. Therefore, a thematic network<sup>107</sup> has been devised to illustrate the interaction between the themes and sub-themes, and to indicate the sequence and direction of influence within the relationships. It is important to note that this network proposes plausible<sup>108</sup>, not causal, relationships between the themes, sub-themes and states of well-being it illustrates.

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<sup>106</sup>R. M. Ryan and E. L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*.

<sup>107</sup>J. Attride-Stirling, *Thematic Networks: An Analytic Tool for Qualitative Research*.

<sup>108</sup>M. B. Miles and A. M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*.

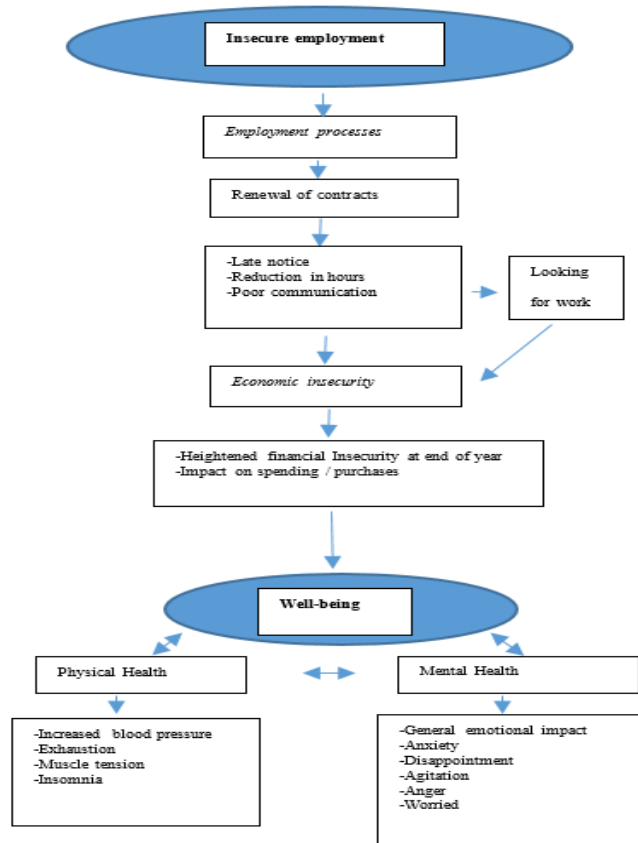
### *6.3 Employment Processes – Renewal of Contracts*

Figure 4 is a depiction of the impact of insecure work on well-being. It identifies that insecure work has a number of specific employment processes associated with it<sup>109</sup>. One process is the renewal of fixed-term contracts, which occurs at the end of every year. LSOs articulated that they find this process difficult for several reasons including: late notice, the possible reduction in hours of employment, and poor communication. Debra, Susan, Leanne, Christine and Lisa have all experienced this first hand and it is Lisa's account that exhibits a number of the key characteristics associated with this renewal process.

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<sup>109</sup> Figure 4 is an excerpt from the *Thematic network*.

Figure 4



*Lisa*

Yeah, it puts a lot of worry on you for a few months because funding doesn't come through usually until the end of the year, sometimes early January. So it's not until the last minute quite often that you know whether or not you're employed. So from October/November particularly in the last few years ...you think do I look for something else or what do I do? I love my job. I don't want to not work there, but those questions continue to pop up.

The thematic network uses the broader theme heading of 'economic insecurity' to represent the sub-themes that arise out of the contract renewal process. The experience of financial insecurity is prevalent amongst the LSOs who participated in this research, especially when their contracts near their expiry

date. Debra's case of delayed home ownership is the most extreme example but Susan, Matthew, Julie, Leanne and Christine all presented examples of where the uncertainty associated with their employment had directly impacted upon their spending or purchasing decisions.

*Matthew*

It's ...Christmas time... You know you're not going to buy a jumper or that shirt, you're just going to get your Christmas presents because money's a bit tight.

*Susan*

So, you don't buy those little luxuries until you know you're safe. It does affect your decision making if you've got work or not, that's for sure.

*Leanne*

Furniture or not going on holiday...because things have to be booked in advance ...you don't know whether or not... come after Christmas, you're going to have a job.

*Christine*

You sort of go into what I term depression mode so you don't spend as much money. You maybe start stocking up on specials just in case you haven't got any money.... You buy extra soap or deodorant, or toilet paper, things like that.

While it is normal for people to decide not to make a significant purchase because they simply cannot afford it, this is not so in this example. The decision not to make a purchase in the case of Matthew or Susan is directly linked to their fear of not being able to afford it if their contract were not renewed. In Christine's case, the motivation to purchase sale items is an attempt to minimise the potential impacts of unemployment. In addition to 'mastery of environment', Ryff's definition of PWB also includes 'autonomy'. Therefore, it is proposed that the financial insecurity resulting from insecure work limits the autonomous decision-making of an individual and consequently impinges upon their sense of well-being. The impact upon autonomy manifests itself by not only restricting the individual's ability to plan for the future but also their family's ability. Leanne and Maria expressed that this was the case, with Maria stating that "*every year, you can't plan holidays...it's financially difficult on contract*". Finally, our thematic map links well-being to

physical and mental health in a two-way relationship to reflect that in some experiences the impact upon well-being results in poorer mental health, as in Julie's case, where she reported increased levels of anxiety around the time of contract renewal.

All three of the 'employment processes' sub-themes: 1) conversion to ongoing; 2) renewal of contracts; and 3) non-renewal of contracts, presented distinct and memorable experiences for most participants. It is proposed that these experiences can be summarized as generally having a negative impact on the well-being of those subjected to them.

#### **6.4 Employment Processes – Conversion to Ongoing**

Ironically, even the process of converting employees from fixed-term to ongoing present as a negative experience when there is a lack of process surrounding the appointment. In Lisa's case, a colleague with fewer years of experience was converted to ongoing without a transparent process, continually leaving Lisa to ask herself "*Have I done something not right, am I not performing?*" Sharon recalled a situation where relationships between her colleagues had become strained because of a promised ongoing vacancy. As she described "*the school's been saying oh, yeah, we're going to have an ongoing position, but nothing's happened.*"

#### **6.5 Employment Processes – Non-renewal**

The non-renewal process has presented the most pronounced impact upon well-being and it does so in three distinct ways. First, LSOs are presented with a scenario in which they are required to compete or qualify for a reduced number of positions. Second, they might not be successful and find themselves without work and without redundancy entitlements. Third, even if successful, they are vicariously traumatised by witnessing the impacts of non-renewal on their unsuccessful colleagues.

For both Susan and Matthew, the requirement to compete for their own position was both stressful and disruptive. Susan described her experience as "*Just that churning; it's almost like going for a job interview again even though you know everyone and it's sort of sweaty palms; all that anxiety*". Matthew's experience was not dissimilar, he recalled that it was "*particularly nerve-racking because I knew I was right around the cut-off like either I won't get it or I will. ...I was very nervous, butterflies in the stomach and all that.*"

The second, and most severe, potential impact of the process is non-renewal. Christine described the process as “*just horrible*” and recounted that even though the employer found her alternate employment her income was reduced, which has had a lasting effect. As the research sample was limited to current employees it is difficult to comment further on the actual impacts of non-renewal of LSOs. However, LSOs who did not have their contract renewed could face two additional barriers to employment. One, it is unlikely that they would have receive a redundancy payment (to minimise the immediate risks associated with loss of income) and two, the age of the employee, which is likely to be over 45<sup>110</sup> making it more difficult for them to find employment. Finally, the third impact of non-renewal is the effect it has on those who remain. Lisa described it as “... *horrible... It is distressing to see good staff not be reemployed.*” In Susan’s example she described the impacts with particular reference to feelings of guilt, “*We all felt just terribly guilty... because... I've got a job and she hasn't and it's a little bit cut-throat ...you don't like to see people upset.*” The emotional impacts are clearly long-lasting, with Lisa’s incident occurring six years ago. In addition, the process amplifies the prevalent feelings of uncertainty and financial insecurity that occur at contract renewal time.

### ***6.6 Respect, Justice and Workplace Relationships***

The representation of ‘Respect, justice and workplace relationships’ in Figure 3 is an interesting example as it reflects a series of responses that are partially contradictory. When participants were asked about whether or not they felt respected by their colleagues, they invariably responded ‘yes’. However, after further inquiry it became evident that many of them had experienced quite significant feelings of not being respected. When asked to illustrate the instances of disrespect, numerous examples were provided and these were consequently condensed into the following sub-themes: (1) lack of support; (2) exhibits superiority; (3) exclusion; (4) no awareness of fixed-term status. The following example, provided by Christine, highlights what types of interactions makes her feel respected:

We work as a team. She asks for my ideas. I give them. She includes me, she asks my opinions of reports; what do you think about this? What do you think about this class? This is what I'm going to do. She keeps me up-to-date with what she's going to do.

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<sup>110</sup> The average age of participants in this research was 49.6 years.

Conversely, Susan provided us with an example of lack of support:

Sometimes, I find it ... frustrating.... When teachers know about our students but work isn't always set for them. They don't always think about our kids.

Unfortunately, both Matthew and Debra have experienced quite disrespectful treatment from teachers. Matthew recalled that:

He kind of appeared somewhat elitist like what he says is gospel....Whatever my opinions or my thoughts were, they were still relevant.

In Debra's experience, the teacher had said to her:

You don't know what you're talking about. You don't have the experience. I've got a certificate. She threw all those things at me and I said okay and let it go. I was belittled. It didn't make me feel very good.

Feelings of 'exclusion' and 'lack of support' from other employees are reasonably common problems associated with insecure work<sup>111</sup>, yet this does not help us to understand the reasons behind the two examples of assumed superiority by teachers towards LSOs.

### 6.7 Voice

The Independent Inquiry<sup>112</sup> identified '*lack of voice at work on wages, conditions and work organisation*' as a significant part of the experience of insecure workers. This research found a mixed response from participants on this dimension, with some LSOs insisting that their employment status had no bearing on whether they felt comfortable raising issues in the workplace. Christine, Debra, Maria and Helen expressed that they did feel unable to speak up for fear of jeopardising their contract renewal. For Christine and Debra their feelings were exacerbated because both are single and consequently do not have an alternate source of income.

Debra's experience reflects her inability to speak up about the organisation of her work and also a broader feeling of collective disempowerment. She recounted how she often says:

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<sup>111</sup> Australian Council of Trade Unions *Lives on Hold: Unlocking the Potential of Australia's Workforce-the Report of the Independent Inquiry into Insecure Work in Australia*,

<sup>112</sup> Ibid.

If I was permanently on staff... I'd actually have a say and you'd actually listen to me. I suppose we've grown to accept that we're just weak, that we're nothing much.

Christine feels that her contract renewal is conditional upon her not speaking up, as she puts it *"I want my job. It's better to shut your mouth and keep my job"*. Christine's lack of voice has prevented her from dealing with issues in her workplace which subsequently had a negative impact on her physical and mental health.

In her words:

You don't sleep because you're thinking about it all night and then you drop into an exhaust sleep for couple of hours and you're up and running for the next day. Two or three days of that you can't do it, but one or two you're right; three, four, you don't. Generally, by then you fall into an exhausted heap.

While Helen did not elaborate on how she felt as a result of not speaking up, she did make it clear what she believes the consequences of speaking up would be:

I just feel as though if I do say anything else, I'm considered a trouble maker and therefore I'd be out the door.

Maria eventually summoned the courage to speak up but in her mind this still came at a significant cost:

It wasn't easy, no. It wasn't easy and nobody asked me about my well-being and how I felt about it and how stressed I was.

### **6.8. Life Course Events and Gender**

Life course events, and in particular when a participant's partner status is 'single' (Figure 3), appears to have a negative impact on the willingness of an employee to speak up. Being 'partnered' appears to have a positive influence on well-being, with some LSOs like Sharon expressing that: *"I don't worry ... because I've got a husband who's got a pretty good job, so I'm just sort of like the top up wages doing what I want to do for personal satisfaction."* Again, this raises interesting questions about the replacement of the 'male breadwinner' model by a 'one and a half' or 'two' income model. These new normative income models are confirmed by Leanne, who makes it plain: *"Whether your kids are old or not, you still got bills and everything else and there's no way my husband and I could live on one wage."* Helen acknowledged that LSOs not in relationships feel this insecurity



more acutely: “Well, I’m lucky I’m married and my husband works, but if I was a single mother like a couple of my single friends, it’s not a great wage to survive on really.”

While only one LSO indicated that their fixed-term status had impacted upon their ability to balance work and ‘family responsibilities’ it must be acknowledged that women still bear a disproportionate share of caring responsibilities and that is statistically evidenced by the Australian Work Life Index data<sup>113</sup>. The lack of evidence of this impact upon family or caring responsibilities may exist because in a school environment it is more likely that both employee and employer understand the need to balance work and care<sup>114</sup>. Alternatively, it could exist because the age demographic of participants means that most LSOs have completed the most intensive phase of caring for children, so no longer feel as conflicted about balancing work and family. This said, Leanne was the exception, providing us with a clear example of how caring obligations can exacerbate feelings of employment insecurity and potentially result in the non-renewal of a contract:

My daughter got eczema really bad, so she had to do some sort of testing which was over a week and I had to go and see the boss and say look, I’m sorry, but I need every second day off, and you do worry. You go okay, is he keeping a check with how many days you take off? Scared that he’s going to say no and scared he’s going to think oh jeeze, she’s had a couple of days off. Maybe we won’t have her next year.

It is possible that the absence of experiences that reflect negative impacts of insecure work on family responsibilities may have arisen out of an unintended sample bias as no interviews were conducted with LSOs who had caring responsibilities for children younger than secondary school age.

### **6.9 Phenomenology – Imaginative Variation**

The discussion of the various themes and sub-themes reflects Moustakas’ reduction process by ensuring that “*Throughout, there is an interweaving of person, conscious experience, and phenomenon*”<sup>115</sup>. In addition to the examination undertaken up to this point, a final process of ‘imaginative variation’ will be applied to the sub-theme of the employment processes – ‘no entitlement to ongoing’– before

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<sup>113</sup> B. Pocock, N. Skinner, and P. Williams, *Time Bomb: Work, Rest and Play in Australia Today*.

<sup>114</sup> B. Pocock, R. Prosser, and K. Bridge, *The Return of Labour-as-Commodity? The Experience of Casual Work in Australia*, B. Pocock, N. Skinner, and P. Williams, *Time Bomb: Work, Rest and Play in Australia Today*.

<sup>115</sup> C. Moustakas, *Phenomenological Research Methods* at 96.

examining the results of the focus group and moving on to the conclusions of this research. The purpose of imaginative variation is to examine a theme from different perspectives with regard to the roles and functions of the actors. To illustrate this, an imaginative variation of fixed-term employment has been applied from the view points of the employee, the employer and the union.

### 6.9.1 Employee

When asked about the appropriateness of using fixed-term employment, LSOs generally responded that it wasn't desirable but invariably qualified that statement in one of two ways: (1) the position was accepted in the knowledge it was fixed-term; and (2) the employer receives variable funding for students with disabilities. When asked about the use of fixed-term Matthew responded negatively but qualified it with, *"I just try to just accept it; like I signed the contract. I'm aware it's a fixed-term."* The second qualification pertains to a belief that because funding for students with disability is variable then it is reasonable for their employment to be treated in a similar fashion. As Susan put it, *"I feel a bit if you don't have work, that's the nature of the beast because you can't have work without students."*

### 6.9.2 Employer

Employers use a mixture of employment methods to meet the variable demands of service provision. In the Catholic system the employer is required to state the reason for using fixed-term employment in the letter of offer they provide to all fixed-term employees<sup>116</sup>. Commonly, these letters state that fixed-term employment is because funding has been provided for a 'specific project'. It is conceivable that the employer benefits from using this mode of employment in the following ways: greater flexibility; no redundancy payments in the event of redundancies; no administrative on-costs associated with facilitating paid and unpaid parental leave; the ability to not re-engage employees they are not satisfied with; and greater employee compliance through fear of contract non renewal.

### 6.9.3 Union

Put simply, the IEU, AEU and CPSU believe that variable disability funding is not a legitimate reason for engaging the vast majority of LSOs on a fixed-term

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<sup>116</sup> Fair Work Australia, *Victorian Catholic Multi-Enterprise Agreement*, 2013, Melbourne, Commonwealth Government Printer

basis. The unions propose that, regardless of the mode of employment, insecure work is undesirable and that employees have a right to promote the use of ongoing employment to protect against the risk of contract non renewal<sup>117</sup>.

This process of imaginative variation presents three very different perspectives that highlight a number of the factors that must be considered when discussing policy implications.

### **6.10 Focus group**

The focus group consisted of Sarah, Tracey and Rebecca from VGS, and Margaret and Robyn from Catholic schools. The cross sectoral participation allows for the experiences of LSOs in government and Catholic schools to be compared and contrasted. There were many similarities between the experiences and it was roundly acknowledged that working with children was the most satisfying aspect of their work. Robyn reports the pleasure she receives from her students simply saying *“bye Robyn, have a nice weekend”*. This sense of appreciation was quickly contrasted by Tracey, *“So I get appreciation from the students. I don’t get appreciation from our Principal team.”* The participants provided a number of examples to evidence the lack of appreciation, respect and support, including: exclusion from staff meetings because they are held after LSOs finish work; no scheduled meetings for LSOs to discuss their work; limited access to Professional Development (PD) even if it is available; having to pay for their own PD; and not being replaced when they take extended leave.

Interestingly, the discussion about the lack of opportunities to meet at work to discuss professional matters diverged into a discussion about what the respective employers would think about the participants being involved in the research. The contributions ranged from Tracey’s schools where LSOs were encouraged to participate to Margaret’s schools where she felt *“if [her] principal knew that [she] was here... it wouldn’t go down well.”* Generally, it was the view of participants that the idea of LSOs getting together to discuss their experiences would be viewed negatively by their employers and have a ‘definite’ impact on the renewal of their fixed-term contracts.

The discourse about the length of fixed-term contracts highlighted a significant dichotomy between the experience of LSOs in VGS and those in Catholic schools. VGS employees Tracey and Rebecca were employed on seven-year fixed-term contracts whereas Catholic school employees Margaret and Robyn

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<sup>117</sup> IEU Victoria Tasmania *Ieu Submission* Melbourne, Australia, 2016

where employed on 12 month fixed-term contracts. Robyn stated that she worked with other LSOs in the Catholic system that had been employed on 12 month contracts for 25 years. On hearing this the other participants voiced their disapproval by exclaiming “*that’s terrible*” and “*that’s abuse*”. Financial security was discussed in the context of not being able to purchase a home, Sarah, on year-to-year contracts, offered her situation as an example to the group: “*what happens if I don’t have job next year? What am I going to do? How am I going to pay the mortgage especially me being on my own? I don’t have a partner to rely on to pay the mortgage if I don’t have a position next year.*” Again, this example serves as further evidence that the intersection between insecure work and the ‘one and a half’ or ‘two’ income model impacts upon LSOs in both government and non-government schools.

