Modernising Labour Law to meet the Challenges of the 21st Century

TUC Submission to the European Commission
Introduction

The Trades Union Congress (TUC) has 63 affiliated unions, representing nearly 6.5 million people working a wide variety of industries and occupations in the UK. In November the EU Commission published its green paper: *Modernising labour law to meet the challenges of the 21st Century*. The green paper seeks to initiate an important debate on how labour law should evolve in the EU to respond to the challenges of increased globalisation and to support the Lisbon Strategy’s objective of achieving sustainable growth in good quality employment. The TUC welcomes the opportunity to participate in this debate.

Summary

The TUC’s key views on the green paper can be summarised as follows:

- The TUC welcomes the recognition in the green paper of the need for increased protection for the growing proportion of workers across the EU in precarious forms of employment. This employment is characterised by low pay; financial and job insecurity; exclusion from basic employment rights including unfair dismissal and redundancy rights and family friendly rights; and limited access to training or in-work benefits including sick pay, and pensions. Increasing the security of those employed in non-standard employment and providing access to training, would contribute to the Commission’s objectives of reducing labour market segmentation, increasing flexibility for employers and workers; making atypical employment a more attractive employment option and increasing productivity.

- Vulnerability in the labour market is not limited to those employed on ‘non-standard’ contracts. The costs and risks associated with increased globalisation have also been experienced by those employed on permanent contracts. The effects of restructuring, contracting-out and plant closures have led to pressure for increased flexibility, including on working time patterns and job losses. The TUC believes that consideration should also be given to improving employment and welfare protection for those affected by restructuring or redundancies.

- The TUC is concerned that the green paper focuses on individual employment rights and gives very limited consideration to the contribution of collective labour laws, including collective bargaining to labour market productivity and flexibility.

- The TUC strongly disagrees with the general arguments advanced in the green paper that improved employment levels and labour market dynamism and innovation is dependent upon the increased use of atypical forms of employment and a weakening of employment protection, in particular dismissal protections.

- Experience from the UK labour market and from other member states demonstrate that these arguments are based on assertion, as opposed to evidence.
  - Between 1997 and 2005, employment growth in the UK took place against the backdrop of a partial re-regulation of the labour market, including strengthened dismissal protection.
  - The vast majority of new jobs created in the UK during this period were in permanent employment. Atypical forms of employment still only represent 6% of the UK labour market.
• Independent research also demonstrates that there is no negative correlation between employment protection legislation (EPL) and unemployment, employment levels or innovation and productivity.

• There is no evidence that increased staff turnover, arising from reduced unfair dismissal protections, would contribute to increased innovation. Indeed, increased turnover is more likely to lead to productivity losses due to the negative impact on staff loyalty and commitment, the reduced return to training investment and the loss of the tacit knowledge of employees with longer tenure.

• The TUC does not believe that the Anglo-Saxon model provides a paradigm for labour market success. Although it has a good employment record, the UK labour market is also characterised by earnings inequality, and a high level of in-work poverty. In contrast, Nordic countries have similar employment records to the UK. However as a result of higher levels of collective bargaining coverage, employment protection and welfare benefits they experience lower earnings inequality and there is a relatively low level of in-work poverty. In addition, these economies have achieved better social outcomes with higher life expectancy, better general health and a lower level of in-work poverty.

• In terms of the future of EU labour law, the TUC believes that the EU should focus on developing a labour market policy based on three key objectives:
  – An **efficient labour market**, with a higher proportion of working-age people in employment, and quick and effective matching of people without jobs to jobs without people. Over time we want more and more jobs to be good jobs, offering fair pay, sustainability and security, satisfying jobs that are compatible with family life and involvement in the community.
  – A **fair labour market.** We want safe and healthy workplaces; secure employment and an end to discrimination and inequality in pay and prospects.
  – A **participating workforce**, where unions play a key part through collective bargaining to give employees a distinct voice at work and in dialogue with social partners.

• The European Union is already committed, under Treaty obligations, to promote the employment, improved living and working conditions, dialogue between management and labour, high employment and the combating of social exclusion. Priorities for the Commission should include:
  – The introduction of equal treatment rights for agency workers, similar to those provided for fixed term and part-time workers.
  – Measures to ensure that all workers, including freelances, qualify for EU employment protection regardless of their employment status. The legal distinction drawn in the UK between ‘employees’ who qualify for all employment protections, and ‘workers’ who are entitled to very limited rights, has contributed to increased labour market segmentation, which is compounded by the problem of some freelances not even qualifying as workers.
  – Improved measures to protect migrant workers from exploitation and discrimination.
  – Measures to provide improved work-life balance, in particular for workers with caring responsibilities.
– The protection and promotion of fundamental rights, in particular rights to freedom of association and for trade unions to organise, bargain collectively and to take industrial action.

• The Commission should also take further steps to ensure that EU employment legislation is effectively implemented and enforced in EU member States, including the Working Time Directive, the Posting of Workers Directive and the Collective Redundancies Directive.

• Beyond core EU labour standards, the TUC believes that decisions over the reform of labour law and the level of social protection provided should remain primarily a matter for determination for Member States and should not be subject to challenge under free movement principles.

Responses to Questions

1. What would you consider to be the priorities for a meaningful labour law reform agenda?

a) Purposes of Labour law

The TUC believes that the objectives of labour law remain the same today as they have always done. These are:

• To redress the unequal power imbalance, which exists between employers and workers

• To provide protection for workers against arbitrary treatment by employers.

• To outlaw discrimination.

• To protect and promote fundamental rights and freedoms including the freedom of association and the right for trade unions to organise, to bargain collectively and to organise collective action.

In addition, regulation of the labour market, including employment legislation and collective bargaining, can also support active labour market policies, for example, by removing barriers which prevent disadvantaged groups of workers from participating fully within the labour market. It is widely recognised that enhanced maternity leave entitlements, combined with equal treatment rights for part-time workers have played an important role in increasing female labour market participation in the UK. Individual regulations often create business advantages, as well as costs. The minimum wage, for instance, has led to an increase in productivity by incentivising spending on improvements in recruitment/retention, training and IT. Labour market regulation, including collective bargaining, can also assist on building high trust, high productivity workplaces.
b) The role for EU Labour Law

The TUC believes that there is a need to promote and extend the social dimension of the European Union. Under Treaty obligations, the European Union is already committed to promoting the employment, improved living and working conditions, dialogue between management and labour, high employment and the combating of social exclusion. The Commission therefore has a duty to promote and maintain the social dimension of the European Union through the development of core European labour standards. Areas of competences and obligations include:

- working towards the upward harmonisation of living and working conditions of non-standard workers;
- providing for fair and just working conditions to all EU workers;
- adopting minimum rules and regulation to safeguard the health and safety of workers including in the area of working time, and ensure that there is no unfair competition in the EU at the expense of the health and safety of workers;
- guaranteeing equal pay and treatment between men and women, and ensure non-discrimination in employment and other areas on grounds of race and ethnic origin, religion, age, handicap and sexual orientation;
- ensuring proper implementation and enforcement of existing EU rules and regulations;
- guaranteeing free movement of workers, services, goods and capital, in a framework of equal treatment and fair competition;
- developing employment and other policies to promote more and better jobs;
- promoting social dialogue.

c) Priorities

The TUC would identify a number of priorities for the Commission in the area of labour law. The TUC does not support the view that future reform should be limited to individual employment rights. The Commission and Member States have an important role to play in protecting and promoting of fundamental rights of workers in the including rights to freedom of association and for trade unions to organise, bargain collectively and to take industrial action, as safeguarded in the European Social Charter, the Charter of Fundamental Rights, ILO Convention 87 and the European Convention on Human Rights.

The case for the introduction of equal treatment rights for agency workers, similar to those provided for fixed term and part-time workers is also well established. The TUC would welcome urgent progress on negotiations on the Temporary Agency Worker Directive. As outlined in our response to questions 7 to 9, the issue of employment status and the application of EU employment standards also needs to be addressed. Provisions should be introduced to ensure that all economically dependent workers qualify for EU and domestic employment rights, regardless of their employment status. The TUC believes that the extension of basic employment protection to vulnerable groups of workers including agency workers, ‘casual’ workers and freelancers would
contribute to the Commission’s strategy for promoting fairness, flexibility and productivity in the workplace and to its wider social cohesion agenda.

In addition the TUC would support:

- Measures to protect migrant workers from exploitation and discrimination. The TUC supports the ETUC framework of action on migrant workers.
- Measures to provide improved work-life balance, in particular for workers with caring responsibilities.
- A review of and improvements to existing regulations designed to provide workers with protection during restructuring and outsourcing, including the directives on collective redundancies, acquired rights and insolvencies.

The Commission should also take further steps to ensure that EU employment legislation is effectively implemented and enforced in EU member States, including the Working Time Directive, the Posting of Workers Directive and the Collective Redundancies Directive.

In the light of pending litigation before the ECJ in the Viking / Laval line of cases, the TUC believes that action by the Commission is necessary to protect the right of Member States to implement social protection measures which exceed the European minimum standards and in particular which protect fundamental rights, such as freedom of association and the right to take collective action. The TUC does not believe that social policy and labour law or industrial relations systems adopted in Member States should be subject to or ‘trumped’ by free movement principles.

The TUC would be firmly opposed to any initiatives designed to encourage the weakening of job protection measures or other aspects of EU or domestic labour law.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?

The TUC believes that improved labour law and the extension of collective bargaining coverage can play a central role in reducing labour market segmentation, extending employment security and creating more adaptable and responsive organisations. Any weakening of employment protection measures or restrictions on collective bargaining would lead to increased labour market segmentation.

a) Improved protection for vulnerable workers in the EU

The TUC shares the concerns expressed in the green paper over the emergence of a two-tier labour market due in part to increased contracting out and diversity of employment relationships. As a result, a growing proportion of EU workers find themselves in insecure and vulnerable forms of employment.