The group discussed ongoing employment compared to fixed-term employment with participants from both sectors remarking that they felt that employers could employ LSOs as ongoing but were choosing not to. There was unanimous agreement amongst participants about this and a noticeable degree of resentment about the use of fixed-term contracts, as it was seen to have been a reflection on the real value given to the work of LSOs in general. This was again re-examined towards the end of the focus group; all agreed that employment should be ongoing. Sarah used her previous work experience in retail to pose the question: “*if a retail store can provide ongoing employment, why can’t a school?*” Participants felt that this should be achievable especially considering the benefits that stability and continuity have for the children they support.

The group was also concerned about the process of having to re-apply and compete for positions that they were already working in. They described having to re-interview every year as “*horrible*” and “*unfair*”. Before concluding, the group then briefly discussed the amount they were paid for the work that they do. There was furious and emphatic agreement that their work is undervalued yet still deeply satisfying. Regardless of the sector, it was evident that LSOs often felt excluded and marginalised in their workplaces, and attributed much of the lack of respect or appreciation they encounter to their insecure employment status, reflecting the traditional understanding that if employers value someone’s work, they give them a secure job.

## 7. Conclusion

Through the application of a combined qualitative method based upon transcendental phenomenology, this research has contributed to the collective understanding of insecure employment and its consequences. It provides a rich account of the human experience of insecure employment and demonstrates

the impacts of this phenomenon on eudaimonic multidimensional well-being. The approach has been transparent and methodical, from the creation of *Epoche*, as a reflexive process to bracket out researcher bias, to the application of validity tests, exemplified by the triangulation interview data, focus group data and the literature<sup>118</sup>.

### *7.1 The Essence of the Phenomenon*

Consistent with the final phase of Moustakas' transcendental approach the phenomenon of insecure work as experienced by LSOs, has been distilled to its very essence:

At best, it presents as an inconvenience, impacting on dimensions of well-being like job satisfaction in an otherwise rewarding occupation. At worst, it is a source of ongoing disruption that accentuates financial insecurity and reduces autonomy, control of one's environment and ultimately human agency.

The impacts of insecure work upon the well-being of LSOs are many and varied. This research presents multiple examples of the emotional distress associated with employment processes experienced by Christine, Debra, Matthew, Lisa and Helen. Through the accounts of Lisa, Matthew, Susan, Leanne and Christine it is also confirmed that insecure employment has an impact upon financial security. Furthermore, the testimony of Susan, Matthew, Debra, Helen, Christine and Maria confirm that it is reasonable to associate insecure employment with feelings of disempowerment and disrespect. This research, like all research, has limitations, in this case that the sample size is small, restricting the generalisability of the results. The combined interview and focus group sample also contained a disproportionate number of LSOs from Catholic schools compared to VGSs and it did not contain any LSOs working in independent schools. Researchers who take a positivist approach may also express concern regarding the fact that participants have self-reported the impacts insecure employment has had upon their well-being.

So after the in-depth examination of such a complex phenomenon can it be concluded that insecure work is a 'wicked'<sup>119</sup> problem without solution? The

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<sup>118</sup> J. W. Creswell, *Qualitative Inquiry and Research Design : Choosing among Five Approaches*.

<sup>119</sup> A wicked problem is both difficult to define and hard to solve. Often possible solutions to this type of problem generate additional unintended problems. C. Althaus, P. Bridgman, and G. Davis, *The Australian Policy Handbook*, 5th edn.; Crows Nest, N.S.W.: Allen & Unwin, 2013, xii, 296 p.

answer to this question is that no problem should ever be considered without solution and that with careful analysis and thoughtful consideration appropriate policies can be developed.

### *7.2 Industrial and Employment Policy Implications*

Macro policy solutions to insecure employment such as 'flexsecurity'<sup>120</sup> or 'Transitional Labour Markets'<sup>121</sup> have been proposed, however due to the scope of this project they cannot be adequately examined here. Regardless of the policy being proposed in response to the phenomenon, it must be consistent with the Australian narrative of work and welfare, and acknowledge the changes that have affected the nature of work in Australia since the demise of the 'wage earners' welfare state'<sup>122</sup>. Additionally, new policies must also respond to the challenges of maintaining balance at the work-care interface<sup>123</sup> and to the introduction of new technologies<sup>124</sup>.

Unfortunately, the visionary transformation required to see the implementation of a macro policy such as a 'Transitional Labour Market' is unlikely to occur in the current Federal political climate as this type of policy proposal would require significant investment and cooperation between the myriad political parties, particularly in the Senate. Pragmatically, it is the pursuit of micro policy initiatives through enterprise bargaining agreements (EBA) that present the most achievable and timely solution to minimise the impacts of insecure work on LSOs. Informed by the process of imaginative variation it is reasonable to accept that employers need to utilise a mix of employment methods, including fixed-term and casual employment, to provide services commensurate with demand. However, to ignore the degree of insecurity currently experienced by LSOs is to ignore that the risk, once borne by the employers, has been shifted unfairly onto the shoulders of the employee. To restore the balance, a

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<sup>120</sup> J. Allebone, 'Flexibility with Security. Driving a New Compact Downunder. ', *Social Policy Working Paper No 11* (Melbourne, Victoria: The Centre for Public Policy and Brotherhood of St Laurence, 2010), 19, G. Belchamber, 'Flexicurity: What Is It Can It Work Down Under?', (Australian Council of Trade Unions 2009), 26.

<sup>121</sup> G. Schmid and B. Gazier, 'The Dynamics of Full Employment Social Integration through Transitional Labour Markets', *Labour Markets & Employment Policy* (Cheltenham: Edward Elgar Publishing Limited, 2002), 1 online resource (464 p.), G. Schmid, *Full Employment in Europe : Managing Labour Market Transitions and Risks*; Cheltenham, UK ; Northampton, MA: Edward Elgar, 2008, x, 385 p.

<sup>122</sup> F. Castles, *The Wage Earners Welfare State Revisited*.

<sup>123</sup> B. Pocock, N. Skinner, and P. Williams, *Time Bomb: Work, Rest and Play in Australia Today*.

<sup>124</sup> Australian Council of Trade Unions *Lives on Hold: Unlocking the Potential of Australia's Workforce-the Report of the Independent Inquiry into Insecure Work in Australia*,

combination of the following micro policy initiatives could be introduced by employers, with the agreement of the respective unions:

- Review the use of fixed-term employment to ensure that it is being used correctly and as per the relevant industrial instruments (with a view to reducing it to the national average of 7.25%)
- Implement a conversion process from fixed-term to ongoing, based on years of service
- Introduce provisions into EBA that require fixed-term LSOs to be converted to ongoing after 12 months
- Devise fair, transparent and timely processes to manage the renewal or non renewal of fixed-term contracts.

For change to eventuate, further research utilising the themes identified in this research will be needed. Quantitative surveys could be designed to test generalisability and frequency of the experiences identified in this research and used to inform the Agreement-making process. It is the hope of the researchers that these findings, and any future research in this area, adequately recognises the gendered nature of the experience of insecure work for LSOs and has a transformative effect by contributing in some way to an improved life experience.

Finally, a few wise words from Susan about tackling the phenomenon of insecure employment. She believes that: *“Until people start kicking up a fuss and waving the flag, saying this is not good enough...”*, LSOs will continue to be employed on fixed-term contracts, a method of insecure employment that this research concludes has negative impacts upon well-being.

# New Forms of Employment in Spain after the 2012 Reform: The “Working Time” Factor as a Tool to make “Distance Work” more Flexible

Lourdes Mella Méndez \*

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**Abstract.** This paper analyses some aspects of the legal regime of new forms of employment in Spain after the 2012 Reform, especially in relation to distance work. One key factor in ensuring flexibility and the reconciliation of professional and family life is working time. The organization of working time is key to adapting work to the legitimate demands of the parties to the contract and meeting expectations of productivity and work-life balance. In this sense, this research is devoted to examining the impact of this “time factor” in distance work in Spain. This analysis is not easy as the Spanish legislator keeps silent on this point and the Article 13 of the Workers’ Statute does not clarify this aspect or the way working hours should be organized. Besides, collective agreements contribute little in terms of working time, so many questions remain unresolved.

**Keywords:** *Distance work, working time, employer control.*

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\* Lourdes Mella Méndez is Professor of Labour Law at the University of Santiago de Compostela, Spain. Email address: [lourdes.mella@usc.es](mailto:lourdes.mella@usc.es).



## 1. Introduction

Spain's urgent measures to reform the labor market were implemented by means of Law 3/2012 of 6 July in order to promote labor market flexibility – by encouraging the use of anti-crisis measures targeting employers – and to safeguard existing jobs. Some further measures were taken to modernize Spanish Law and to devise new ways of working featuring new information and communications technology (ICT). In this regard, Article 13 of the Workers' Statute (WS) was amended to legally recognize a new scheme promoting remote working. Thus, the previous title of that provision (the “work-at-home employment contract”) has now been changed to “distance work”, that is work “predominantly performed at the worker's home or at a place freely chosen by them, as an alternative to the employer's premises” (par. 1).

As indicated in the Preamble of Law 3/2012, lawmakers wanted to include this new working scheme into the WS, because it is considered “a particular form of work organization that fits perfectly into the productive and economic model pursued”, therefore favoring flexibility in terms of work organization while increasing employment opportunities. From this point of view, it is clarified that “the organization of traditional homeworking is amended to include distance work based on the intensive use of new technologies” (paragraph three).

While regulating this new way of working, the legislator also stresses two important aspects regarding the form and content of the law. Regarding the form, it is required that the agreement on telework is formalized in writing, either at the start or during the employment relationship. This formal requirement seeks to increase legal certainty, by ensuring that the clauses specifying the provision of remote work are laid down in writing (Art. 13.2 WS). The following three paragraphs of the article concern legal contents. To begin with, a general statement is provided according to which remote workers have “the same rights as those working on-site, except for aspects inherent to work performance at the employer's premises”. As an example of such non-discriminatory treatment, some individual rights are reaffirmed: 1) equality of pay, thus remote workers will be paid as much as workers in the same grade; 2) access to vocational training, mobility and career advancement; and 3) protection against occupational risks. In addition, 4) the exercise of collective rights (collective representation, collective bargaining, and collective disputes) is also recognized. According to the initial definition, it can be argued that the new form of telework in Spain is configured as a new way of working that includes two subcategories. The first includes traditional homework, involving

manual and ordinary tasks carried out offline with the employer, who checks one's work at the end of the assignment. While Article 13 of WS does not refer to this type of telework, this working scheme should be conceived as being regulated by this provision all the same. The second subcategory includes the new type of telework, performed through new information and communications technologies and therefore it gives the opportunity to connect with employment online while engaging in the task assigned. Importantly, the Spanish legislator did not make any reference to new technological working tools. This is questionable, for there are many interesting aspects concerning these instruments that raise questions and should be regulated, among others the employer's obligation to provide workers with these tools, possible links with the employer's power of control and the teleworker's privacy. The fact that the legislator makes no mention of the benefits associated with distance work is equally striking, though the preamble to Law 3/2012 states that this type of work provides higher levels of flexibility of working time and "distance work improves the relationship between "the employee's working, personal and family life". One key factor in ensuring flexibility and the reconciliation of professional and family life is *working time*. The sound organization of working time is key to adapting work to the legitimate demands of the parties to the contract and to meet the expectations of productivity and work-life balance. In this sense, this research is devoted to examining the impact of the "time factor" in distance work in Spain. This analysis is not easy, as the Spanish legislator keeps silent on this point and the provisions in place – Article 13 WS - neither clarifies this aspect, nor the way working hours should be organized.

## **2. Working Time as Feature of both On-site and Remote Work: The Key Factor for a Successful and Combined Working Model**

When working time is studied in relation to telework, the first aspect to note is that it bears relevance in the legal configuration of this working scheme, because teleworkers do not work remotely full-time. In other words, as provided in WS, teleworking can be only performed part-time. Although WS does not make special mention of this aspect, its partial nature is arrived at when considering its legal definition, which indicates that "work is carried out *predominantly*" at the site selected by the worker, and "as an *alternative* to performing work" at the traditional place of work (Art. 13.1). This way, the employee's working time consists of work carried out at the employer's premises, alternating this to that performed through telework, in the manner agreed by the parties. Working hours as referred to in the provision must be understood as performed weekly or annually, as it is not possible to alternate

between shifts in office and at home on a daily basis. Significantly, this is expressly prohibited by some rules laid down by the Autonomous Communities<sup>1</sup> concerning public-sector jobs, due to the fact that public-sector workers might face organizational problems. However, some exceptions exist allowing workers to switch from telework to traditional work on a daily basis, thus 20% of working time is performed at a distance (one example is work performed at the Repsol Company)<sup>2</sup>.

This general alternative scheme is justified by individual reasons and might be aimed at avoiding some possible negative effects. It is evident that in case the employee works exclusively at home, there are risks that they lose touch with company goals, therefore feeling disengaged. In order to prevent such risks, the European Framework Agreement on Telework of 16 July 2002 (EFAT) already required the employer to adopt measures to avoid the “isolation” of the worker from his/her colleagues at the company, such as invitations to participate in face-to-face meetings and access to business information (clause 9, third paragraph). However, the Agreement did not clearly refer to part-time telework, whereby some working hours should be performed at the employer’s premises.

However, in Spanish collective bargaining, most individual and collective agreements on telework negotiated since 2002 have provided for this way of working on a part-time basis<sup>3</sup>. As an example, the White Paper on Teleworking drafted by Repsol states that “the company has declined to include a full-time telework mode, thereby preventing employees from becoming disconnected

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<sup>1</sup> Art. 15.3, Order of December 20, 2013, by the Vice-President and Ministry of Presidency, Public Administration and Justice and the Ministry of Finance, regulating the accreditation, the working day and work schedule, flexitime and teleworking for public employees of General Administration and the public sector of the Community of Galicia (DOG of December 31, 2013). It is established the prohibition of splitting “the daily work so that one can work remotely and at the employer’s premises”; Art. 8.2 Decree 92/2012, of May 29, Euskadi (BOPV of June 7, 2012); Art. 4.2 Decree 127/2012, of 6 July, Extremadura; Art. 9.1 Decree 36/2013, 28 June, Balearic Islands (BOIB of 29 June) and Art. 3.1 Decree 57/2013, of 12 August, Castilla-La Mancha (DOCM 16 August).

<sup>2</sup> White Paper Teleworking in Repsol, p. 66

[http://www.repsol.com/imagenes/es\\_es/libro\\_blanco\\_tcm7-627218.pdf](http://www.repsol.com/imagenes/es_es/libro_blanco_tcm7-627218.pdf). Similarly, Art. 43 of the agreement “Alcatel Lucent Spain” (EGD Resolution of 28, January 2015, BOE of 10 February) and Art. 36 of the collective agreement “Thales Spain GRP” (Resolution EGD of 23 November 2015; BOE of 9 December). These agreements say that remote work may be performed daily through “on a full or a part-time basis”.

<sup>3</sup> As laid down in Art. 49 I of the collective agreement “Alcatel-Lucent Transformation Engineering & Consulting Services Spain” (Resolution EGD of 12 February 2014, BOE of 24 February).

from the company and guaranteeing a sense of belonging and teamwork”, establishing that they “must be in the office at least 16 hours a week”<sup>4</sup>.

Although WS seems to point to a combined model of teleworking, it should be recognized that, in considering collective bargaining, there are some collective agreements that expressly set forth “distance-work” contracts to perform work “at home or at any other place available to the employee on a predominant *or a full* basis<sup>5</sup>. Thus, it is possible to distinguish between “part-time” and “full-time” telework, defining the latter as “work which is fully performed at the worker’s home, without him/her having a fixed workstation at the employer’s premises”<sup>6</sup>. If we admit the compatibility of this form of full-time distance work with current legislation, it appears that this might be used to face situations of economic crisis, which might involve the plant closure. Of course, the risk of isolation would persist and it is important to find solutions to this problem.

Of course, if working from home on a part-time basis is allowed, the share of work that can be performed at home should be determined. In this sense, Art. 13 of WS states that work carried out outside the plant should be “predominant” if compared to that performed at the employer’s premises.

Since “preponderant” means “predominant in influence, number or importance”<sup>7</sup>, it is clear that the only legal requirement allowing for the alternation between telework and traditional work is that the former should last longer. This is also in line with the idea expressed by the EFAT that telework must “regularly” take place outside business premises.

Therefore, although a share of work should be performed at the company to avoid isolation, more than 50% of weekly, monthly, and yearly working time should be done outside the company. On this point, the collective agreement concluded at BBVA provides that “the provision of work through telework

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<sup>4</sup> Already cited.

<sup>5</sup> Art. 11.3 VI of the collective agreement “Carlson Wagonlit Spain” (EDG Resolution of 20 June 2013, BOE of 10 July). Also, see Art. 9.7 of the collective agreement “Europcar IB” (EDG Resolution of 13 May 2013; BOE of 30 May).

<sup>6</sup> Art. 73 XII of the collective agreement “HIBU Connect” (EDG Resolution of 28 May 2013; BOE of 12 June) Art. 50 VII of the collective agreement “BP Oil Spain” (EDG Resolution of August 4, 2014, BOE of 22 August), makes use of the same wording of the sixth convention prior to the labor reform, which defined telecommuting as: “that form of employment that is characterized by the fact that the employee performs all their daily tasks from their own house”. Similarly, article 50 VIII of the collective agreement “Telefónica On the Spot Services” (EDG Resolution of 11 February 2014, BOE of 21 February) refers to teleworking as a way to provide services whereby “the employee performs his duties, partly or entirely, outside the company”, although referring to telecommuting in the WS and expressly mentioning the new Art. 13.

<sup>7</sup> From Oxford Dictionary, <https://en.oxforddictionaries.com/definition/preponderant>.

implies that the employee should work remotely, that is from home, for up to 90% of his working hours” (sixth paragraph)<sup>8</sup>. As seen, the agreement allows workers to perform much of their work at home, along with a minimum share of work to be performed at the company to ensure interaction with other employees.