While a majority of the UK workforce are employed in permanent jobs a significant proportion, including many migrant workers, face exploitation, financial and job insecurity, limited access to training and discrimination due to their precarious employment.
Agency workers in the UK face discrimination on pay and other basic employment conditions. In 2002 the UK Government (DTI) estimated that agency workers in the UK earn approximately 68% of the earnings of permanent employees. The OECD also recognises that temporary employment is associated with a wage penalty.

Research carried out by the TUC in 2005 revealed that far from receiving equal pay as compared with directly employed staff, there are many instances of agency workers not even receiving the minimum wage. Case studies gathered by the TUC revealed that some agencies:

- Make deductions for ‘unforced’ payments for benefits such as meals, (which in reality the agency worker has no choice but to accept as part of the package) and then counting those deductions towards the minimum wage.
- Count deductions for items such as uniforms, equipment and transport towards national minimum wage pay, contrary to the legislation. In one case, workers had £500 deducted from their wages, allegedly in payment for their return fare to Spain. The TUC was also told about workers being charged for health and safety equipment in direct contravention of the law.

The TUC has also received reports of migrant agency workers being forced to live in over-crowded, sub-standard accommodation and then being charged exorbitant rates for the accommodation. Migrant workers are particularly vulnerable to abuse from unscrupulous operators in the sector, due to language difficulties and a lack of awareness of their rights.

The TUC believes that the adoption of the EU Temporary Agency Worker Directive would guarantee agency workers equal treatment on pay and other basic employment conditions. It would also contribute to the Commission’s strategy for promoting fairness, flexibility and productivity in the workplace and to its wider social cohesion agenda. The introduction of equal treatment rights would not restrict employers’ freedom to use flexible forms of employment. It would however prohibit discrimination against agency workers, making agency work a more attractive option for a wider category of workers, thereby extending the pool and increasing the quality of workers from which employers can choose.

Many UK workers, including agency workers, casuals, freelancers and others employed on non-standard contracts, are also vulnerable due to their precarious employment status and their exclusion from many employment rights. The inconsistent application of employment rights has contributed to the creation of a two tier workforce and increased labour market segmentation in the UK.

By employing individuals on non-standard contracts, employers are free to hire and fire at will. Although non-standard employment is often transient in nature, atypical workers are increasingly employed on a longer-term basis. Statistics from the Labour Force

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1 The DTI Regulatory Impact Assessment, of the effects of the proposed EU Temporary Agency Worker Directive
2 2002 Employment Outlook Report
3 TUC Below the Minimum: Agency workers and the minimum wage, 2005
Survey indicated that 25 per cent of agency workers remain on the same assignment for more than 12 months. However, unlike directly employed permanent staff or those on fixed term contractors, agency workers have no rights to unfair dismissal protection or redundancy pay if laid off.

‘Workers’ are also excluded from maternity, paternity and parental leave, reducing to their ability to choose flexible working patterns which accommodate their caring needs. Some freelancers have faced difficulties in enforcing their working time rights. ‘Workers’ are also excluded from trade union rights, including the right to protection for taking part in official industrial action, limiting their ability to take collective action to protect their interests.

Measures designed to clarify employment status and to extend employment rights to all workers would not restrict the abilities of employers to use more flexible contracts. However, it would ensure that those employed on flexible contracts are treated fairly, making non-standard forms of employment more attractive.

b) Collective bargaining: offering win-win solutions

The TUC also believes that collective bargaining and effective worker representation can play a central role in reducing inequality and enabling organisations to adapt to increased competitive pressures.

Trust is an essential element for facilitating successful change in workplaces. Involving employees in decision-making and giving them a real influence over decisions leads to higher morale and to staff being more likely to support workplace change. An independent voice can reassure workers that their interests have been fairly taken into account. There is no evidence that union recognition impairs any employer’s flexibility. Research conducted by the TUC reveals that unionised workplaces are more likely to use temporary workers and more often outsource functions.

Joint working between unions and employers can also bring benefits in terms of increased working time flexibility. Unions have for several years been negotiating for flexible working time to enable workers to integrate the whole of their lives. This has resulted in working patterns which marry the operational needs of the organisation and those of working parents. For example, the Time of Our Lives project at Bristol City Council, backed by the TUC and council trade unions, succeeded in developing innovative working patterns that helped improve Council services at the same time as employees were able to enhance their work-life balance. The Time of Our Lives succeeded because everyone involved was committed to a mutual gains solution, joint working and a partnership approach.4

c) Effects on equality and social cohesion

Some commentators point to the Anglo-Saxon model - based on low welfare benefits, light levels of employment protection legislation, and a low level of collective bargaining coverage - as providing a paradigm as offering a paradigm for labour market success. However, it is important to note that the UK labour market is characterised not

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only by a comparatively strong employment record but also by earnings inequality, a high level of in-work poverty and discrimination. For example:

- According to the 2006 Monitoring Poverty and Social Exclusion Report commissioned by the Joseph Rowntree Foundation and prepared by the New Policy Institute, the number of adults aged 25 to retirement in poverty but in working households in the UK has risen from 1.3 million to 1.9 million on the last decade.

- Many low paid workers in the UK are not classified as living in poverty, as a result of long working hours, living in households with those earning more or the effect of tax credits. According to the Monitoring Report, in 2005 14% of men aged 22 plus and 29% of women in the same age range earned less than £6.50 an hour. Part-time work in the UK brings a high (50 per cent) risk of low pay. The proportion of both male and female workers on low pay has however slowly declined since 2000, as a result of the introduction of the National Minimum Wage.

- In the UK, women face major barriers to rewarding employment.
  - In 2005, full time hourly earnings for men were 17% higher than for women and much higher in some sectors, e.g. 42% higher in banking and insurance services.\(^5\)
  - According to the OECD\(^6\) on gender pay gap the UK ranked 12th out of 19 countries studied.
  - Key explanations in the UK include job segregation, but also the long hours culture where part-time work is ghettoised into lower-paid, short hours jobs. In 2005, women working part-time earned only 62% of the average hourly earnings of men working full-time.
  - Many thousands of women earn less than the Lower Earnings Limit and therefore lose out on social protection benefits.
  - The prevalence of part time and other forms of non-standard employment for women in the UK has a major impact of pension entitlement. In retirement, women receive 47% lower weekly income than men.

- People from black and minority ethnic communities also suffer discrimination in the workplace.
  - Unemployment is now higher for black workers than it was ten years ago. People from black and minority ethnic communities are nearly twice as likely to be unemployed as those from white communities.
  - In 2005, 69 per cent of Pakistani and Bangladeshi community were classified as poor compared with 22 per cent of the country as a whole and individuals from these communities are three times more likely to be unemployed than the population as a whole.\(^7\)

In contrast, Nordic countries, which are characterised by collective bargaining and social dialogue, more generous welfare benefits and more restrictive employment


\(^6\) Employment Outlook, OECD, July 2002, chapter 2, “Women at work: who are they and how are they faring?”

\(^7\) Poverty, Exclusion and British People of Pakistani and Bangladeshi Origin, TUC
protection, have achieved similar employment records to those witnessed the UK. This clearly demonstrates that there is no one route to full employment. However in these Nordic countries earning inequality is lower and there is a relatively low level of in-work poverty. In addition these economies have achieved better social outcomes with higher life expectancy, better general health and a lower level of in-work poverty.

Independent research also confirms that collective bargaining, and in particular centralised bargaining at a sectoral or national basis, reduces income inequality. In its 2004 Jobs Study\(^8\) the OECD looked at two measures of earnings inequality: the ratio of top to bottom earnings and the relative rewards of women in Members States. It found: “consistent evidence that overall earnings dispersion is lower where union membership is higher and collective bargaining more encompassing and centralised.”

A World Bank review\(^9\) reached similar conclusions: “Countries with highly coordinated collective bargaining tend to be associated with lower and less persistent unemployment, less earnings inequality . . . and fewer and shorter strikes compared to countries with part-coordinated bargaining (for example, at industry level) or uncoordinated (for example, firm-level bargaining or individual contracting.”

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\(^8\) Employment Outlook 2004, Chapter 3, OECD, 2004

3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?

It is now widely recognised that levels of employment protection legislation (EPL) do not have a negative correlation with levels of employment or unemployment. In 2002 Richard Freeman looked at countries’ economic performance and their labour market institutions, product market regulation and regulations on business formation and found “no discernable link”.

This point was recognised in the OECD Jobs Study in 2004 and is confirmed by experience from the UK labour market and other member states. Since 1997, the UK Government has introduced a number of new employment regulations, including signing the Social Chapter; giving workers a right to four weeks’ paid holiday, introducing paternity leave and extending paid maternity leave, the creation of statutory recognition rights that have led to over 1,000 new recognition deals, and the introduction of the national minimum wage and its extension to young workers. Most significantly in the context of debates on the green paper, the Government also made to individual job protection, including the reduction in the qualifying period for unfair dismissal protection from 2 years to 12 months and increased compensation awards.

Critics argued that each and all of these measures would result in increased unemployment and reduced employment opportunities. In practice, the exact opposite occurred. Since 1997 unemployment has fallen from 8% to 5%. Over the period 2001-04, the UK’s average employment was 5.1%. The economy generated 1.5 million new jobs. In addition, Nordic countries have as good an employment record as that experienced in the UK. However these economies are characterised by high collective bargaining coverage and stricter employment protection legislation.

Further the TUC does not agree with the argument reflected in the green paper that labour market regulation, including collective bargaining coverage, has a negative effect on productivity. Although the European Commission has ranked the UK’s labour market performance “among the best in the EU”, it has also recognised that UK productivity is “historically weak compared to the EU average . . . due in part to insufficient levels of basic skills and a lack of access to training among certain categories of worker”.

Labour market regulation seems not to be the cause of the UK’s relatively poor productivity record. In the following chart the unbroken horizontal line divides the seven countries with the highest level of regulation from the seven with the lowest, based on an OECD index measuring the rules covering regular and temporary employment and collective dismissal.