Similarly, regional regulations often clarify the preponderance of remote work through the “three plus two” formula, whereby telework should be performed three days a week and traditional work two days a week<sup>9</sup>. However, a different distribution of working days may be agreed upon due to production needs. Should that be the case, mention should be made of the new circumstances justifying the amendments to the traditional distribution of working hours (the “three plus two” formula)<sup>10</sup>.

Other regional provisions might reduce, without providing any reason, the share of work carried out remotely below 50% of total working time. Thus, the Decree put in place in Castile-La Mancha, which has been already referred to, reduces the working time to be performed through telework to 40% of monthly working hours<sup>11</sup>, failing to comply with the minimum percentage imposed by Article 13 of WS and leading one to speak of telework performed on an occasional basis<sup>12</sup>. In our view, the fact that work performed remotely has to be preponderant determines that telework carried out on an occasional basis falls outside the scope of WS, therefore not representing an innovation in the traditional ways of working.

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<sup>8</sup> <http://www.ccoo-servicios.es/bbva/teletrabajobbva/>

<sup>9</sup> Cf., for example, Art. 15.3 of the Galician Order of December 20, 2013; Art. 8.2 of Decree 92/2012, of May 29, the Basque Country; Art. 4.2 of Decree 127/2012 of 6 July, Extremadura and Art. 9.1 of Decree 36/2013, of 28 June, the Balearic Islands, cited.

<sup>10</sup> Art. 8.2 of Decree 92/2012, of May 29, Euskadi, cit.

<sup>11</sup> Art. 3.2.

<sup>12</sup> In the case of the White Paper on Teleworking issued by Repsol, cited above, p. 66, four types of telework part-time are envisaged: one of them, which has been already mentioned, allocates 20% of daily working time to distance work, while others devote one or two days a week or two afternoons and Fridays. However, it should be noted that these working schemes were created before the labour reform of 2012, as pointed out on page 66 of the White Paper. The agreement recently signed is already adapted to the wording of the Art. 13 WS, increasing the percentage of distance work. Thus, article 43.6.2 XII of the collective agreement “Repsol Química” (EDG Resolution of 30 April 2015, BOE of 21 May) incorporates a new option by which distance time is preponderant with respect to on-site working time: 3 days a week. Teleworking has a limited use, as it is performed through a pilot plan up to “a maximum of eight hours a week”, to be distributed on a full day or two half days, as agreed between the employee and the Director (IV collective agreement “Numil Nutrition” (EGD Resolution of 16 August 2012, BOE of 31 August). See also Article 34 V of the collective agreement of the company “Nutricia” (EGD Resolution of the Department of Employment, Tourism and Culture of the Community of Madrid of 7 November 2014; BOCM of February 7, 2015).

### 3. Distance Work: Minimum Rights Regarding Rights Regarding Ordinary Working Time and Overtime

As already noted, the worker who works at a distance only for a part of their working time have the same rights as their peers doing the same job on the employer's premises. This includes minimum rights regarding working time – particularly the application of the 40-hour threshold per week – and the recognition of overtime and minimum daily, weekly and annual rests. Therefore, although the cited Article 13 of the WS does not expressly say so, the general rules laid down in Articles 34-38 of the WS are applied in relation to working time. No exceptions are possible, as this type of distance work is regulated by Labour Law and workers are subject to the employer's power of direction and control. More clearly, maximum working time and minimum rest periods always apply, regardless of the workplace, the way work is performed, and the employee's right to combine work and rest periods.

Accordingly, when the company asks the teleworker to work longer than eight hours, overtime applies, along with relevant legislation<sup>13</sup>. Overtime cannot exceed 80 hours per year; workers working beyond normal hours will be entitled to paid time off – which should be taken in the following four months – or to higher rates of remuneration. Paid rest periods taken within the subsequent four months fall within the 80-hour limit, while those taken after four months do not.

When the employee works longer hours, problems arise in relation to the employer's control on workers' performing overtime. This issue might be dealt with by considering the communication system in place between the teleworker and the employer. If communication is interactive, technological devices will certainly allow such control. In case employees work offline, employer control is still possible, especially if rules on traditional homework are applied. The employer is required to make available to the worker a register where normal and overtime hours are noted down<sup>14</sup>. As will be seen, some collective agreements expressly provide this opportunity. Moreover, Art. 13.2 of WS refers to Art. 8.4 of the same text, which indicates that working time is dealt with in the contract (or in the specific agreement on telework). Accordingly, a copy of it must be delivered to workers' representatives within ten days of the date on which its signing and then sent to the employment office.

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<sup>13</sup> Cfr. García Quiñones, J. C., *The organization of working time and rest and conciliation in telework*, in AAVV volume (L. Mella): "Telework and distance work" (Pamplona, 2015).

<sup>14</sup> According to the ruling of the Spanish Supreme Court of 17 May 1988 (Ar. 4238), work which is not subject to working time arrangements or labour rules and that is remunerated all the same depending on the outcome, cannot be considered as homework.

It is interesting to refer to one of the few and most recent rulings on the matter, delivered by the High Court of Justice of Castile-Leon (Valladolid) of 3<sup>th</sup> February 2016<sup>15</sup>. In this case, a worker was engaged in telework on a part-time basis to perform commercial tasks, although the company did not establish a work schedule or working hours in advance. The Labour and Social Security Inspectorate sanctioned the company after discovering that the workers in question worked 10 to 12 hours daily. The sanction referred to the violation of fundamental rights concerning working time. The company argued that the absence of a time schedule was due to the fact that teleworkers were given the opportunity to organize their working time when working remotely. The employer also claimed that teleworkers did not perform overtime work. However, employees filed a lawsuit to claim remuneration for work performed beyond normal hours. Thanks to documentation submitted by the Labour Inspectorate, the Spanish Court of First Instance brought evidence that teleworkers were engaged in overtime shifts and ruled that the company would pay 3,978 euros, plus a 10% interest for late payment. This decision was also confirmed by Spain's High Court of Justice. Significantly, the employer did not challenge the ruling but questioned the application of overtime to part-time telework. Rather curiously, he argued that the concept of overtime is difficult to assess when involving workers operating remotely, for "the right to privacy applies to their dwelling" (Article 18 of the Spanish Constitution, SC). Since "the employer cannot exercise control over them, working overtime is at their own discretion". In other words, working beyond normal hours cannot impact on the company economically, so the employee cannot claim remuneration for overtime. Rightly, the Court of last instance rejected this argument, pointing out that the employer has an obligation to monitor employees' working time regardless of the place where work is performed.

### 3.1. The Employer's Obligation to Monitor Employees' Working Time and all its Possible Consequences

According to the ruling referred to above, the time the worker provides his/her services to the employer is always regarded as working time, so the hours spent working remotely are "regarded as working time in the same way as those worked in the employer's premises". Though obvious, it bears repeating that through telework the employee works remotely on a part-time basis, to avoid commuting and saving time and money while reconciling work and family life. The place where one works is not relevant, as the work performed is so that working time should be arranged. When an employment

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<sup>15</sup> Ruling Number 2229/2015.

contract exists that includes workers' tasks in line with labor law, the rules governing normal and overtime hours, as well as minimum rest periods, always apply.

In considering this premise, the inference from the ruling previously analyzed is that "control of one's working time falls within employers' responsibility". They should thus "note down the worker's daily working hours in a register, using them to calculate remuneration and delivering a copy to the worker" (Art. 35.5 WS). Logically, the employer is the head of the business and is given managerial powers and the right to sanction workers, where necessary. He can and must organize business activities, give workers orders and instructions about tasks and specific conditions, including working time. Undoubtedly, this information is key to ensuring the productivity of workers and that of the company, and to determine the remuneration system (e.g., per working hours or per task). From the worker's point of view, the definition of working time is also important because, while performing work, he is subject to the employer's managerial powers. However, regardless of the place of work, it is up to the employer to monitor the teleworker in working hours. In this sense, it is the employer who should take steps to comply with the limits imposed by legislation on working time. Specifically, while normal hours are set by collective agreements or the employment contract and should not exceed forty hours per week considering the annual average (Article 34.1 of the WS), overtime work is subject to different legal regimes. Remuneration is due for normal working hours, as is overtime, which should not exceed the 80-hour annual limit.

The employer's obligation to note down all workers' working hours – including those worked remotely – as well as the requirement to send them daily summaries of the number of hours worked – should always be met and not only in the event of overtime shifts. On this aspect, it might be important to refer to a recent ruling handed down by the Spanish High Court of Justice on 4 December 2015<sup>16</sup>, according to which the monitoring of daily working time was seen as a "necessary requirement" to assess the actual hours worked by workers and to determine whether they worked beyond normal hours<sup>17</sup>. Duly documented working time arrangements were regarded as the only means to assess the existence of overtime. Without these documents, neither the employer nor the Labour and Social Security Inspectorate (no one, except the

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<sup>16</sup> Ruling number 301/2015.

<sup>17</sup> The register does not have to report overtime hours, since a workday can be extended without these hours to be calculated, being part of the working day. This is the only way to determine whether the limits of the daily working time are exceeded.



worker) could be able to assess the number of hours actually worked. Should this be the case, it would be for the worker to prove the existence of overtime. Another argument that can be made from the analysis of the previous ruling is concerned with the purpose of monitoring workers' working time on the part of the employer. As the Court remembers: "compliance with the limits imposed on working hours and rest periods is part of the right of workers to protect their safety and health (Directive 2003/88/EC), which falls under the responsibility of the employer as a consequence of his general obligation to prevent risks and devise prevention measures". Accordingly – and regardless of the employee's place of work – the employer is always responsible for workers' safety and health, and he must comply with all the obligations imposed by rules on occupational risks, particularly those regarding the assessment of possible risks and the adoption of appropriate measures. Evidently, one of the parameters to be considered is working time. The employer's monitoring of this aspect is not only important to ensure the worker's compliance with minimum standards, thus promoting productivity, but also to ensure that workers are given adequate rest periods, as required by law.

As is known, the limitation of working time is another aspect indirectly referred to by Directive 89/391/EEC of 12 June 1989 on the implementation of measures to promote workers' safety and health in the work, and directly, by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, on the minimum safety and health requirements for the organization of working time. Under Spanish Law, Article 40.2 of the Constitution requires public authorities to ensure workers' necessary rest periods, by limiting working hours. Therefore, the provisions on minimum statutory rest periods, as foreseen in the WS, have a constitutional basis and are intended to protect the health of workers. These minimum standards improve the regulation of the Working Time Directive and thus the minimum daily rest periods it provides (eleven consecutive hours per twenty-four, to which one more hour should be added between the end of a working day and the beginning of the next; Art. 34.3 of the WS). This also determines that the minimum weekly rest period laid down by the Directive (35 hours: 24 of uninterrupted rest for every period of seven working days and plus the 11 of daily rest) is also increased by one hour. As for the annual rest period, it consists of thirty calendar days (Art. 38.1 of the WS) and some legal mechanisms exist ensuring that the workers enjoy this right.

In any case, the EU legislator requires that the employee's rest is "adequate", i.e., characterized by regular and continued rest periods (Art. 2.9 Directive), so that this break is restful for the worker's health. Obviously, excessively long working days can affect job performance, increase the odds of accidents and seriously affect workers' physical and mental health. On this point, psycho-

social diseases are more and more relevant, as is work addiction (workaholism) or, in the case of teleworking, addiction to new information and communications technologies. Such technological addiction – called techno-addiction – is seen as a psychological disorder resulting in the uncontrollable need to use new technologies for long periods. Logically, the excessive use of such devices can cause stress, fatigue, anxiety and other significant changes to workers' health. Accordingly, it is important to stress that the employer should control and limit working time, especially over time, in order to prevent such risks.

Certain collective agreements concluded in Germany and France are significant as they establish measures to protect the worker against the prolonged use of technological tools while at work. In France, the sectoral agreement concluded on 1 April 2014 between SYNTEC and CINOV employers and CFDT and CFE-CGC unions, sets obligations for both parties to limit working time<sup>18</sup>. For the first time, the worker has recognized the right and the duty to disconnect from the Internet (Art. 4.8). This right is accompanied by a duty to cooperate with the employer, in order to avoid working outside normal working hours. As for the employer, he also has the duty to refrain from making contact with the employee outside normal working hours or when the end of the working day approaches. He also has to take measures – which also include disciplinary ones – to make sure workers are disconnected from the Internet and stop working when not required. One technical measure to be taken to prevent working beyond normal hours consists in disconnecting or switching off devices from company servers. The recent labor reform in French incorporated these rights into the Labour Code (Art. L. 2242-8, 2.7). Accordingly, ways “to ensure that the worker can disconnect from IT tools to allow him to enjoy rest periods and leave” will be negotiated in collective bargaining on an annual basis. These aspects should be agreed at the company level, as they refer to workers' quality of life and working conditions. The goal is to encourage collective bargaining to deal with aspects related to ICT and negotiate measures to protect workers' health and reduce the risk of working longer hours.

### 3.2. Home Privacy Does Not Relief the Employer from the Duty to Monitor the Teleworker's Working Time

For the purposes of Article 18.2 of the SC, one's residence (*domicilio* in Spanish) is concerned with the area in which the individual lives without being

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<sup>18</sup> On this point, see my paper “New technologies and new challenges for conciliation and health of workers”, *Trabajo y Derecho*, 2016, n.º. 16, pp. 45 et seq.

necessarily subject to customs and social conventions and where they can enjoy a sense of freedom. Therefore, besides safeguarding “one’s physical space”, protection is also provided to “his/her private sphere characterizing this space”<sup>19</sup>. Therefore, this is a different and broader definition than the one provided by the legislator in other branches of law. For example, the Civil Code conceives the notion of residence in a more neutral way – as one’s habitual residence (Art. 40); and the place where legal representation is established or where core functions are carried out for legal purposes (Art. 41). Curiously, in the ruling referred to above the worker’s fundamental rights to privacy and inviolability of the home are referred to by the employer to justify non-compliance with his own duties.

This is also in line with the position of the High Court, which argued that “the right to privacy and inviolability of the home concerns the worker, that is, the home dweller and not the employer, so the latter cannot refer to this right against them”<sup>20</sup>. In other words, these rights can only be exercised by the owner to protect his privacy from the employer’s control and to justify his failure to put forward monitoring activities as regards working time, while the reverse is not possible. By accepting the employer’s previous arguments, this might affect workers’ interests, paradoxically using one of their fundamental rights to deprive them of those on working time.

Further, as work is performed partly remotely and partly at the employer’s premises, this fundamental right to privacy is logically altered to allow the employer to exert their managerial powers, particularly in relation to working time and the prevention of work-related accidents.

As far as occupational risks are concerned, the obligation to specify one’s place of work in the employment contract was already envisaged for traditional homework in order to put forward “the necessary measures to protect the health and safety” of workers (Art. 13.2 of the WS prior to the 2012 reform). Concerning telework, the EFAT expressly provides that – in order to ensure the proper application of safety and health rules – the employer, workers’ representatives and relevant authorities (especially labor inspectors) “have access to the telework location”, within the limitations set by the law and the collective agreement. For example, if the worker works from home, access to the teleworker’s dwelling can take place after the latter has been informed and has consented to it (clause eight).

Accordingly, this procedure is in line with the Spanish Constitution, for accessing one’s home always requires the owner’s previous consent, or an

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<sup>19</sup> Ruling from Constitutional Court n° 137/1985, of 17 December (RTC 137, 1985).

<sup>20</sup> Ruling of High Court of Justice of Castile-Leon (Valladolid) of 3 February 2016, cit.

authorization from the tribunal pursuant to Article 18.2 of the SC, save for cases in which someone is caught in *flagrante delicto*.

In any case, the EFAT seems to establish the right of the employer to access the teleworker's home, so prior notification is needed not so much to obtain the worker's consent, as to inform or to reach agreement on the way access should take place (e.g., the day, the time, the areas that will be inspected or who will carry out the checks). Therefore, the content of the notification must be as complete as possible and include any other relevant detail (e.g., the possible duration of the inspection). The notification shall be in writing and sent through any means admitted by law (e.g., by post, fax or email). The notice period will be specified in the collective agreement, the telework agreement or an individual employment contract and, whereas not expressly referred to, such notice period will be set at 15 days or 30 days, which is sufficient to discuss aspects concerning inspections and reach agreement between the parties. The need for the parties to negotiate is evident and this requirement should be understood as different from the one concerning notification mentioned earlier since they are conceived as two distinct aspects in the section of the EFAT on house inspections.

If the parties fail to reach consensus because the worker explicitly opposes the inspection or keeps delaying it by raising groundless objections, the employer must remind the worker of his duty to cooperate to prevent work-related accidents and, if necessary, take appropriate measures against him, which include asking the employee to move to business premises and therefore terminating the telework agreement. As a milder alternative, the authorization to perform telework can establish that the place of work is different from one's home and can be freely accessed from the employer, in order to prevent issues concerning the employee's privacy. In the public sector, some regional regulations governing telework specify that when inspection authorities are denied access to workers' home, the principal, and the relevant General Secretariat need to be informed<sup>21</sup>. This is done to relieve authorities of any responsibilities if the employee faces health problems.

The checks of inspectors from the Labour and Social Security Department to the private house elected as a place of work are also subject to the general requirement of workers' prior notification and agreement on the inspection date. Apart from the EFAT, permission is also required by the Inspectorate of

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<sup>21</sup> Cf. Annex (the C13 procedure on the evaluation of telework), Plan preventing occupational hazards by the Junta de Extremadura (in <http://ssprl.gobex.es/ssprl/web/guest/plan-de-prevencion-de-la-board-de-Extremadura>), prepared to comply with Art. 15 of Decree 127/2012, of July 6, Extremadura (DOE 13 July).

Labour and Social Security (ILSS)<sup>22</sup>. In this sense, Article 5.1 provides that “If the facility inspected coincides with the dwelling of the individual concerned”, inspectors should obtain their express consent or, failing that, legal authorization. Logically, authorization should be sought for the most serious cases, where there are reasons to believe that occupational risks exist for workers’ health and safety and that of other people living with them. Once in, inspectors will remain in the house for the time needed to carry out checks. As for working time, if the worker works offline – as is the case with traditional homework – the employer can fulfill his monitoring duties by setting clear rules on maximum working time and rest periods and then mechanisms to ensure workers’ compliance with them without invading their privacy. In any case, it must be recognized that even taking responsibilities for meeting those standards, it is more difficult to verify whether workers fulfill them. For this reason, a piecework payment system is usually implemented. In the event of non-compliance with these standards, the employer should take direct control or cooperate with the Labour Inspectorate if failing to fulfill such standards entails workers’ health risks. Conversely, if work is performed online, monitoring can take place by “checking the worker’s connection with the company intranet and their participation in the network”<sup>23</sup>. Thus, this control is easy and “at first and under normal conditions, does not imply the invasion of protected space under the concept of private home”<sup>24</sup>.

Back to the central theme of the comments made by the High Court of Justice of Castile-Leon, the following is an important point:

- One: the employer is obliged to supervise the daily work of the teleworker or the homeworker. To do that, he has to set clear guidelines on working time and rest periods, respectful of legal and conventional regulations, therefore considering the worker and the tools for evaluating the work carried out. These tools vary depending on the communication system between the contracting parties, which also determines the degree of collaboration by the worker.
  
- Two: the employer is obliged to pay overtime following the setting up of a working time monitoring system allowing to assess if an employee has worked beyond normal working hours. However, this obligation also applies when, even without establishing a control system, the worker manages to prove he worked longer hours than agreed upon. Naturally, if the employer does not

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<sup>22</sup> Law 42/1997, of 14 November regulating the establishment of the Inspectorate of Labour and Social Security.

<sup>23</sup> High Court of Justice of Castile-León (Valladolid), 3 February 2016, cit.

<sup>24</sup> Ibid.

fulfill his main obligations, and does not set instruments to monitor distance work, the exemption referred to above concerning the obligation to remunerate overtime work does not apply. Otherwise, as pointed out by the ruling, that would be tantamount to “creating a space for circumventing the law in distance work and homework”. Moreover, the employer would be released from his obligation to pay overtime, even when aware that it took place, leading them to oppose his right to monitor the employee’s working hours. Undoubtedly, such a position would encourage malpractice and violation of the rules protecting workers.

- Three, if the employer meets his obligations as regards working time control, the responsibility for compliance with guidelines and mechanisms established for that purpose falls on the worker. Therefore, if the latter fails to comply with the employer’s control instruments on a voluntary basis, his behavior can determine an exemption of the employer’s obligation to pay overtime work. As shown, he who does not fulfill his obligations must face the consequences arising from such a violation, as is the case with the worker who loses the right to claim the payment of overtime from the employer. Yet this does not rule out the possibility that he may be subject to disciplinary action for failing to comply with instructions from the employer.

#### **4. Working Time in Spanish Collective Agreements**

Given the importance of working time in any contract of employment, especially in those concerning remote work, and the legislator’s disregard for this aspect, collective bargaining must be analyzed in order to determine whether the parties regulate this matter. Some aspects are therefore pointed out:

1. *Scarce regulation in collective bargaining.* The first aspect is that few collective agreements deal with distance work or telework and, of them, only some address working time. In general, regulation is limited and insufficient to address all the problems, so neither the legislator nor the social partners are able to provide specific provisions. In addition, the wording of the rules is literally “copied and pasted” from other collective agreements, usually from the same sector. So it will be up to the parties to the contract to set down specific terms. Therefore, some agreements state for instance that some aspects of working time in telework will be treated in the same way as those concerning full-time positions or other existing working arrangements if performed part-

time<sup>25</sup>. It is usually enough to indicate the number of weekly days and hours telework will be performed unless otherwise indicated by productive reasons<sup>26</sup>. More detailed working hours can be specified when we know in advance that teleworkers cannot arrange their working time flexibility<sup>27</sup>.

2. *Combined model of distance work and office-based work, prioritizing the latter and the employer's interests.* As already noted, most collective agreements established that work should be performed partly at home and partly at the office. Sometimes it is expressly stated that this way of organizing work tries to meet the interests of both parties, and an attempt is made at organizing working time to mutually benefit the employer and the employee<sup>28</sup>. However, priority is subsequently given to the interest of the former, since it is established that “telework cannot hamper adequate work organization” and cannot be used to avoid dealing with replacements, changes to production and unforeseen circumstances<sup>29</sup>. Accordingly, telework shall be organized so that it does not affect work performance at the employer's premises and allow one “to deal with changes in response to organizational needs, in compliance with working and office hours”<sup>30</sup>. In other words, we start from the principle that work should be performed as if the employee were in the office, so the latter “may be required at any time to return to the usual workstation” if the company asks so, within the limits of daily working hours<sup>31</sup>. The employer's requests made to the worker to work at the company can be used at the time of assessing the conversion of teleworking agreements, which can take place upon the request of one of the parties to the employment contract.

3. *Preference for uniform working time in the company, regardless of where work is performed.* The primacy of the employer's interests and the fact that at times workers have to go back to the main working centre to perform some duties have as a consequence that workers, while allowed to work remotely, have to

<sup>25</sup> Art. 74 XII Collective Agreement “HIBU Connect”, cit. Also Art. 33 collective agreement “Numil Nutrition”, already cited.

<sup>26</sup> Annex V (conditions of implementation of teleworking, n° 5) the collective agreement “companies linked to Telefonica Spain, Telefonica Móviles Spain and Telefónica Solutions Information Technology and Communications” (EDG Resolution of 28 December 2015, BOE of 21 January).

<sup>27</sup> Ibid.

<sup>28</sup> Art. 36 of the Collective agreement “Thales Spain GRP”, already cited.

<sup>29</sup> Clause sixth, B) of the Collective agreement on conditions for the provision of services in the BBVA bank, already cited.

<sup>30</sup> Ibid. Also Art. 74 XII of the collective agreement “HIBU Connect”, cited.

<sup>31</sup> Art. 36 of the Collective agreement “Thales Spain GRP” and Art. 43 of the collective agreement “Alcatel Lucent Spain”, already cited.

comply with the same working times as their peers operating at the company, to be able to cooperate with them if needed. Sometimes, this is expressly indicated, along with the fact that their working time will be determined “according to that of those working at the same productive unit<sup>32</sup> or to that established in the collective agreement<sup>33</sup>”. In any case, the time needed to travel from home and to the office is not regarded as working hours<sup>34</sup>. This requirement affects the core element of teleworking, that is flexibility and freedom to perform work according to worker’s needs. One can always deal with working tasks during regular working time, but then there is a risk of overworking and not enjoying rest periods.

In some cases, time flexibility in distance work is accepted in relation to the general time schedule applying at the company, although some requirements are needed. Specifically, teleworking outside normal working hours: 1) must be requested by the employee; 2) must be justified by objective productive needs or work-related reasons and must not have negative effects on other colleagues and work for the organization<sup>35</sup>; 3) working time cannot be longer than normal daily working hours – including overtime – and provide daily and weekly rest periods; 4) must not give rise to different forms of remuneration than that granted to workers operating at the company<sup>36</sup>; and 5) must be agreed with the company first (i.e. the employee’s supervisor)<sup>37</sup>. The specific changes must be documented in writing along with the original contract (if not provided from the very beginning). As shown, there is limited or “exceptional” flexibility, which must be agreed with the company. Additionally, telework is also possible through shift working whereas one worker working on shifts does so remotely without the need of amending the contract<sup>38</sup>.

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<sup>32</sup> Art. 74 XII Collective Agreement “HIBU Connect”, cited. Also Annex V (working conditions of teleworkers, n.º. 1) of the collective agreement “companies linked to Telefonica Spain, Telefonica Moviles and Telefonica Spain Information and Communications Solutions”, cit.

<sup>33</sup> Art. 38.2.3 collective agreement “Orange Espagne” (EGD Resolution of August 5, 2014, BOE of 21 August).

<sup>34</sup> Annex IX. 9.5 collective agreement “Nokia Solutions and Networks Spain” (EDG Resolution of 14 April 2015, BOE of 25 April).

<sup>35</sup> Ibid. Also Art. 61.3 collective agreement “ONO Group” (DGE Resolution of 11 June 2013, BOE of 1 July).

<sup>36</sup> Ibid.

<sup>37</sup> Art. 36 Collective agreement “Thales Spain GRP”, already cited.

<sup>38</sup> Annex V (working conditions of teleworkers, n.º. 1) the collective agreement “companies linked to Telefonica Spain, Telefonica Moviles and Telefonica Spain Information and Communications Solutions” and Art. 61.3 collective agreement “ONO Group”, cited.



4. *Occasionally, working time is related to remuneration.* This takes place when remuneration depends on the teleworker's working time, which is set according to the time schedule applying in his/her productive unit. In this case, the time schedule is used to limit one's remuneration, for it is not possible to use telework "as a way to generate higher remuneration"<sup>39</sup>. Evidently, this provision runs counter to the ones stating that reimbursements are granted to workers to cover the expenses resulting from working remotely. No mention is made of overtime, except for some vague reference indicating that if a teleworker works beyond normal hours, the relevant collective agreement will apply<sup>40</sup>. Given the importance of this point, it is surprising that this is not discussed in negotiations in a more detailed fashion.

5. *Few references to the right to minimum breaks.* There are few explicit references to breaks, and when they exist, they only reassert the right to statutory breaks, without going into detail. On some occasions, the right of the teleworker to annual leave is expressly foreseen, according to the provisions of collective agreements in force in the company where the teleworker operates<sup>41</sup>. As already stated, the link between workers' rest and health requires the recognition of these breaks for all of them, regardless of their status. Therefore, what was said for annual leave must be applied to minimum daily and weekly rests, days off and time off. While some differences are possible (e.g. breastfeeding leave), they must be acknowledged, as must the legal recognition of equal rights between teleworkers and office-based workers. Also, because of its peculiar nature, the absence of clauses concerning the time spent available for work needs attention. This should be set clearly and remunerated, as it limits the freedom of workers and even their right to rest.

6. *Few References to the Relationship between Working Time and Work-life Balance.* As is well known, reducing and making working time more flexible are key elements to promote work-life balance. Therefore, it is surprising that little reference is made to the latter and the use of working time (point 3) to ensure reconciliation of work and family lives. Maybe it happens because in such agreements telework is seen as a measure put in place by employers to save costs or deal with economic crises as an alternative to the closure of the business. However, teleworking can also be a work-life balance measure and, as

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<sup>39</sup> Annex V (working conditions of teleworkers, n.º. 1) of the collective agreement "companies linked to Telefonica Spain, Telefonica Moviles and Telefonica Spain Information and Communications Solutions" and Art. 61.3 of the collective agreement "ONO Group", both cited.

<sup>40</sup> Annex IX. 9.5 of the collective agreement "Nokia Solutions and Networks Spain", cited.

<sup>41</sup> Art. 75 XII of the Collective Agreement "HIBU Connect", cited.

some agreements state, “the teleworker is responsible for effectively managing the time devoted to work and leisure”<sup>42</sup>. This wording sounds more like a warning to the worker than as an affirmation of his/her rights. Some companies, however, make clear that work-life balance is a teleworker’s right and put forward measures to improve their work environment and save them the trouble of commuting<sup>43</sup>.

7. *Working time monitoring systems in telework*. Collective agreements do not clarify if teleworkers’ organization of working time and its monitoring by the employer depend on how the parties interact (online, offline, or one-way online communication). So workers who comply with the traditional time schedule tend to interact with their fellow at the company, thus monitoring is possible by means of technologies. In some cases, the agreement provides that “the worker must work and be *online* in the hours his presence is mandatory, according to the work schedule”<sup>44</sup>. Collective agreements frequently contain clauses relating to workers’ monitoring system to verify the performance of daily activities. Some of them require that an electronic device signaling the worker’s online presence should be installed on their computer through the company’s intranet<sup>45</sup>. In other words, the teleworker may be required to report when they start and end working by operating this “presence mechanism” helping the employer to monitor compliance with working time and overtime arrangements. In any case, control can take place in different forms depending on the worker’s tasks. The employer must inform and report to them, to representative bodies and at times to other entities (for example, the commission monitoring and interpreting the agreement).

Logically, it is always necessary to respect the dignity of workers and those systems must be proportionate to the aim pursued.

As shown, collective agreements contribute little in terms of working time, so many questions remain unresolved. If distance work use increases in the future (as seems likely to happen), so is conflict between the parties, thus the social partners will be compelled to regulate the different aspects of this way of working in detail, including those concerning working time. Otherwise, this task will be left to the courts.

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<sup>42</sup> Annex IX. 9.5 of the collective agreement “Nokia Solutions and Networks Spain”, cited.

<sup>43</sup> Art. 73 of the collective agreement “Repsol Butano” (EDG Resolution of 21 May 2012; BOE 8 June).

<sup>44</sup> Art. 38.2.3 of the collective agreement “Orange Espagne”, cited.

<sup>45</sup> Art. 75 XII of the Collective Agreement “HIBU Connect”, cited.

# Compensation for Work Related Injury or Disease: Do Injured Workers Starve to Death?

Brenda Barrett \*

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**Abstract.** This paper asserts there can be no situation where a worker is more vulnerable or in a more precarious position than after suffering a work related injury or contracting a work related disease causing incapacity to work. It sets out the British system which imposes liability on employers to pay damages to employees who have suffered injury or disease through their employer's fault. Acknowledging the faults of this system it looks at an International Labour Organisation publication which refers to systems in other states and supplements this by further research. Then it returns to the ILO paper's criteria for a good system and measures the British system against that criteria. Finally, it questions the fate of those whose incapacity is not work related.

**Keywords:** *Work-related Injuries, Vulnerable Workers, ILO, Injuries to Vulnerable Workers.*

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\* Brenda Barrett, Emeritus Professor, Middlesex University, email: b.barrett@mdx.ac.uk.

## 1. Introduction

There can be no situation where a worker is more vulnerable or in a more precarious position than after suffering a work related injury or contracting a work related disease that causes incapacity to work and earn a living. The International Labour Organisation (hereafter ILO) has estimated that, worldwide, more than 2.3 million people die from work-related accidents or diseases each year and that hundreds of millions more people, to a greater or lesser extent, suffer ill-health or disability as a result of their work.<sup>1</sup> There are several ways in which workers may be provided with income support while they are incapacitated by work: the state may provide them with income or, by one means or another, responsibility for maintaining the worker may be placed upon the organisation for whom the victim was working when incapacity occurred. Employers' liability may be income maintenance or possibly damages to compensate for the injury. Whether a country operates a social security scheme or an employers' liability scheme, a good scheme will also provide for rehabilitation to enable the victim to return to work as soon as possible. It has been suggested that worldwide less than 30 per cent of the working-age population, and less than 40 per cent of the economically active are obtaining compensation for work-related injuries. This is noted in the SIDA<sup>2</sup> report, published by the ILO, and cited extensively in this paper.<sup>3</sup> The SIDA report notes employment injury schemes are to be found in 65 countries and proposes that prevention is better than cure<sup>4</sup>:

Employment injury schemes perform three linked functions. Firstly, they help (or should help) to support preventive work, so that fewer workplace accidents take place and fewer workers are affected by occupational diseases. Secondly, where accidents and illness have occurred, they help in the rehabilitation process, so that the individuals affected can if possible return to their original jobs, or if this is not possible to other employment. Thirdly, they offer compensation where individual workers have lost out, through illness or disability.

This paper was inspired by consideration of the system in the author's own country, namely Britain<sup>5</sup> and noting the shortcomings of that system the

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<sup>1</sup> ILO *Introductory Report: Global Trends and Challenges in Occupational Safety and Health, XIX World Congress on Safety and Health at Work*, Istanbul 11-15 September 2011.

<sup>2</sup> Swedish International Development Cooperation Agency.

<sup>3</sup> *Strengthening the role of Employment Injury Schemes to Help Prevent Occupational Accidents and Diseases* 2013) ISBN 978-92-2-127090-4 (print) ISBN 978-92-2-127091-1 (web). (The SIDA report).

<sup>4</sup> SIDA report pp 12-13.

researcher decided to compare it with arrangements in other countries in an attempt to identify a more satisfactory system. The starting point here is therefore an outline of the British employers' liability scheme. There will then be an exploration of the situation in other countries. Clearly this exploration could not be comprehensively world-wide because there are so many countries and some of the larger ones notably Canada, Australia and USA have federal systems of government where determining the relevant system of compensation may be partially or entirely delegated to the individual provinces. The paper was therefore initially intending to rely on the SIDA report to provide an overview of systems in operation in the 24 states covered by that report. However, that publication was not sufficiently helpful and so further investigation was conducted about four of the 24 states listed by that publication and other states which were formerly British colonies. Finally, to contribute to its conclusions the paper measures the British system against the propositions the SIDA report advances regarding the attributes of a good system, but then questions whether any such system is of itself adequate to support the disabled.

### *1.1 Relevant Questions*

This paper looks for answers to the following questions in respect of the states considered:

- 1) Is the problem of income maintenance of the incapacitated worker addressed at all?
- 2) Where the problem is addressed does the system provide income maintenance or damages, or possibly both?
- 3) Who is to make the payments to the victim – the state or the employer?
- 4) Will the scheme benefit all workers or just employees?
- 5) What, if any steps are taken to provide a secure fund from which payments may be drawn?

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<sup>5</sup> Britain, rather than UK because there are separate laws for N. Ireland though the system set up there is much the same.

- 6) Will the intended beneficiary have any remedy if the scheme is not honoured?
- 7) Is the system accompanied by an effort to prevent occupational accidents and diseases?
- 8) Is there any focus on rehabilitating the victim?

## 2. The British Scheme

Primary responsibility for providing compensation to the injured employee has always rested with the employer. The liability of the negligent employer to pay damages to an injured employee can be traced back to 1837, but was not meaningful for many years because in practice there were so many situations<sup>6</sup> where there would be no liability.

### 2.1. *Income Maintenance*

After The Workmen's Compensation Act 1897, which copied the then German scheme, employers were required to make weekly payments towards maintaining the income of workmen during their work-related incapacity.<sup>7</sup> Many employers insured to meet their liabilities, and until about the 1930s, it was apparently deemed more prudent for a worker to claim income maintenance than to go to court to claim damages by proving the employer's negligence<sup>8</sup>. It has been suggested<sup>9</sup> that the success of the victims of road accidents in obtaining damages inspired workers to litigate to claim damages from their employers.

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<sup>6</sup> E.g. the injury was not due to the negligence of the employer but to the conduct of a worker in 'common employment' with the victim (and managers could be in 'common employment with the victim) or the victim knew of the risk but continued to work so that he was held to have 'assumed the risk'.

<sup>7</sup> 'Workmen' were not the same as 'employees'; workmen were labourers rather than clerical or professional workers.

<sup>8</sup> Holman Gregory Report on Workmen's Compensation (1920) Cmd. 816 A 3858.

<sup>9</sup> It was suggested the reluctance to sue for damages may have been due to touting by insurance companies. A. Russell Jones (1944) 7 M.L.R 13 at pp.20/21.