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10 OECD, Employment Outlook 2004

The vertical line divides the higher from the lower productivity countries. The measure is GDP per hour worked; in 2002 the UK’s productivity was 88.3% of the EU15 average.

EU member states are scattered equally across all four quarters of the chart. The UK is outstanding for low regulation and low productivity. Only Portugal, Spain and Greece record lower levels of hourly productivity. Any correlation between productivity levels and employment protection legislation is clearly not established.

The TUC also does not accept the argument that job protection legislation impacts on innovation because it slows down labour market churn. This argument assumes that the adoption of new technologies and innovation is dependent on labour turnover. However, as a recent Work Foundation report¹² argued employment protection legislation is more likely to have ‘a positive effect because offering employees a higher degree of security elicits a higher level of discretionary effort. Longer job tenures may enhance human capital too – employers are more likely to invest in the training and development of workers who stay with the organisation for a prolonged period. Equally, there are valuable opportunities for employees to develop tacit knowledge leading to productivity gains that can be captured by the employer.’

There is widespread recognition of the important role which collective bargaining and effective worker participation can also play in building high trust, high skilled workplaces which are equipped to respond to the rapidly shifting challenges generated

¹² ‘Who’s afraid of Labour Market Flexibility?’ Work Foundation (2006)
by increased globalisation. The presence of unions in workplaces make an important contribution to innovation and to promoting ‘functional’ flexibility, through increased investment in training enables employees to adjust their skills to match the demands of changes in technology and workload. Analysis of data from the Chartered Institute of Personnel and Development’s 2001 Training and Development Survey revealed where unions are directly involved in training policy decisions at the level of the establishment, the company is more likely to use staff attitude surveys, workplace consultative committees, job rotation, mentoring, train-the-trainer programmes and quality circles.

4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

As stated above, the TUC welcomes the recognition of the need for measures to improve the labour market opportunities, including access to training, for vulnerable groups of workers including agency workers.

The TUC however does not accept the insider / outsiders analysis contained in the green paper or the assertion that improved labour market opportunities for those precarious forms of employment is dependent on the weakening of employment protection for those in permanent employment.

a) Benefits of equal treatment rights

The TUC believes that the introduction of equal treatment rights for agency workers would improve the quality of working life for vulnerable groups of workers and increase the attractiveness of such flexible forms of employment. Some people enjoy agency work because they relish the variety of flexible working patterns and new challenges, or want to get a taster or experience of working in a particular sector or industry at the start of their careers. But they are a minority. The UK Labour Force Survey reports that only a quarter (26%) of agency workers choose agency work because they do not want a permanent job, while half (48%) say that they would prefer a permanent job. 57% of male agency workers said that they could not find permanent work, compared to 37% of female agency workers. For many agency work is second best – insecure, badly paid and at worst downright exploitation.

The Temporary Agency Worker Directive would also assist workers to make labour market transitions by providing rights for agency workers to improved training opportunities and prohibiting the use of temp-to-perm fees. The DTI in the UK estimated that if agency workers were to be given access to equivalent training opportunities as permanent staff, as proposed in the Temporary Agency Worker Directive, this could result in improved productivity at a value of between £98m and £272m.

b) Atypical employment and employment growth

However the TUC is concerned that the green paper over-exaggerates the importance of a greater use of ‘non-standard’ employment for economic success. Evidence from the UK labour market demonstrates that employment growth is not dependent on an increased use of contingent labour.
Re-regulation and job growth in the UK 1997-2002

<table>
<thead>
<tr>
<th>UK, seasonally adjusted</th>
<th>1997 (000s)</th>
<th>2002 (000s)</th>
<th>Change (000s)</th>
<th>Change (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees</td>
<td>22,660</td>
<td>24,452</td>
<td>+1,792</td>
<td>+ 7.9%</td>
</tr>
<tr>
<td>Permanent employees</td>
<td>20,903</td>
<td>22,874</td>
<td>+1,971</td>
<td>+ 9.4%</td>
</tr>
<tr>
<td>Temporary employees</td>
<td>1,757</td>
<td>1,578</td>
<td>- 179</td>
<td>-10.2%</td>
</tr>
<tr>
<td>Full-time employees</td>
<td>16,896</td>
<td>18,197</td>
<td>+1,301</td>
<td>+ 7.7%</td>
</tr>
<tr>
<td>Part-time employees</td>
<td>5,764</td>
<td>6,255</td>
<td>+ 491</td>
<td>+ 8.5%</td>
</tr>
<tr>
<td>Self employed</td>
<td>3,277</td>
<td>3,141</td>
<td>- 136</td>
<td>- 4.2%</td>
</tr>
<tr>
<td>Total employment</td>
<td>26,270</td>
<td>27,778</td>
<td>+1,508</td>
<td>+ 5.7%</td>
</tr>
</tbody>
</table>

The vast majority of jobs created between 1997 and 2002 were in permanent employment. Fewer than 6 per cent of employees in the UK work on a temporary basis. The most common form of temporary work is fixed term contract that accounts for nearly half (45 per cent) of all temporary employees. This is followed by casual work (20 per cent). Agency working comes third at just under 18 per cent. Seasonal work was 6 per cent. All other forms of non-permanent employee work account for 11 per cent of temporary workers.