## *2.2 The Employers' Liability Compulsory Insurance Act 1969*

In 1968 there was a serious factory fire in which many workers were killed due to being trapped in the burning building. The employer was not insured. This incident led to the Employers' Liability Compulsory Insurance Act 1969 (hereafter the 1969 Act) and this short Act remains in force today. It requires every employer to have insurance cover with a recognised insurer and provides that employers must compensate, in the form of damages, any employee who suffers work related injury or disease, where that injury is due to the employer's negligence.<sup>10</sup>

The Health and Safety at Work Act 1974 (hereafter the 1974 Act) set up a system for creation and enforcement of regulations aiming to ensure that no one affected by activities at the workplace is injured. Failure to comply with regulations is a criminal offence. The Executive (HSE) set up under the 1974 Act is also charged with ensuring that employers have the cover that the 1969 Act requires and an employer who is not insured<sup>11</sup> commits a criminal offence. Recorded prosecutions suggest defaulters are likely to be SMEs.<sup>12</sup>

## *2.3 Shortcomings in the British Scheme*

- Soon after the 1969 Act came into force it was described as a 'broken reed'<sup>13</sup> largely because the scheme lacked anything comparable to the Motor Insurers' Bureau to provide for situations where the victim's employer was not insured. Thus it failed to address the very situation that prompted Parliament to legislate. This remains the case today except that The Mesothelioma Act 2014 enabled setting up a scheme for a levy on insurers in order to fund the compensation of victims of this disease.<sup>14</sup>

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<sup>10</sup> Until recently employers were liable under the 1969 Act for breach of a strict statutory duty, but s.69 of the Enterprise and Regulatory Reform Act 2013 relieved employers from liability to compensate where they are not negligent.

<sup>11</sup> The criminal sanction is provided in the 1969 Act.

<sup>12</sup> E.g. Gumus Takeaway Limited, of Eastgate Street, Gloucester was fined a total of £2,000, with costs of £2,360, for offence under Section 4(2)(b) of the Employers Liability Compulsory Insurance Act 1969 <http://press.hse.gov.uk/2016/takeaway-shop-fined-for-failure-to-produce-elci/>

<sup>13</sup> R. .A. Hanson, *The Employers' Liability (Compulsory Insurance) Act 1969 – A Broken Reed* 1974 ILJ pp.79-86.

<sup>14</sup> The problem this Act addressed was that these were so called 'long tail' claims: i.e. the illness did not manifest until long after exposure to asbestos and the claimant may have worked for a number of organisations so attaching liability was difficult and also the organisations might no longer exist.

- The 1969 Act provides only for employees and thus it does not cover other 'workers' as now statutorily defined.<sup>15</sup> It is not always easy to identify whether a person is within the statutory definition of worker although not an employee,<sup>16</sup> but in one case a court considered the test was whether the individual though lacking a contract of employment was nevertheless 'integrated' into the employer's organisation.<sup>17</sup> Interestingly insurers may cover volunteers, although in some cases, the number engaged as volunteers may exceed the number of employees<sup>18</sup>. The self-employed are not covered: they are expected to carry their own insurance.<sup>19</sup> Employees who are members of a TU may be assisted by it in lodging a claim.

- Reports by the Department of Work and Pensions<sup>20</sup> considered more needed to be done to ensure the rehabilitation of injured workers. The amount of compensation awarded under the 1969 Act will largely be determined by medical evidence which should address prospects for recovery and make allowances for rehabilitation costs and less than complete recovery.<sup>21</sup> Possibly the criticism is aimed at a scarcity of rehabilitation programmes.

- Relatively little is done to ensure that employers carry the insurance that the 1969 Act requires. HSE inspectors are encouraged to ask to see the insurance policy when inspecting a workplace.<sup>22</sup> However much inspection is delegated to local authority inspectors<sup>23</sup> and they are not empowered to prosecute in

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<sup>15</sup> Employment Rights Act 1996 s.230 (3)(b) '... the individual undertakes to do or perform personally any work or services ... for another party ... whose status is not ... that of a client or customer...

<sup>16</sup> HSE has acknowledged this problem and suggested the employer may need legal advice <http://www.hse.gov.uk/pubns/hse40.pdf>

<sup>17</sup> *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ. 1005.

<sup>18</sup> E.g. sales personnel in charity shops or museums or wildlife trusts: to the authors knowledge in the case of wildlife trusts volunteers are frequently at risk by doing manual work in the countryside.

<sup>19</sup> If they are providing services for an employer they may be able to claim under that organisation's public liability insurance, but the law does not make public liability insurance compulsory.

<sup>20</sup> Unfortunately DWP has now archived these relatively recent reports.

<sup>21</sup> The ILO paper notes that employers' liability schemes are found in countries with an 'Anglo-Saxon' background which would appear to mean countries with a tradition of paying damages to victims.

<sup>22</sup> <http://www.hse.gov.uk/foi/internalops/og/og-00042.htm>

<sup>23</sup> Health and Safety (Enforcing Authority) Regulations 1998 (SI 1998/494).



respect of the 1969 Act. Nevertheless a postal survey<sup>24</sup> suggested only about 0.53% of those employed were without the cover the law required.

- There are indications that failure to insure may be attributable either to ignorance of the legal requirement or to the high cost of insurance. In addition some insurers will not cover high risk enterprises; in the postal survey a few respondents gave rejection by insurers as the reason for their failure to carry insurance. This raises questions why such situations are deemed too risky; is it the accident record of the particular enterprise or the reputation of the industry? In either case it would appear more needs to be done to prevent workplace injuries.

### 3. Systems in Other Countries

#### 3.1. Systems in Other Countries

This report was submitted to ILO by a Swedish organisation known as SIDA<sup>25</sup> as an outcome of its project *Linking Safety and Health at Work to Sustainable Economic Development: From Theory and Platitudes to Conviction and Action*<sup>26</sup>. It had been compiled by building on a report prepared by Dr. Sven Timm<sup>27</sup> of the German Social Accident Insurance Organisation who had benefited from the experience and insights of many contributors. The SIDA report incorporated the outcome of additional telephone interviews in order to develop recommendations for the establishment of new, or the improvement of existing schemes with a focus on prevention of injury. The report considers 24 countries and includes: the type of employment injury scheme operating in each country; the coverage; the supervisory and administrative arrangements; services and benefits, including prevention services. The very title of the report suggests SIDA's focus is less on the type and content of the schemes than on their contribution to workplace safety.

The list of countries appears to be somewhat random and closer investigation indicates these countries were chosen on the basis that information about them was available because they had been the subject of other research. The list comprises:

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<sup>24</sup> <http://www.hse.gov.uk/research/rrpdf/rr188.pdf>

<sup>25</sup> Swedish International Development Cooperation Agency.

<sup>26</sup> Undertaken 2009–2012.

<sup>27</sup> Deutsche Gesetzliche Unfallversicherung.

- **Africa:** Kenya, Togo, Tunisia
- **Asia:** Australia, Indonesia, Japan, Korea, Singapore, Saudi Arabia
- **North America:** Canada (Ontario), Mexico, Panama
- **South America:** Brazil, Columbia, Costa Rica
- **Europe:** Austria, Belarus, France, Germany, Former Yugoslav Republic of Macedonia, Poland, Russia, Spain, Switzerland

Notably the UK is not included.

The report remarks the coverage will have varied greatly, particularly between developed and developing countries. In general, workers who are on casual contracts or are working on a self-employed basis, as well as domestic workers, and those working in the informal economy are most at risk of not being covered. (These groups comprise, arguably, some of the workers most at risk of accident and disease). It is noted that actual coverage of workers, by any scheme may be far from comprehensive, but the report gives little indication as to the extent of coverage in the schemes in each of the 24 addressed in its report.

There is virtually no discussion in respect of the individual countries covered in the report. The systems in these countries is set out in graphs and tables of which the most relevant here are:

**Table 1: types of employment injury insurance, selected countries;**

This shows that the majority have social insurance and relatively few have employers' liability schemes, but the table fails to take into account all of the 24 countries; notably Australia is omitted.

**Table 2: Coverage of employment schemes: selected countries;**

This looks at 10 of the 24 countries and demonstrates that all of these countries have schemes covering a wider range of the categories of the workforce than is the case under the 1969 Act in Britain.

**Table 4: Services and benefits concerning rehabilitation;** 22 of the 24 countries (not Poland and Tunisia) provide medical rehabilitation.

The analysis of the situation in the 24 countries considered is not of itself very helpful but comments and conclusions put forward in the report are more interesting in the present context. However at this point an attempt will be made to investigate in greater depth the systems in a selection of the 24 countries addressed by SIDA.

#### 4. Supplementing the SIDA Report

Given that the SIDA report suggests that employers' liability schemes are found in countries with an 'Anglo-Saxon' inheritance those countries in the report which were originally British colonies will be addressed because the primary purpose of this paper is to compare the British system with other employers' liability schemes. Therefore the six systems investigated are Australia, Canada, Singapore and Kenya which were in the SIDA list of states and two others, namely New Zealand and India which were British colonies but not mentioned by SIDA.

**Australia:** The state of New South Wales (NSW) has been chosen because comprehensive information about the system in this state is provided in a book gifted by the author to this researcher.<sup>28</sup> Chapter 11 explains workmen's compensation is not an area that has been statutorily 'harmonised' by federal government, so each state and territory has its own legislation. Nevertheless in NSW the Workers Compensation Act 1987 followed the federal lead and abolished completely the right to recover common law damages for workplace injury and dealt solely with the liability to pay income maintenance, following the model of the British Act of 1897.

However there was public pressure for the reintroduction of common law rights so NSW exercised its prerogative and it now has a scheme which provides employers' liability alongside social security providing periodic payments the level of which are set at a common income support amount unrelated to earnings.

Common law damages are recoverable for injury due to the employer's negligence or breach of statutory duty and are usually a 'once for all' lump sum. Insurance premiums are calculated according to an 'Insurance Premium Order' and take into account the wage paid by the employer, the type of industry and an 'experience factor' according to the number of claims made by the employer in the previous two years.<sup>29</sup> An emphasis on rehabilitation is covered in the Workplace Injury Management and Workers Compensation Act 1998 which requires that insurers develop 'injury management programmes'; that is an overall policy on assisting workers to return to work. For each worker who has suffered a significant injury insurers are required to develop an injury

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<sup>28</sup> See chapters 5 and 11 of N. Foster, *Workplace Health and Safety Law in Australia* (2012) Lexis Nexis (Butterworths).

<sup>29</sup> The Act sets up an Uninsured Liability and Indemnity scheme allowing the worker to make a claim under the scheme if the employer is either uninsured or missing and unable to be located.

management plan. The common law scheme covers 'workers'. Worker is defined as 'a person who works under a contract of service or a training contract with an employer i.e. the common law contract of employment but case law has extended this to some other people.'<sup>30</sup>

**Canada.** The Canadian system of providing support for workers who are victims of work-related injury is one of income maintenance. How the system operates is set out in *Brief Summary of Canadian Workers' Compensation System*<sup>31</sup> which provides:

Workers' compensation in Canada had its beginnings in the province of Ontario. In 1910, Mr. Justice William Meredith was appointed to a Royal Commission to study workers' compensation. His final report, known as the Meredith Report, was produced in 1913. The Meredith Report outlined a trade off in which workers' relinquish their right to sue in exchange for compensation benefits. Meredith advocated for no-fault insurance, collective liability, independent administration, and exclusive jurisdiction. The system exists at arms-length from the government and is shielded from political influence, allowing only limited powers to the Minister responsible.

The five cornerstones to the original workers' compensation laws have survived:

1. Workplace injuries are compensated regardless of fault. The worker and employer waive the right to sue.
2. Collective liability: The total cost of the system is shared by all employers.
3. Security of payment: A fund is established to guarantee that compensation monies will be available.
4. Exclusive jurisdiction: All compensation claims are directed solely to the compensation board.

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<sup>30</sup> E.g. in *QBE Workers Compensation Ltd v Simaru Pty Ltd* [2005] NSWCA 464 a woman selling products on a commission basis and called a 'distributor' was deemed to be covered. Similarly in a case where a labour hire firm was supplying labour to a host firm, the host was regarded as an employer of the individual hired out and this will be the rule provided that the individual is not running his own business. *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 99 ALR 735

<sup>31</sup> Prepared by the Office of the Chief Actuary, January 2010. [http://www.actuaries.org/CTTEES\\_SOCSEC/Documents/Canada\\_Workers\\_Comp.pdf](http://www.actuaries.org/CTTEES_SOCSEC/Documents/Canada_Workers_Comp.pdf)

5. Independent board: The governing board is both autonomous and non-political.

Each province and territory in Canada has its own exclusive Workers' Compensation Board/Commission.

Nevertheless it appears that common law claims against employers are theoretically possible if the workers' compensation board refuses a claim. An advertisement by an insurance company is illustrated by an example of a work-related injury where the victim had been denied statutory compensation, and urges employers to take out a policy to provide cover for such a situation.<sup>32</sup> This advertisement points out that under the Commercial General Liability policy there is a specific exclusion relating to employees covered by workers compensation. However, in the event cover or benefits have been denied by any Canadian Workers' Compensation Authority, the standard wording can offer coverage under an extension called Contingent Employers Liability.'

**Singapore.** Singapore operates an employers' liability scheme to provide compensation for employees injured in the course of their employment. It is spelt out in the Work Injury Compensation Act.<sup>33</sup> The Act sets out exactly how the sum due to the injured employee is to be calculated, how claims are to be made and stipulates the form in which an employee's claim must be made. The scheme is solely concerned with income maintenance.

**Kenya.** The system in Kenya is spelt out in the Work Injury Benefits Act as revised in 2012 and is solely concerned with income maintenance. Every employer is required both to register with the Director of Occupational Health and Safety Services and to keep a record of the earnings and other prescribed particulars of all employees and when required produce it to the Director for inspection. An employer is liable to pay compensation to an employee injured while at work unless the injury is caused by the deliberate and wilful misconduct of the employee. Apart from exceptions every employer must obtain and maintain an insurance policy, with an approved insurer in respect of any liability that the employer may incur under the Act. An employee who suffers temporary total disablement due to an accident that incapacitates for three days or longer is entitled to receive a periodical payment

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<sup>32</sup> *Not Required to Carry Workers Compensation? Consider purchasing Employers Liability Coverage.* <http://businessinsurancecalgary.com/not-required-carry-workers-compensation-consider-purchasing-employers-liability-coverage/>.

<sup>33</sup> The current version being (CHAPTER 354) (Original Enactment: Act 25 of 1975). REVISED EDITION 2009 (31st July 2009).

equivalent to the employee's earnings, subject to the minimum and maximum amounts. Compensation for temporary partial disablement consists of a proportionate amount of the periodical payment. Compensation for permanent disablement is calculated on the basis of ninety-six months earnings. The Act also covers specified diseases.

Other countries not considered in the SIDA report but worthy of mention here are New Zealand and India.

*New Zealand.* In the 1970s New Zealand abolished its fault liability system of compensation for personal injury in favour of a social security system only to find this created problems of its own including high administrative costs and the blunting of deterrence effects. Return to fault based liability for accidents was achieved by The Accident Compensation Act 2001. The purposes of the Act are very comprehensive; they include providing for a fair and sustainable scheme for managing personal injury<sup>34</sup> that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs).

The Act is very detailed and sets out every aspect of claims to which it applies. It specifically covers injury or disease caused by work. The victim claims from the employer. The employer has to establish a funding account to enable it to meet claims made upon it; in practice this means employers will need to have appropriate liability insurance to meet sums claimed. The Act requires the employer to meet relevant claims by providing, according to the circumstances, weekly compensation, and a lump sum for permanent impairment.<sup>35</sup> Rehabilitation must be considered where it is reasonably practicable for the employee to return to the same employment.<sup>36</sup>

*India.* It is difficult to find any guidance to the post-colonial law on compensation for work related personal injuries in India. A document described as 'A Guide for Activists'<sup>37</sup> gives an account of the Workmen's Compensation Acts 1923<sup>38</sup> and 1948 as amended in 2000. This legislation

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<sup>34</sup> Thus it appears that there is no limitation on the situations in which the injury may have occurred always provided the claimant has insurance sufficiently comprehensive to cover the situation.

<sup>35</sup> Section 69.

<sup>36</sup> Section 71.

<sup>37</sup> <http://www.ngosindia.com/resources/wcact.pdf>.

<sup>38</sup>

<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/32077/76827/F336348694/IND32077.pdf>.

makes the employer of more than twenty 'workers' liable to insure to provide a percentage of income maintenance during incapacity for work. The guide is published by Alternative Law Forum, Bangalore, 2005 but appears to be intended to explain legislation relating to the whole of India. The suggestion that it is needed by 'activists' may indicate that the law is not well understood and actively enforced.

While it is doubtful whether many workers in India receive any compensation for worker-related injury or disease it is clear the legislation intends only income maintenance rather than damages.

#### ***4.1 Summary***

The majority of the former British colonies considered in the account above appear to impose on employers a duty to provide income maintenance broadly as envisaged in the nineteenth century Workmen's Compensation legislation. Only NSW and New Zealand impose on employers a duty to pay damages and, interestingly even in these two states there was an albeit brief period towards the end of the twentieth century when employers' liability was reduced to paying income maintenance. However in both cases employers' liability to pay compensation in the form of damages was re-introduced by popular demand. The current system in NSW addresses some at least of the defects in the British system.

#### **5. SIDA Recommendations**

The SIDA report made recommendations about factors which it believed were likely to provide the most satisfactory workers' injury compensation arrangement together with reasons for this belief:

##### ***5.1 Preference for Social Security Schemes***

The reasons for this preference may be summarised:

- Social insurance is likely to prove a more flexible and more satisfactory way of providing employment injury insurance than employer-liability insurance arrangements.

- Evidence suggests social insurance schemes are better able to encourage preventive practices by employers.
- Social insurance for employment injury naturally forms a part of an overall social security system.

### *5.2 Potential weaknesses with employers' liability schemes*

These may be summarised:

- Claims processing may be so bureaucratic or opaque that workers may have to struggle to obtain compensation.
- Claims can be held up pending the formal acceptance by an employer that an incident has occurred.
- Schemes may lack the procedures for reporting of occupational accidents and diseases that are needed in order to identify their causes and enable preventive measures to be taken.
- It is an essential precondition that schemes are financially sustainable.

### *5.3 Preventive Strategies*

The ideas set out in the paper concerning prevention include:

- Regulatory measures – generic terms such as ‘safe and healthy workplaces’ do not help with the practical details needed for good practices.
- Experience rating - charge higher or lower employer contributions, depending on past claims records.
- Engage with workers’ organizations, works councils or safety and health committees established by the social partners.
- Provide appropriate training and expert advice.
- Combine the support work of an adviser with the powers of inspection, provided inspectors fashion their services to the needs of the enterprise.