Other key trends in the UK labour market include:

- Part-time work has grown steadily in every decade since the start of the 1970s. The UK’s figure is above the EU-15 average, and more prevalent in the UK than any other EU-15 nation except The Netherlands (44%).
- Self-employment has ranged between 3.3m to 3.6m employees over the past decade, and is increasingly dominated by white-collar professional jobs.
- Second jobs (1.1 m) have fallen back slightly since 1997, and are more common amongst the low-paid.
- Homeworking – about 2.5% of employees work from home, well below the EU-15 average (3.8%)².
- Teleworking cuts across various forms of employment and is replacing more traditional forms of homeworking, but less than 1% are engaged in telework.

**c) Limitations on the role for atypical work**

Further as a recent ESRC funded research report *Managing to Change*¹⁶ argues that while flexible working practices in the UK may be widespread, future growth in flexible working may be limited and the spread of flexible labour “is running out of steam”.

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¹³ Labour Force Survey data, total employment includes government trainees and unpaid family workers.


¹⁵ It is highly likely that the total number of agency workers is somewhat higher than the LFS estimate. The DTI Regulatory Impact Assessment estimated that there were 700,000 agency workers in the UK in 2001.

Managing to Change suggests that various factors explain the plateau of flexible working in the UK: employees’ resistance to providing endless supplies of expendable labour in a booming labour market; its attractions for employers may be declining as temporary and part-time employees are given more rights in employment law; and employers are becoming convinced that “the best flexibility is that of well-trained, motivated and adaptable employees”.

Indeed, measures designed to encourage member states to incentivise the use of atypical forms of employment could prove detrimental to business success. As the UK Treasury\textsuperscript{17} points out: “A high proportion of temporary workers may be detrimental to the economy if it reduces the incentives for employers to offer training and development opportunities to workers whom they judge are unlikely to stay with them in the longer term.”

Research carried out by Beynon et al (2002) on employers’ strategies reveals that agency and casual staff are increasingly concentrated in low skilled and often monotonous jobs on a permanent basis. These practices are particularly prevalent in the food manufacturing, hotels and catering, transport, communications, finance and local government sectors.

Such strategies have a number of risks. Research by Purcell et al (1999) found that employers often associated the use of so-called ‘flexible-workers’ with high labour turnover, absenteeism, and low staff morale which could result in low levels of commitment, loyalty and performance. These factors often outweighed the benefits associated with increased flexibility for employers to match labour supply to shifts in demand. As a result in a number of sectors employers were retreating from the use of flexible working arrangements.

It is also widely recognised that the lack of appropriate training is one of the key problems associated with the use of casual and agency workers. Due to the frequently temporary duration of their assignments, there is limited incentive on employers to invest in the vocational training of such workers. In the case of agency workers, where training is provided, skill levels are often not firm or organisation specific. The absence of relevant experience and knowledge can result in increased burdens on permanent staff, who are required to perform a mentoring role for temporary workers.

\textsuperscript{17}EMU and labour market flexibility, HM Treasury, 2003, para. 2.93.
5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

The TUC recognises that there is a wide-ranging debate on ‘flexicurity’ in the European Union. We look forward to participating in this wider debate.

The green paper appears to reduce the ‘flexicurity’ agenda to the issue of the reform of labour law and increased ‘numerical flexibility’ through external contractual flexibility and the increased use of atypical forms. Very limited consideration is given in the paper to the benefits of ‘functional’ flexibility; through which increased investment in training and life long learning enables employees to adjust their skills to match the demands of changes in technology and workload.

The green paper emphasises the need for a relaxation of ‘overly protective terms and conditions’ linked to the traditional employment relationship, such as dismissal regulation. The assumption is that such changes would ease transitions for standard workers from one job to another job, and to ease access for ‘outsiders’ or non-standard workers into more regular employment.

The TUC has a number of concerns about this approach. Firstly, the TUC does not accept the assumption that weakening job protection measures for those in standard employment would ease access for non-standard workers into more regular employment. Evidence from across Europe gathered by the OECD shows that significant numbers of people in all forms of temporary job move into permanent work. In most economies studied between one third and two thirds of temporary workers move on to permanent jobs within two years. There was limited evidence that the presence of stricter employment legislation restricted employment transitions for agency workers. The rate of transition into permanent employment was similar in the UK, where there are limited job security measures, to the rate in economies with stricter protections.

Other factors, in particular lack of access to education and training, or protracted periods of unemployment may have a more significant effect. The OECD found in 2002, “mobility into permanent jobs is the highest for medium to highly educated persons between the ages of 25 and 34, who have not been unemployed in the previous five years and are employed by a medium or large sized firm in the private sector.” This is hardly surprising, as such a group of workers would be highly employable in almost any labour market. Those with poor education, older workers, and those with lengthy and frequent spells of unemployment are far more likely to be left behind. The OECD also warned, “persons spending an extended period of time in temporary jobs may be compromising their long run career prospects, in addition to being subject to considerable employment insecurity”.

Secondly, the green paper suggests that ‘legal frameworks sustaining the standard employment relationship may not offer sufficient scope or the incentive to those on regular permanent contracts to explore opportunities for greater flexibility at work’. This supposition fails to recognise the increased pressure for flexibility faced by those on standard contracts in recent years. Experience from the UK reveals that vulnerability in the labour market is not limited to those employed on ‘non-standard’ contracts. The costs and risks associated with increased globalisation have also been experienced by those employed...
on permanent contracts. The effects of restructuring, contracting-out and plant closures have led to pressure for increased flexibility, including changes in working time patterns and job losses. In addition, many UK workers in permanent employment lack a strong skills base.

In the UK, job losses have been particularly prevalent in manufacturing. In December 1980, there were 6,401,000 jobs in manufacturing; 25 years later, in December 2005 the figure was nearly halved to 3,367,000 and manufacturing jobs continue to be lost at a rate of about 100,000 a year. A study undertaken by the Work Foundation looking at what had happened to the workers laid off at MG Rover found that eight months later a third were still unemployed; over half were now employed full-time, but on average their new jobs paid them £3,523 a year less than MG Rover, and almost half thought their new jobs were worse.18

UK unions have repeatedly expressed concern that the inadequacies of UK redundancy laws mean that employers too often fail to engage in meaningful consultation with union representatives prior to announcing collective redundancies. As a result there is limited opportunity to give serious consideration to options restructuring organisations or the reduction of job losses. The absence of effective sanctions also means that there is no deterrent for employers acting in breach of the legislation.

The inadequacy of protection is at least in part due to the defective implementation of the EU Directive on collective redundancies in UK law, in particular relating to the timing and nature of consultation. The limitations in UK employment law create incentives for employers to close plants, reduce the size of workforces and outsource work from the UK on the basis of short-term gains from reduced labour costs. Commentators and employers have commented that the ‘flexible nature of the UK labour market’ means that it is easier and cheaper for employers to make UK workers redundancy as compared with their EU counterparts. There is also a concern that employers take pre-emptive action, for example, selling plant equipment in advance of announcing redundancies, thereby reducing the prospects of longer term survival specific plants or enterprises. The TUC would argue that such approaches are not consistent with policy objectives of promoting a business rescue culture and retaining high skilled jobs.

Thirdly, the TUC is concerned that the green paper gives inadequate consideration to the need for improvements in social protection for those required to make labour market transitions. In 2006 the OECD revised its former 1994 assumption that out-of-work benefits must be kept low has been substantially revised, with the acceptance that ‘relatively generous’ unemployment benefits are not inconsistent with strong incentives to move into employment. The OECD also highlighted that workers seem to feel more secure in systems offering generous benefits than in systems that seek to achieve this end through labour market regulation.19 In the UK workers experience not only a low level of employment regulation, but also a lack of generous social benefits. After housing costs are taken care of, a single non-disabled unemployed adult’s benefit will be about 375 Euros a month. (Those aged under 25 will receive even less.)

19 Employment Outlook - Boosting Jobs and Incomes, 2006, OECD.
Finally, there are important lessons which may be learnt from those Nordic economies where the concept of flexicurity originated, and most notably Denmark. It is important to note that the Danish model of flexicurity combines generous social protection arrangements with comparatively strict employment protection measures. Danish workers facing economic dismissals have comparative long notice-periods, providing them time to find another job before ending their previous. These protections are far more extensive than existing UK laws. Danish workers also enjoy strong protection against unfair dismissal for non-economic reasons.

Further the development of flexicurity models have coincided with a highly developed social dialogue, where social partners have played an essential role in negotiating the balance between flexibility and security on the labour market. Social partners have played a crucial role in building the necessary trust and confidence that the adaptation of rules and regulations was taking into account workers’ and employers’ interests in a balanced way, thereby legitimising change.

In conclusion, the TUC is concerned that reducing dismissal protection would result in increased in job insecurity and job satisfaction with its consequential effects on worker motivation, loyalty and productivity levels. In our view, in seeking to improve flexibility, to generate better quality jobs and to ease labour market transitions, the Commission should focus on positive measures such as improved education and life long learning, generous social protection measures and, measures to improve the reconciliation of work and private life.

6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

It is important that employees on different forms of contracts are supported in progressing their careers by enabling them to access training and development programmes that are in place for all permanent full-time staff. Collective bargaining has a key role to play in this respect and one positive recent example of this in the UK is the collective agreement covering the workforce of the National Health Service ('Agenda for Change') which includes a significant agreement on training and development ('Knowledge and Skills Framework') and which can be used for staff on different contracts (e.g. temporary staff). However, collective bargaining in the UK does not require employers to address training and development issues and as a result many employees on different forms of contracts, especially in the private sector, would only be helped to access training and development to help develop their careers if this was achieved under law rather than via the collective bargaining process.