- Make risk assessments of work place activities.
- Investigation after an incident can help identify better practices and procedures for the future.
- Personnel appointed as inspectors should have high educational qualifications and have other appropriate work experience.
- To ensure the impartiality of inspectors and to retain experienced staff, adequate salaries are necessary.
- Employers should seek expert advice from other than inspectorates (e.g. professional associations).
- Employers should ensure that articles and substances produced for, and used at the workplace are safe and workers are instructed in how to use them.
- Employers should use medical personnel to ensure workers are protected from work related injury.

## **6. How Does the British System Measure Up?**

In order to respond to the SIDA propositions factors taken into account will include matters not set out in the opening account of the British employers' liability scheme.

### ***6.1 The British Social Insurance System***

While the British employers' liability scheme assumes compensation in the form of damages will be provided through the 1969 Act this scheme has to be seen in the context of a very comprehensive social insurance system that largely operates to deal with need without reference to the claimant's nationality or status. Foremost in this system is the National Health Service which provides medical care for any person attending a hospital emergency service, regardless of the cause of incapacity. Before the patient leaves the hospital the social work department addresses any need for further support. For patients not normally resident in the UK arrangements may be made for returning to their country of domicile. For those domiciled in the UK where

necessary arrangements will be made for the patient to go into residential care and other sources of support both in the nature of rehabilitation and income will be reviewed. Many of the needs of the patient will be met through social services.<sup>39</sup>

Under the Social Security Contribution and Benefits Act 1992 the burden of ensuring a degree of income maintenance to an employee off work due to sickness was transferred from the social security system to the employer. This sick pay scheme requires the employer to make a weekly payment to an employee who earns more than the minimum each week, after the employee has been off work for 3 days, for up to 28 weeks, subject to medical certification that the employee is unfit for work. To be entitled to receive this statutory sick pay the employee does not need to have suffered an industrial injury or have an industrial disease. The criteria is simply unfit for work. The worker who suffers a lasting disability as the result of an industrial disease or accident is entitled to claim from the industrial disability benefit scheme. Payments made under this scheme are drawn from the National Insurance Fund in part provided by payments made by employers and 'earners'.

### *6.2 Are there Serious Weaknesses in the British Employers' Liability Insurance Scheme?*

- This scheme only provides cover for people who work under a contract of employment, though part time and even casual employees will be covered. Length of service is not a prerequisite of entitlement. Volunteers, being persons who are not paid for the services they provide to a willing organisation will often be covered.
- Insurers are not likely to go into liquidation because s.1 of the 1969 Act stipulates only 'authorised' organisations are eligible to offer cover; however insurers may refuse cover to enterprises deemed by to be too risky.
- If the employer denies liability then the victim may be forced into litigation to prove the entitlement. Similarly those who were not employees will need to sue if they are to attach any liability to the employer and they will have to prove the injury was attributable to the employer's negligence, whereas the employers'

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<sup>39</sup> As part of the recent negotiations relating to the referendum on EU membership it was proposed to restrict the NHS from providing free treatment of those who had not been resident in the UK long enough to have 'earned' an entitlement to free treatment. It is not clear how NHS was intended to respond when faced with a patient needing emergency treatment.

liability scheme may also provide cover for injury resulting from breach of a statutory duty<sup>40</sup>. Additionally the employee may not be aware of the employer's duty to insure; employees are much more likely to be unaware of rights if they are not members of a trade union.

### *6.3 Prevention of Work-related Injuries*

The primary purpose of HSE is the prevention of work-related injury. It is responsible for drafting health and safety regulations and when these drafts have been approved by Parliament it is HSE's task to ensure that they are complied with. It is responsible for the inspection of workplaces, investigation of accidents and the prosecution of those who do not observe health and safety legislation. Legislation places great responsibilities on employers and the British Act of 1974 requires an employer 'to ensure, so far as is reasonably practicable the health, safety and welfare at work of all his employees.'<sup>41</sup> While the SIDA paper might regard this as a vague requirement the expression 'reasonably practicable' has a long history in British compensation law. It is frequently used successfully as the ground for prosecution. It is almost strict liability and its very generality means it is very difficult for an accused to avoid liability. Another arduous duty stemming this time from Europe is the requirement that organisations carry out risk assessments.<sup>42</sup> Risk assessments have to be carried out for the purpose of identifying the measures that need to be taken to comply with legislation. Given the generality of the 'reasonably practicable' duty this means that safe systems are necessary throughout workplace operations.

An official report published on the eve of the 1974 Act stated that in 1970 there were 985 fatal accidents at work and a total of 472,746 accidents.<sup>43</sup> The most recent annual report states 142 workers were killed and 76,000 other injuries were reported.<sup>44</sup> The demise of the heavy industries may account for

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<sup>40</sup> Some such duties are strict e.g. failure to guard a machine. Recent legislation has removed this strict liability meaning claimants will need to litigate to establish that the breach was in fact negligent or due to defective equipment.

<sup>41</sup> S.2(2). Incidentally s.6 addresses the safety of articles and substances used at work.

<sup>42</sup> Made law in Britain by the Management of Health and Safety at Work Regulations 1992 (SI 1992/2051) Regulation 4. Subsequently revised and reissued.

<sup>43</sup> Report of the Robens Committee on *Safety and Health at Work* 1970-1972 Cmnd 5034.

<sup>44</sup> Key figures for Great Britain 9014-15. <http://www.hse.gov.uk/statistics/>. There is a duty resting principally on employers to report accidents to HSE (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (SI 2013/1471)). In the case of a fatality the police are involved, which ensures that in these cases HSE is informed.

some of this improvement but some credit must also go to legislative system. Moreover fatalities would nowadays be much lower if it were not for deaths resulting from historical exposure to asbestos.

Amongst its other work the inspectorate provides much advice. Most of this is readily available on its website and includes guidance notes and research reports, some of which have been produced by other organisations<sup>45</sup>. In addition Regulations made in 1977 which apply to unionised workplaces expect employers to consult with union appointed safety representatives. These representatives are empowered to inspect the workplace and also to ask for a safety committee.<sup>46</sup> When trade union membership became less general a further set of regulations required employers to consult with their employees and empowered elected safety representatives to make representations to their employers about potential hazards and dangerous occurrences at the workplace.<sup>47</sup> Unfortunately safety representatives are not so widely appointed nowadays and it is not clear that the protection now given to whistle blowers<sup>48</sup> has the same persuasive influence upon employers.

## 7. Conclusion

This account has more than addressed the questions posed at its outset. It is always difficult to compare aspects of the regulatory systems of one state with those of another and systems of compensation for incapacitating work-related injuries are no exception to this general rule.

The paper began by admitting that there were imperfections in the British Act of 1969. Evaluating this system by the criteria suggested in the SIDA paper, confirms the 1969 Act is comparatively narrow in scope in that it applies only to those within the statutory definition of 'employee' but it operates in a state which has both a comprehensive social security system and a strong culture of requiring organisations to operate to safe systems in order to minimise workplace injuries. Comparing the British system with that of countries that were formerly British colonies has been interesting because all show some indications of their inheritance, but only two, NSW and New Zealand have schemes which are similar to the British one and these may be superior to the British scheme in that they have greater legislative control over insurers, provide for cover when the employer is not covered and apply to a wider range

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<sup>45</sup> Quite often such reports have been produced by other organisations, possibly universities under contract with HSE.

<sup>46</sup> Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500).

<sup>47</sup> Health and Safety (Consultation with Employees) Regulations 1996 (SI 1996/1513).

<sup>48</sup> Ss. 43A, 44 and 103A of the Employment Rights Act 1996.

of victims. Canada, Singapore, Kenya and India provide only for income maintenance, and in India this intention may not be honoured. All of the states considered, (that is the 24 in the SIDA report, and those with the common law inheritance) have schemes that aim to protect incapacitated worker from starvation.

However it is noteworthy that ILO estimated that, worldwide, more than 2.3 million people die from work-related accidents or diseases each year and that hundreds of millions more people, to a greater or lesser extent, suffer ill-health or disability as a result of their work. It has been suggested that legal coverage worldwide is less than 30 per cent of the working-age population, and less than 40 per cent of the economically active. Finally even where a country purports to have a comprehensive scheme of income maintenance that scheme may not be honoured.

Analysis of the British system of employers' liability in the context of the national social security system revealed that there is a comprehensive system of at least providing income maintenance for all who are too incapacitated to work. This comprehensive provision means that not only those whose injury was caused by work are provided for but that provision is made for those whose injury is unrelated to work; thus for example those who suffer a sports related injury, or undergo amputation of a limb due to diabetes are covered, as are those who suffer a genetic incapacity. This paper did not set out even to produce a comprehensive world-wide review of provision for those who suffered work related injury or disease; it completely overlooked those whose incapacity was not work related. Had it undertaken this wider investigation it would surely be clear that there is no reason to be complacent that the incapacitated will receive sufficient support to ensure they do not starve.

# Age Discrimination in Financial Services: The United Kingdom Case

Helga Hejny \*

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**Abstract.** This paper asserts there can be no situation where a worker is more vulnerable or in a more precarious position than after suffering a work-related injury or contracting a work-related disease causing incapacity to work. It sets out the British system which imposes liability on employers to pay damages to employees who have suffered injury or disease because of their employer's fault. Acknowledging the faults of this system, it looks at an International Labour Organisation publication which refers to systems in other states and supplements this by further research. It then returns to the ILO paper's criteria for a good system and measures the British system against that criteria. Finally, it questions the fate of those whose incapacity is not work related. This paper considers age discrimination in financial services, focusing on the United Kingdom. It does this by examining the 'Demographic transition Model', population size and Age Dependency Ratio. Acknowledging the negative impact of age discrimination on national economic trends, it looks at the inactivity of older workers and how it has been tackled by the Equality Act 2010 and the Technical Guidance 2016. Therefore, this analysis defines older people both as vulnerable workers and vulnerable customers. Finally, it questions on the conflict in financial services between economic interests, equality and their link to population aging.

**Keywords:** *Demographic Change, Vulnerable Workers, Financial Services in United Kingdom, Age Discrimination*

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\* Anglia Ruskin University, email: [helga.hejny@anglia.ac.uk](mailto:helga.hejny@anglia.ac.uk).

### Introduction: a 'Demographic Transition Model'

In the forthcoming next decades, demographic aging will have a significant impact in the European Union (EU). We are now living the fifth stage of the so-called “epidemiologic model” where birth rates are below the population replacement level.<sup>1</sup> Overall, developed countries, including the European Union, are facing the demographic and economic consequences of the population aging: lower birth and lower mortality rates are modifying the population age structure. Kalache, Barreto and Keller emphasize the implications of this trend, by simply assuming that: “we are growing old before we become rich”.<sup>2</sup> Thus, the problem is pursuing economic growth with a population aging. The effects of demographic changes in a variety of countries have been studied in 1929 by the American demographer Warren Thompson. He addressed this demographic process developing the ‘Demographic Transition Model’.<sup>3</sup> With this Model, he identified three types of countries (A, B, and C) with three different rates of population growth. Group A describes those countries with falling rates of increase and a potential decline of the population. In this category, the countries of Western Europe and those overseas countries were included, which had been settled by immigrants of European origin. In group B the countries with a reduced mortality, reduced fertility and a higher life expectancy for older people are described. In this group, the countries of Eastern and Southern Europe were included. Finally, in group C those countries in which neither birth nor death rates were under control are described. In particular, this study revealed how in industrialized societies, characterized by economic and welfare improvements, the demographic transition is represented by a decrease in death rates, thus an increase of population aging. In other words, Thompson’s model highlights how welfare improvement is possibly inversely proportional to demographic aging. The graph below shows this inverse proportion applied to possible fluctuations in ageing and welfare.

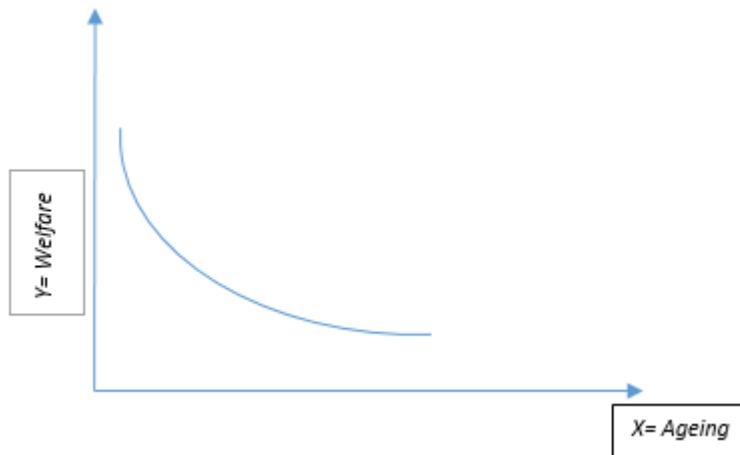
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<sup>1</sup> Manning Feinleib, “The Epidemiologic Transition Model: Accomplishments and Challenges”, [2008] AEP Vol. 18, No. 112, pp 865–867

<sup>2</sup> Kalache Alexandre, Barreto Sandhi Maria, Keller Ingrid, ‘Global Ageing: The Demographic Revolution in All Cultures and Societies’, in Johnson Malcolm (ed.) Age and Ageing, (The Cambridge Handbook of Age and Ageing. Cambridge: Cambridge University Press, 2005) pp. 30–47.

<sup>3</sup> Thompson Warren, 'Population', [1929] American Journal of Sociology, Vol. 34, pp. 959-975.

Figure 1: Inverse proportion  $Y = k/x$  (where  $k$  is a constant).  $Y$ = Welfare is inversely proportional to  $x$ = Ageing



This inverse proportion trend is further supported by historical facts. A demographic transition followed the ‘baby boom’ phenomenon, a period from 1946 to 1964 characterized by a high fertility rate.<sup>4</sup> Nowadays, the “baby boom” generation is moving into its 60s, and will soon approach the retirement age. Consequently, the aging of the baby boomers together with a slower population growth are determining a shift in the population age structure. Eurostat data confirms this change: birth rates and higher life expectancy are transforming Europe into a much older population structure. The figure below compares the estimated number of people over 65 in EU Member States and the UK between 2004 and 2014.

<sup>4</sup> Bongaarts John, “Human population growth and the demographic transition”, [2009] Philosophical Transactions of the Royal Society: Biological Sciences, Vol. 364, p.2985–2990.



Figure 2: Increase in the share of population aged 65 years or over between 2004 and 2014



(\*) Provisional estimate.

(\*) Break in time series in various years between 2004 and 2014.

Source: Eurostat

While the population is getting older, immigration flows are mitigating this phenomenon in western countries such as the UK. Nevertheless, this gives rise to reflections which led Europe to seriously consider the aging phenomenon from a legal and economic perspective. In October 2006, the Commission presented its position on the EU demographic challenges. The first European demography report<sup>5</sup> (produced under Vladimir Špidla's mandate<sup>6</sup>) identified five key areas for policy action, bringing the attention to older people condition. Among the others, the Commission listed: improving work opportunities for older people; increasing productivity and competitiveness by valuing the contributions of both older and younger employees.<sup>7</sup>

In the employment field, age discrimination has been tackled by the Directive 2000/78/EC on equal treatment in employment and occupation. For the first time at European level, this Directive explicitly prohibits age discrimination at the workplace. Nevertheless, age discrimination outside employment has not been legislatively covered yet. So far, one of the main difficulties encountered by Directive 2000/78/EC is the implementation, and thus the interpretation of Article 6.<sup>8</sup> Accordingly, this article permits to justify age discrimination under certain conditions. In particular, it allows both direct and indirect age discrimination when a national legitimate aim is provided and the means chosen to achieve that aim are proportionate and necessary. This justification

<sup>5</sup> European Commission, *Europe's demographic future: Facts and figures on challenges and opportunities*, (European Communities, 2007) p. 7

<sup>6</sup> Vladimir Špidla: European Commissioner for Employment, Social Affairs and Equal Opportunities from November 2004 to February 2010

<sup>7</sup> European Commission (n.5), p. 7

<sup>8</sup> Article 6: Justification of differences of treatment on grounds of age 1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

leads to a series of interpretive problems, especially on what a legitimate aim is and under which ‘appropriate and necessary’ circumstances age can be justified. To guarantee consistency, Member States have often referred to the Court of Justice of the European Union (CJEU) for preliminary rulings.<sup>9</sup> In this way, the CJEU revealed the how age justification received different interpretations on the basis of the context. The “general principle of non-discrimination” on the grounds of age, found in *Mangold*<sup>10</sup> has been further developed by other case law,<sup>11</sup> although there are still cases that show how age justifications are applied especially for state pension age.<sup>12</sup>

Finally, the growing attention given from the European community to the demographic aging problem demonstrates how age discrimination is a concern for the next future. Accordingly, the European Commission worked on a draft Directive for banning age discrimination in the provision of goods and services<sup>13</sup> extending the scope of the equal treatment policies. The draft Directive was supposed to supplement the existing legal framework, but it has not been adopted yet. Despite that, the Europe 2020<sup>14</sup> strategy is addressing alternative solutions for the demographic ageing. This strategy (proposed by the European Commission in 2010) aims to overcome the economic crisis<sup>15</sup> through a better promotion of growth, employment and sustainability of public finance. Therefore, Europe 2020 pursues the aim for which an economic upturn can only occur after a social progress. This is even more evident from

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<sup>9</sup> See for example: *Félix Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Case C-411/05; *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* (C-388/07) [2009] E.C.R. I-1569 (CJEU (3rd Chamber)); *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] 2 C.M.L.R. 31, C-341/08; *Vital Pérez v Ayuntamiento de Oviedo* [2015] I.R.L.R. 158, (C-416/13)

<sup>10</sup> Case C-144/04 *Mangold v Rüdiger Helm* (2005) ECR I-9981

<sup>11</sup> On this point see: *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

<sup>12</sup> Case C- 45/09, *Rosenblatt v. Oellerking Gebäudereinigungsges.mBH* [2010] ECR 1-000 p. 373-7

<sup>13</sup> Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC (2008) 2180} {SEC (2008) 2181}, COM/2008/0426 final - CNS 2008/0140. Available online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008PC0426>> accessed 02.06.2016

<sup>14</sup> Commission (EC), ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ (Communication) COM (2010) 2020 final, 3 March 2010. Available online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>> accessed 12.01.2014

<sup>15</sup> Višnja Samardžija and Hrvoje Butković, *From the Lisbon Strategy to EUROPE 2020* (Institute for International Relations (IMO),2010) 312 pp. Available online: <[http://www.dubrovnik.hr/HUPG/conference\\_dubrovnik2013/keydocuments/From%20the%20Lisbon%20Strategy%20to%20Europe%202020.pdf](http://www.dubrovnik.hr/HUPG/conference_dubrovnik2013/keydocuments/From%20the%20Lisbon%20Strategy%20to%20Europe%202020.pdf)> accessed 10.01.2014

the European Commission wording: “competitiveness and solidarity have both been taken into account in building a successful Europe for the future.”<sup>16</sup>

### Population Size and Age Dependency Ratio

Following the Demographic Transition Model, the European Commission underlines that the Member States can possibly face different demographic aging problems.<sup>17</sup> The more evident variable among countries is their population size. In this way, higher migration, fertility, and life expectancy assumptions can either contribute in determining different aging problems, but also a different set of opportunities. In this way, the population size leads to reconsider the role of the ‘age dependency ratio’ in studying age discrimination effects. Age dependency ratio is defined as the ratio of dependents (people younger than 15 and older than 64) to the working-age population (those aged 15-64). Nowadays in Europe, according to the age dependency ratio for every person aged 65 or over, there are four people of working age (15-64). It is predicted that by 2050 there will be only two people of working age for every person aged 65 and over. In this scenario, it is important to encourage an active role of older people in the economy and to the society.<sup>18</sup> The data below compare the European Union and the United Kingdom, showing the fluctuation of the portion of dependents per 100 working- age population.

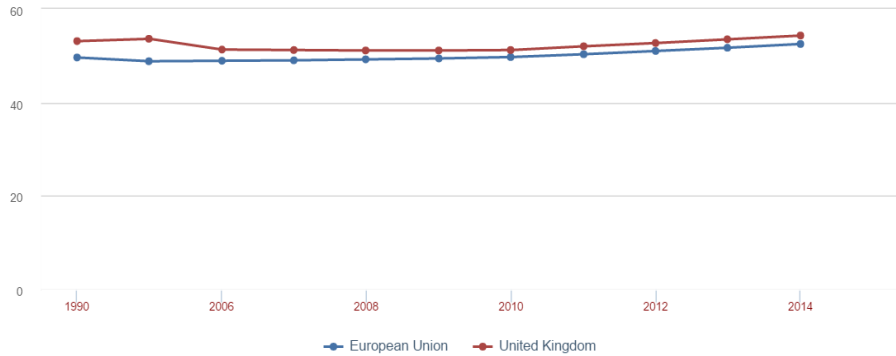
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<sup>16</sup> Commission (EC), ‘European Social Policy - A Way Forward For The Union’ (A White Paper) COM(94) 333 final, 27 July 1994. Text available online: <[http://europa.eu/documentation/official-docs/white-papers/pdf/social\\_policy\\_white\\_paper\\_com\\_94\\_333\\_a.pdf](http://europa.eu/documentation/official-docs/white-papers/pdf/social_policy_white_paper_com_94_333_a.pdf)> accessed 19.01.2014

<sup>17</sup> Commission Of The European Communities, *Demography Report 2008: Meeting Social Needs in an Ageing Society*, (Commission Staff Working Document, 2008) SEC(2008) 2911

<sup>18</sup> See Council Resolution of February 2007, DOC 6216/1/07.

Figure 2 Age dependency ratio (% of working-age population). The European Union – the UK



Source: World Development Indicators (periodicity annual)

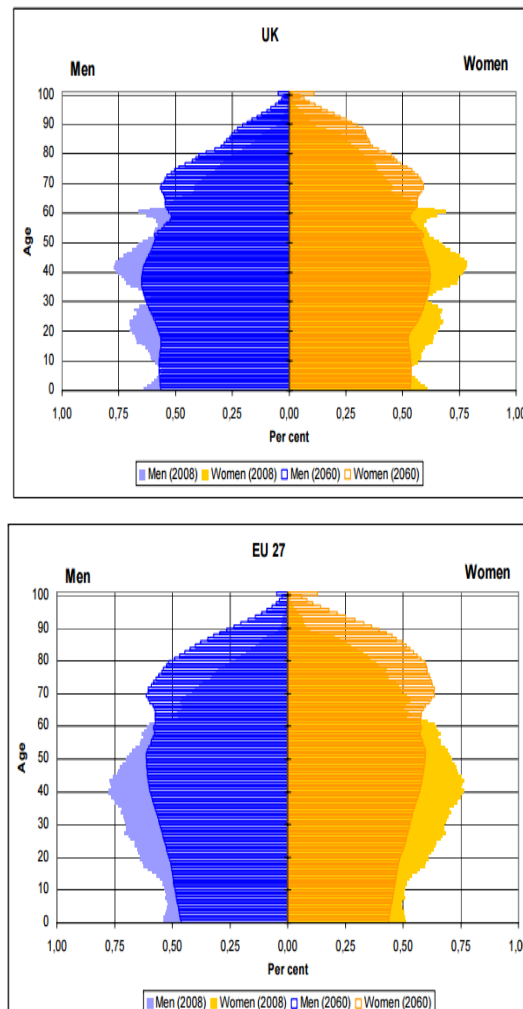
While age dependency ratio of the United Kingdom is slightly higher than in the European Union, its average age of population over 65 is lower (see figure 1). Therefore, the highest dependency ratio of the UK indicates that those economically active and the national economy, in general, face a greater burden to support the welfare. The working population is in this way stressed by the fact that older people are outside the labor market, being economically dependent. Finally, while a higher dependency ratio appears alarming, the fact that the number of people over 65 are expected to increase in the next decades requires reconsidering the current age policies. Therefore, the question is whether an active role of older people might rebalance this age dependency ratio in favor of a flourishing economy.

### The United Kingdom Case

In the United Kingdom, 10 million people are nowadays over 65. While one-in-six of the UK population is currently aged 65 and over, by 2050 it will be one-in-four. In Europe, it is predicted that by 2060 the population over 60 will heavily shift towards the older age. The figures below project this population structures both in EU and in the UK, underlining how the great diversity is represented by differences in political and social background. For example, while the United Kingdom has experienced a positive net migration many EU regions (Germany, the Czech Republic, Slovakia, Hungary, Slovenia and adjacent regions, as well as in the Baltic States and Sweden to the north and Greece in the south) assisted to a negative 'natural population change' (i.e.

more people have died than have been born).<sup>19</sup> Conversely to the rest of Europe, in the UK the generational gap has been temporarily mitigated by a positive rate of people moving into the country and by fewer people moving out.

Figure 3



Source: Eurostat, EUROPOP2008 convergence scenario

<sup>19</sup> European Commission (n.5), p.49

This statistic shows the fluctuation of the percentage of people's age over the years. In particular, in 2060 the working age population will reduce in favor to a higher number of people in their 70s. Nevertheless, the statistic demonstrates how, compared to the rest of Europe, the UK will rely on a higher number of working age population and a lower number of people in their 80's. However, both in the UK and in EU the amount of population at risk of being economically inactive and possibly socially isolated is predicted to increase. Therefore, the main ground of action has been firstly individuated in the work capability and discrimination against older workers. Accordingly, job requirements (age limits and ranges or experience requirements), job advertisements, terms of employment, pay and other benefits, opportunities for promotion, training, and transfer might be a ground for direct or indirect age discrimination. Nevertheless, as introduced before, Article 6 of the Directive 2000/78/EC permits to justify direct age discrimination at the workplace. Therefore, it should not be surprising that only 46 percent of people aged 55–64 are in work. This drops to 11 percent of 65–69-year-olds and 5 percent of those aged 70–74.<sup>20</sup> This data underline an alarming situation which worsened when we consider the weaknesses of the age dependency ratio measurements. In fact, it can be argued that despite age dependency ratio measures the demographic profile, it does not reveal how many people of working age are actually not working. This shed a light on a bigger problem: the unemployment rate. Having considered the unreliability of the 'lump of labor fallacy' theory,<sup>21</sup> the discrimination against older workers might have a negative implication on the unemployment rate, although Article 6 is often recalled properly for justifying unemployment purposes.<sup>22</sup> The inactivity of older workers might be determined by retirement, personal or family reasons and status of 'discouraged worker' (i.e. people who, while willing and able to engage in a job, are not seeking work or have ceased to seek work because they believe no suitable job is available). In this way, improving people's ability to handle periods of financial difficulty can keep them active. Therefore, having access to work as well as financial services is a prerequisite for active workers.

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<sup>20</sup> Guerzoni Benedetta, Zuleeg Fabian, "Working away at the cost of ageing: the labour market adjusted dependency ratio" [2011], EPC Issue Paper No.64, p. 15

<sup>21</sup> "The lump of labour fallacy contends that older workers should leave their jobs in favour of a younger workforce." Hejny Helga, "The lump of labour fallacy and youth unemployment: implications of an ageing population", in *Tackling youth unemployment*, edited by Morley Gunderson and Francesca Fazio, (Cambridge Scholars publishing 2014)

<sup>22</sup> On this point see: Case C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) V Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373 (ECJ) where ECJ confirmed that mandatory retirement is not unlawful;

This is regulated in the UK by the Equality Act 2010 and recently improved by the technical guidance 2016.

### Equality Act 2010 and the Technical Guidance 2016

In the UK age, discrimination is regulated by the Equality Act 2010, which is part of the current national strategy directed to combat the demographic aging keeping older workers active. More precisely, the Equality Act 2010 is an Act of Parliament of the United Kingdom which implements the Directive 2000/78/EC. It protects people from discrimination, harassment, and victimization in a range of situations. Age is among these protected grounds. In fact, the Equality Act bans age discrimination against employees, job seekers, and trainees. However, accessing financial services is excluded. The Act defines a financial service as banking, credit, insurance, personal pension, investment or payment nature.<sup>23</sup> Thus, all actions or omissions by any financial service provider relating to age thresholds or age bands are justified, victimization or harassment are however an exception.<sup>24</sup>

At the time of the publication of the Act (2009), the Association of British Insurers (ABI) warned that imposing any restrictions on the use of age by insurers would only mean higher insurance costs and less choice “as insurers would have insufficient information to fully assess the risk, and less choice for consumers”.<sup>25</sup> In 2014, the Equality and Human Rights Commission<sup>26</sup> consulted on a draft of ‘Age Supplement to the Code of Practice on Services, Public Functions and Associations’.<sup>27</sup> The draft was submitted to the

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<sup>23</sup> The Equality Act 2010, Sch. 3, Part 5 para. 20A (3). Mortgages, annuities, current accounts, savings accounts,

cheque cashing services, loans, bank overdrafts, credit cards, charge cards, debt advice, debt management services, emoney services, equity release, fraud and credit scoring used by financial services companies, spread betting services and investment advice all fall within the exception. This is not an exhaustive list. Available online: < <http://www.legislation.gov.uk/ukpga/2010/15/schedule/3>> Accessed 10.06.2016

<sup>24</sup> The Equality Act 2010, Sch. 3, Part 5 para. 20A (1)

<sup>25</sup> Association of British Insurers (ABI), “Equality Bill must focus on genuine discrimination not on insurance says the ABI” (ABI, 2009). Available online: < <https://www.abi.org.uk/News/News-releases/2009/04/Equality-Bill-must-focus-on-genuine-discrimination-not-on-insurance-says-the-ABI>> accessed 13.06.2016

<sup>26</sup> The Equality and Human Rights Commission is Great Britain’s national equality body and has been awarded an ‘A’ status as a National Human Rights Institution (NHRI) by the United Nations. Official website: < <https://www.equalityhumanrights.com/en/about-us/who-we-are>> accessed 10.06.2016

<sup>27</sup> Codes of Practice and guidance: Statutory Code of Practice; The non-statutory guidance. Two separate forms that give individuals, businesses, employers and public authorities the

Government in June 2014 for approval and laid before Parliament to come into force as a Code of Practice. Nowadays, it has been published as this technical guidance to the Equality Act 2010 but it did not come into force yet. It represents a new clear orientation in the field of age discrimination in financial services. Nevertheless, the guidance shows more attention on controls in the assessment of risk<sup>28</sup> and on voluntary agreements in case of travel and motor insurance.<sup>29</sup>

### **The Financial Conduct Authority (FCA)**

The Financial Conduct Authority (FCA) is a non-governmental financial regulatory body in the United Kingdom introduced by the Financial Services Act 2012. It replaced the Financial Services Authority with the Financial Conduct Authority and the Prudential Regulation Authority and created the Financial Policy Committee of the Bank of England. Nowadays, the FCA regulates financial firms providing services to consumers and maintaining the integrity of the UK's financial markets.<sup>30</sup> Interestingly, the FCA entirely found by the financial services firms. Therefore, transparency is guaranteed only by the fact that every year the FCA needs to report on their progress to the Treasury and the Parliament.

The FCA supervises banks to ensure they treat customers fairly in providing financial services. These include banking and savings accounts, investment products, mortgages, insurance and some pension schemes. Additionally, the FCA is also in charge of researching on consumer behavior in retail markets, aiming to make the latter more competitive so that consumers can get a fair deal when buying financial services products. On contrary, it can be argued that in this scenario 'competitiveness' and 'equal treatment' can be hardly combined. In fact, the job of financial service providers is properly to target the different characteristics of consumer groups. Linda Woodall, Director of Life Insurance and Financial Advice and Sponsor of Ageing Population Project

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information they need to understand the Equality Act 2010, exercise their rights and meet their obligations. Statutory Code of Practice available online: <<https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>> accessed 10.06.2016

<sup>28</sup> The Equality Act 2010 Sch. 3, Part 5 para. 20A (2)

<sup>29</sup> Association of British Insurers (ABI), Is your home underinsured? A guide to buildings and contents insurance, Available online: <<https://www.abi.org.uk/~media/Files/Documents/Publications/Public/Migrated/Home/Is%20your%20home%20underinsured.pdf>>

<sup>30</sup> Vina Gonzalo, "U.K. Scraps FSA in Biggest Bank Regulation Overhaul since 1997" [2010] Businessweek (Bloomberg).



Financial Conduct Authority, sustains that “regulators and firms need to adapt to make sure that financial services still fit for purpose, and are able to meet the wide range of needs of today’s older consumers”.<sup>31</sup> On the other hand, financial providers defend the preconception that competitiveness and earning expectations are incompatible with the risks embedded in older customers. Accordingly, a UK Government consultation clarified that differences between customers on the ground of age can continue, although “they will need to show if challenged, that there is a good reason (“objective justification”) for that different treatment”.<sup>32</sup>

### Financial Services

Financial services are not the financial good itself but “the process of acquiring the financial good”.<sup>33</sup> Accordingly, this process can vary on the basis of the service conditions which are determined by financial providers, who are in turn allowed to differentiate their product on the basis of the assessment of the risk. In this context, it is not unusual that people experience discrimination because of their age. Therefore, using age bands in financial services might result in an inferior service, or having a product restricted, or not being treated in the same way of other age groups when receiving a service. Examples of age discrimination in financial services include car insurance, travel insurance, loans and mortgages. Insurance is a socially desirable financial service as “it aims to provide an affordable means of protecting against potentially large financial loss to the insured, their family (e.g. life insurance), another party (e.g. third party motor insurance) or society as a whole (e.g. medical expenses, reducing the burden on the state)”.<sup>34</sup> Nevertheless, obtaining financial services after a certain age might result more expensive as prices are calculated on the basis of

<sup>31</sup> Financial Conduct Authority, *Ageing population and financial services*, (Discussion Paper 16/1, 2016), p. 8

<sup>32</sup> Government Equalities Office, “Equality Act 2010: Banning age discrimination in services, public functions and associations Government response to the consultation on exceptions”, [2012], p. 2 available online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/84987/government-consultation-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/84987/government-consultation-response.pdf)> accessed 10.06.2016

<sup>33</sup> Asmundson (n.11) p. 46

<sup>34</sup> Groupe Consultatif Actuariel Européen Position, *Use of age & disability as rating factors in insurance. Why are they used and what would be the implications of restricting their use?* (Paper, 2011), p. 3 available online: <[http://actuary.eu/documents/GC\\_Age\\_Disability\\_Underwriting\\_Paper\\_051211.pdf](http://actuary.eu/documents/GC_Age_Disability_Underwriting_Paper_051211.pdf)> accessed 12.06.2016

the customer age.<sup>35</sup> For example, most companies will not give quotations to people aged 75 or over. Accordingly, in these fields, it is possible to assist at a “financial exclusion” because of age. While existing a broad range of definitions of exclusion, this study adopts the one for which

Financial exclusion refers to a process whereby people encounter difficulties accessing and/or using financial services and products in the mainstream market that are appropriate to their needs and enable them to lead a normal social life in the society to which they belong.<sup>36</sup>

In the UK, when booking a train ticket on-line, the only insurance available is for people under 75 years old. Most policies only go up to 75, although a couple will run until 85, particularly if bought with home insurance. Some of the major insurance companies such as the *Co-op*, *NFU*, *Yorkshire Building Society*, *Quotemehappy* and some *Zurich* policies ban the over 75s. Renewal is always possible as motor insurers do not apply maximum age limits for their existing customers. Nevertheless, an 85-year-old will pay three or four times what a 45-year-old might be charged. On the other hand, other age-friendly insurance companies like *Saga*, *Age UK*, and *RLAS* have no upper age limit and specialize in looking after older policyholders. Age-friendly companies are extremely important especially because the UK financial services regulation encourages to set “interest rates relative to the costs of providing financial services”.<sup>37</sup> This means that the cost is consequential to the risk, and the assessment risk is often based on the customers’ age. The Association of British Insurers (ABI) reinterprets this evaluation considering that using age as a risk factor could even benefit the older consumers. In this way, age bands might help to ensure that the customer pays a fair price for their risk, or they might act as a proxy for other risks such as health. Thus, this will incentivise older people to purchase an appropriate level of insurance.<sup>38</sup> In this context, a

<sup>35</sup> See for example Barclays’ policy: For customers up to and including age 74 an Annual Multi-Trip travel cover is available. Single Trip cover is available for customers up to and including age 79. For travellers aged 80 the bank needs to be contacted directly. Available online < <https://www.barclaystravelinsurance.co.uk> > accessed 12.06.2016

<sup>36</sup> European Commission, *Financial service provision and prevention of Financial Exclusion*, (Report, 2008) p. 9

<sup>37</sup> Cruickshank Don, 2000. *Competition in UK Banking: A Report to the Chancellor of the Exchequer*. HMSO, London.

<sup>38</sup> Association of British Insurers (ABI), *Age and Insurance: Helping older customers find the cover they need* (ABI, 2009). Available online: [https://www.abi.org.uk/~/\\_/media/Files/Documents/Publications/Public/Migrated/Age%20and%20Insurance/Age%20and%20Insurance%20Helping%20older%20customers%20find%20the%20cover%20they%20need.pdf](https://www.abi.org.uk/~/_/media/Files/Documents/Publications/Public/Migrated/Age%20and%20Insurance/Age%20and%20Insurance%20Helping%20older%20customers%20find%20the%20cover%20they%20need.pdf) accessed 14.06.2016; Oxera, *Agenda: Advancing economics in business. ‘Equality’ in insurance pricing: the effect of the gender ban* (Oxera, 2013) available online:

non-statutory agreement between the Government (represented by the Government Equalities Office and Her Majesty's Treasury), ABI and the British Insurance Brokers' Association (BIBA) aims to protect the interests of both consumers and insurers. Particularly, this wants to be pursued ensuring fair rights of access to information for consumers to improve transparency, insurance for consumers to improve access to the private motor or travel insurance where maximum age limits are used.<sup>39</sup>

For financial providers working as intermediator redistributing the risk is not an easy practice. Indeed, most of the financial providers agree that financial services perform best in low-interest rate environments. Accordingly, this sector generates revenue from mortgages and loans, which gain value as interest rates drop. Therefore, it is unrealistic to demand a fair redistribution of the risk as financial providers simply increment their income by charging their customers more. But the interest rate is not the only obstacle. NGOs, as *Help the Aged* (Now *Age UK*), denunciate how it is considered a form of discrimination also attempting to sell inappropriate and complicated products rather than products which would suit older people's needs.<sup>40</sup> For example, the most competitive insurance covers are those that are only available online and older people face more difficulties in accessing online sources. Overall, it can be sustained that the problem can be summarized in a conflict of interests: the financial providers are more attracted by low-risk customers as they pursue an economic stability. Consequently, because actuarial statistic determines that higher chronological age links to a higher risk then older people are less desirable customers. Less desirability means also more vulnerability.

### Vulnerable Workers vs. Vulnerable Customers

While financial services are crucial to the functioning of the economy, they are also part of the standard life as they permit access to a range of opportunities

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<http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Risk-based-pricing.pdf?ext=.pdf> accessed 14.06.2016

<sup>39</sup> HM Government, Association of British Insurers, BIBA, *Transparency and access in motor and travel insurance for older people. An agreement on age and insurance* (Agreement, 2012) available online: <

[https://www.abi.org.uk/~/\\_media/Files/Documents/Publications/Public/Migrated/Travel/Transparency%20and%20access%20in%20motor%20and%20travel%20insurance%20for%20older%20people.pdf](https://www.abi.org.uk/~/_media/Files/Documents/Publications/Public/Migrated/Travel/Transparency%20and%20access%20in%20motor%20and%20travel%20insurance%20for%20older%20people.pdf)>

<sup>40</sup> Help the Aged, 'The Help the Aged Response. Financial Inclusion Taskforce', [2005] Help the Aged, p.4 Available online: < [http://www.ageuk.org.uk/documents/en-gb/for-professionals/money-and-benefits/financial\\_inclusion\\_taskforce\\_2005\\_pro.pdf?dtrk=true](http://www.ageuk.org.uk/documents/en-gb/for-professionals/money-and-benefits/financial_inclusion_taskforce_2005_pro.pdf?dtrk=true)> accessed 10.06.2016

and freedoms. Nevertheless, the cost or the age limits of the financial product puts part of the population beyond their reach. While a fair market would underpin a reciprocal trust between providers and consumers, this relationship is often driven by an economic rationale. Essentially, financial providers are more likely to follow the market trends lowering the price for who represent a lower risk. Furthermore, the competitiveness among providers is encouraged by a patchy and weak legislative framework, which gives to statistical and actuarial evaluations the power to discriminate because of age. As discussed above, in employment field older workers are better protected by a legislation able to block arbitrary approaches because of age. Therefore, while older people are protected as considered vulnerable workers, older customers are hardly considered vulnerable. In the UK the financial firms and ABI seem to recall the mechanism for which “rule of the market rules the law”.<sup>41</sup> In this way, vulnerable customers can possibly experience an underestimation of their financial capability, which consequently means an underestimation of their skills, knowledge, attitudes, and motivations to make good decisions. This is counterproductive for the economy as financial capability combined with an inclusive financial system can lead to the best possible financial wellbeing.<sup>42</sup> The matter has been considered in a work on consumer vulnerability, where, however, the Financial Conduct Authority (FCA) generalized the problem: “every consumer runs the risk of becoming vulnerable due to their personal circumstances, no matter what their age”.<sup>43</sup> In this way, the FCA refers to vulnerability more as a personal issue rather than a proper social exclusion, despite they seem to be two sides of the same coin.

The problem of vulnerable customers can be further read through the founded theory of the market segmentation. The business dictionary describes the market segmentation as “the process of defining and subdividing a large homogenous market into clearly identifiable segments having similar needs, wants, or demand characteristics”.<sup>44</sup> Under these circumstances, different age bands appear to be the consequence of a segmented market. While it is true that customers are grouped by their age, it is likewise true that financial

<sup>41</sup> Pritchard, Bill, “How the Rule of the Market Rules the Law: the political Economy of WTO Dispute Settlement as Evidenced in the US-Lamb Meat Decision,”[2005] Review of international Political Economy,12(5): 776-803

<sup>42</sup> Money Advice Service ‘Financial Capability Strategy for the UK’ (2015) p11 <<https://www.moneyadvice.org.uk/en/corporate/the-financial-capability-of-the-uk>> accessed 01.06.2016

<sup>43</sup> Financial Conduct Authority , *A vulnerable consumer is someone who, due to their personal circumstances, is susceptible to detriment, particularly when a firm is not acting with appropriate levels of care* (Consumer Vulnerability Occasional Paper, 2015)

<sup>44</sup> Market segmentation, definition from [theBusinessdictionary.com](http://theBusinessdictionary.com) <[www.businessdictionary.com](http://www.businessdictionary.com)> accessed 01.06.2016

providers rely on such stereotyped distinctions. Interestingly, the market segmentation theory seems to contradict the concept of vulnerability as a personal issue. Of course, insurance companies price their contracts on the basis of actuarial judgments, as these latter ones define the probability of the risks.<sup>45</sup> However, it cannot be denied that identifiable age segments are used in order to group those people who share a protected characteristic.

In January 2016, the Association of British Insurers (ABI) and the British Insurance Brokers' Association (BIBA) launched a joint code of good practice for vulnerable customers.<sup>46</sup> Their aim is to help insurers and insurance brokers recognizing and helping potentially vulnerable customers, who may need extra support when renewing motor and home insurance policies. The Code is part of the industry's ongoing work to improve consumer outcomes and to help all customers make the most of the competitive motor and home insurance markets at renewal. Furthermore, it supports the ABI's call for the FCA to regulate on improving clarity and transparency at renewal for home and motor insurance customers across all distribution channels. Unfortunately, the adhesion to this code is voluntary.

### **Can Age Be Relevant and Reliable Information? Assessment of Risk And Age Justification**

Generally, because financial service providers use age as a "risk factor", most of the financial products are designated for young adults and middle aged people. Concretely, it means that prices for motor and travel insurance differ depending on the age of the customer. In this way, older people, but also people under 25 pay more for the same financial services.<sup>47</sup> Practically, from the perspective of financial providers, the risk factor determines the frequency and the costs of the claims, and the likely risk of default in relation to a bank loan or mortgage.

Conceptually, risk relates to the probability of future events. As people get older there is an increased risk of adverse health conditions, which could affect a person's ability to work and therefore to repay a loan. In addition, actuarial

<sup>45</sup> Wright Mike, Watkins Trevor, *Marketing Financial Services* (Routledge, 2010), p.147

<sup>46</sup> ABI and BIBA, *Code of Good Practice regarding support for potentially vulnerable motor and household customers at renewal* (2016) Available online: <[https://www.abi.org.uk/~/\\_media/Files/Documents/Publications/Public/2016/Vulnerable%20customers/ABI%20BIBA%20Code%20Good%20Practice%20support%20potentially%20vulnerable%20motor%20household%20customers%20renewal.pdf](https://www.abi.org.uk/~/_media/Files/Documents/Publications/Public/2016/Vulnerable%20customers/ABI%20BIBA%20Code%20Good%20Practice%20support%20potentially%20vulnerable%20motor%20household%20customers%20renewal.pdf)> accessed 01.06.2016

<sup>47</sup> Government Equalities Office, *The use of age-based practices in financial services* (Paper,2009) Oxera, p. i

statistics report that an increase of medical treatment being needed is also foreseeable, which increase the cost of travel insurance.<sup>48</sup> Therefore, targeting specific age groups is justified by the fact that age is considered an information about the customers: it is a filter to determine how risk is assessed. Statistical techniques translate information about the insured person and the insured event into an estimate of the likelihood (and size) of a claim. As a result, prices reflect the expected claims cost. From an economic point of view, such cost-reflective pricing is what is researched by financial providers.<sup>49</sup> Nevertheless, a further element must be considered.

Overall, age prejudice is directed to negatively predict the older age group performances. This is can be easily verified in employment field where performance and productivity are linked to age. However, to explain the age prejudice genesis in financial services, two social theories are recalled: the functional perspective and the terror management. In particular, the functional perspective sustains that the negative attitudes toward older adults are “an ego-protective function for the stereotyping individual”.<sup>50</sup> The fact that older customers are labeled as ‘risky’ is most commonly interpreted by statistical evidence. Pricing must be based on demonstrable evidence rather than unsubstantiated assumptions or prejudice and statistical studies apparently, satisfy this reliability requirement. Nevertheless, assessing the risk is still in the power of financial providers and cannot be fully delegated to statistics. Nevertheless, the financial service field is driven by a high degree of competitiveness and to be competitive the providers need to drop the price, which occurs only if the risk has been lowered. Therefore, the assessment of risk is weakened by the market expectations. Hence, to guarantee their income, financial providers still rely on age prejudice simply deciding to not cover people over 75 in order to avoid any risk. Finally, this aspect reopens the discussion on the limits for justifying age discrimination.

The European Court of Justice (CJEU) in *the Age Concern case* demonstrates how prohibiting age discrimination is to be applied with a certain rigor in order to protect against the vulnerability. In this case, Age Concern challenged the Employment Equality (Age) Regulations 2006 (now Equality Act 2010) because it allowed the dismissal of an employee aged 65 years or over for reasons of retirement on the basis of the justification allowed by article 6 of

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<sup>48</sup> Government Equalities Office, *Equality Act 2010 and age discrimination: What do I need to know? A quick start guide for financial services*, (Paper, 2012)

<sup>49</sup> Rees Ray, Wambach Achim, “The Microeconomics of Insurance”, [2008] *Foundations and Trends in Microeconomics*, v. 4, pp. 1–163

<sup>50</sup> Nelson Todd, “Ageism: Prejudice Against Our Feared Future Self”, [2005] *Journal of Social Issues*, Vol. 61, No. 2, p.213

Directive 2000/78/EC. Consequently, the CJEU interpreted article 6 in a strict way, restricting the room for age justification. At this point the CJEU added: Mere generalizations [...] are not enough to show that the aim of that measure is capable of justifying derogation from that principle (non-discrimination principle) and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.<sup>51</sup>

Finally, article 6 opens to an interpretation of justified age discrimination which must have the prerogative of letting the rights ascertainable. The Member States are asked to determine what ‘appropriate and necessary’ means, although this determination can assume different connotations on the basis of Member States structural differences. It is, however, important that justifications fall within a social policy area and not within mere economic rationales. So far, the interpretation given in employment field is running in the opposite direction of the practice in financial services.

## Conclusion

Demographic trends and labor market aspects need to be both considered when assessing the impact of population aging on the national economy. Nowadays, falling rates of increase and a potential population decline are threatening the UK economy. In particular, the aging of the baby boomers together with a slower population growth are determining a shift in the population age structure. Ensuring access to financial services is emphasized by national policies. In fact, an economic upturn is possible only if consequential to social progress. The Directive 2000/78/EC and the Europe 2020 strategy equally demonstrates that the European Union is moving in this direction. So far, age discrimination in financial services has not encountered a strong legislative resistance, not at national or European level. In the UK, this legislative gap is left to a *quasi*-legal instrument such as the ‘Technical Guidance’ and the non-Statutory agreement on financial services. Nevertheless, the UK population size and the age dependency ratio demonstrate how the problem needs to be seriously considered. Conversely, the financial providers raise the concern that possible restrictions on the use of age by insurers would determine higher insurance costs and less choice. This is explained by the fact that insurers would have insufficient information for fully assess the risk determining less choice for consumers. Nevertheless, more control on the assessment of risk is recently required by the Technical

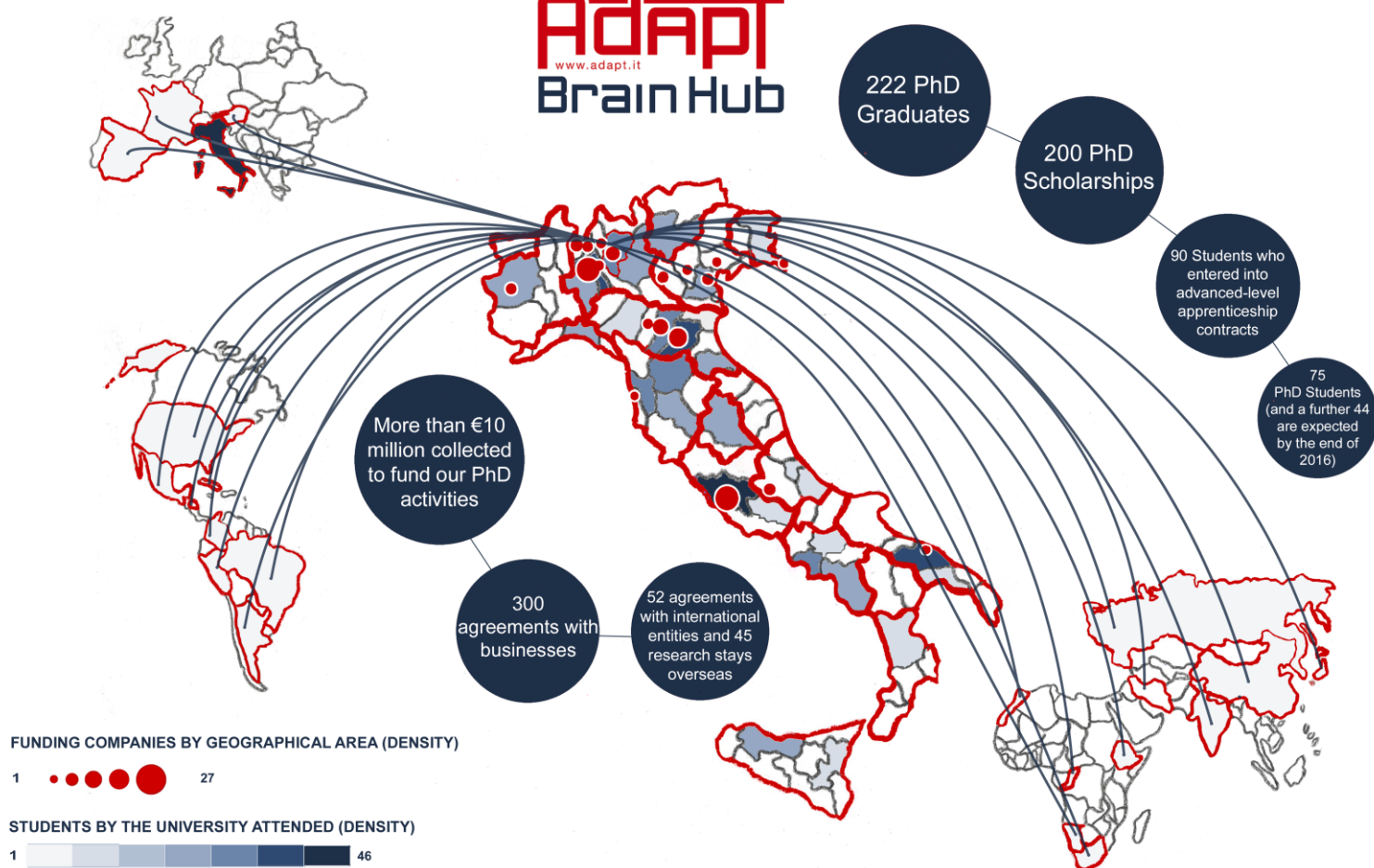
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<sup>51</sup> Ibid-Paragraph 51

Guidance 2016. Consequently, a key factor in adjusting economies to the challenges of an aging population is to find mechanisms for managing longevity risk. Evidence suggests that individuals systematically underestimate their life expectancy. Therefore, statistical or actuarial evidence not always reflects the shades of the getting old process.

While age justification in employment field is based on a social policy rationale, accessing financial services is left to a matter of assessment of risk. In this way, the Financial Conduct Authority (FCA) underlines the need for objective justification also in financial services. Furthermore, focusing on single individuals rather than on the age group contradicts the founded theory of the market segmentation. Therefore, the thesis of FCA on vulnerability cannot be accepted. In conclusion, it has been demonstrated how financial service providers are adopting a 'product and supply' strategy instead of a 'customer driven and solution oriented' view. It means that their aim is not to improve the financial capability of their customers, but rather to enhance their competitiveness on the market. Therefore, the success of this competitive strategy can be doubted in the light of the demographic aging which instead requires a stronger legislation on age discrimination in financial services.





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# The Future of Work: A Matter of Sustainability

UNIVERSITÀ DEGLI STUDI DI BERGAMO

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**The Future of Work**  
**A matter of sustainability**

Università degli Studi di Bergamo  
11 - 12 November 2016  
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**Technological progress and changes in demography and climate are only some of the aspects affecting the world of work.** Currently, trades, professions, skills, contractual arrangements, places and times of work are undergoing changes at unprecedented speed and through new interactions. Against this ever-changing backdrop, international institutions wonder about the future of work. Examples of this include the political debate launched at the last annual meeting of the World Economic Forum, the ones promoted by the International Labour Organisation or the Organisation for Economic Co-operation and Development. While, at first, the focus has been on the need to protect employment levels, now increasing attention is given to the quality of work. This is because there seems to be a growing awareness that the challenges and the opportunities accompanying the future of work – and the promotion of «smart, sustainable and inclusive growth» (Europe 2020) – depend not only on the economic conditions related to the working activity, but also on the ways work itself is organized.

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Participation in the conference is free. Further information at [info@adapt.it](mailto:info@adapt.it).

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