7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

In 2000 the OECD recognised ‘the borders between self-employment and wage salary employment are becoming more blurred’\(^20\). There are growing numbers of workers

\(^{20}\) OECD Employment Outlook, 2000
occupying the ‘grey areas’ between employed and self-employed status. This is particularly an issue in sectors where employers increasingly rely on outsourced or subcontracted labour, including the media sector and print journalism, and most significantly construction that currently accounts for 22.6% of all self-employed workers.21

In these sectors, the traditionally held assumptions that employees accept the trade-off of security in return for personal dependence or subordination, while the self-employed enjoy independence and access to fiscal subsidies and the greater opportunity for profit for the self-employed, often no longer hold. There are many nominally self-employed workers who do not employ others, have little or no access to working capital, and have few business assets other than their own know-how and expertise.

As research by Mark Harvey has demonstrated, many workers in these sectors, whilst being classified by the courts as being self-employed for the purposes of employment protection, are in practice economically dependent on one or a number of employers. As a result they are excluded from employment protection and employers avoid the costs of direct employment. This a problem commonly experienced by freelancers who may work regularly for a limited number of employers over a number of years, working at the employers’ premises under their direction, but as they are described as freelance or as engaged as and when required, they are not considered to be employees. As the workers are not free to set their own rate for the job, but rather are paid the rate set by the employer or the sector, they are in practice economically dependent.

As our response to question 2 highlighted the two-tier approach to employment status has contributed to increased labour segmentation and the exclusion of a growing proportion of the workforce from core employment rights.

Employment status is a confusing and contentious issue in the UK. The distinction in UK employment law between ‘worker’ and ‘employee’ is a significant one, governing access to a hierarchy of employment rights. In order to claim entitlement to important rights such as protection from unfair dismissal and entitlement to redundancy payments and certain parental rights, it is necessary for an individual to demonstrate that they are an ‘employee’ rather than a ‘worker’. Certain groups of worker in the UK labour market, notably those in what are regarded as various forms of ‘non-standard’ employment relationships, find it particularly hard to demonstrate that they are ‘employees.’ The so-called bogus self-employed are one such group. Other groups of workers similarly affected are agency workers and homeworkers. This is compounded by the problem of some freelances not even qualifying as ‘workers’ and therefore losing out on working time rights which are crucial in long hours areas such as the audiovisual and entertainment sectors.

The TUC would welcome any legislative changes at an EU level that would prevent such exploitative practices. The TUC believes that all EU employment legislation should apply to a wide category of workers and that there should be a legal presumption that an individual qualifies as a worker. The onus should be placed on the employer to demonstrate that an individual does not qualify for employment protection rights.

would be concerned about any change in EU law that encouraged employers to increase the out-sourcing of labour or promoted labour market segmentation.

8. Is there a need for a floor of rights dealing with the working conditions of all workers regardless of the form of their work contract? What in your view would be the impact of such minimum requirements on job creation as well as on the protection of workers?

The TUC shares the concern expressed in the Green Paper that there are groups of vulnerable workers who are excluded from basic employment protection. As highlighted in our response to question 2 in the UK, the legal distinctions drawn between ‘employees, ‘workers’ and ‘the self-employed’ means that growing groups of workers lose out on basic rights.

Measures designed to clarify employment status and to extend employment rights to all workers would not restrict the abilities of employers to use more flexible contracts. However, it would ensure that those employed on flexible contracts are treated fairly, making non-standard forms of employment more attractive.

The TUC would not, however, generally encourage the Commission to adopt the UK-styled ‘floor of rights’ approach to guaranteeing fair treatment for workers across the EU. There is a risk that a floor of rights approach can all too readily translate into a ceiling of rights leading to a ‘levelling down’ of the best legal and collectively negotiated employment rights.

The TUC would also want to protect the right for member states to implement and maintain social policy and industrial relations systems which exceed EU employment law minima. Increasingly, such social systems have been threatened in the Viking / Laval line of cases, on the grounds that they are trumped by free movement principles.

The EC Treaty has always treated social policy as at the heart of national sovereignty and, under the principle of subsidiarity, social policy remains largely a matter for individual member states. We believe that this principle should be maintained and safeguarded.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in three-way relationships?

The lack of clarity in UK employment law as to which party – agency or end user organisation – employs the agency worker and is responsible for their terms and conditions is well documented and is evident from case law decisions. The Conduct Regulations 2003, as mentioned above, provide that employment agencies (businesses) must provide certain contractual information to those they place in temporary work. However, this does not require them to offer employed status. Nor is there any such obligation on the organisation that the worker is placed with – even though in some cases, a temporary worker may be placed with an organisation for years and work under their direction and control doing exactly the same work as permanently employed staff.
The TUC believes that while the employment agency should be treated as the primary employer for agency workers, the hirer employer should also have joint and several liability for any breaches of employment rights.

10: Is there a need to clarify the employment status of temporary agency workers?

Agency workers in the UK have precarious employment status and as a result they are often excluded from basic employment rights. See responses to questions 2 and 8 for further information.

Neither the Employment Agencies Act 1973 nor the Conduct of Employment Agencies and Employment Businesses Regulations 1976, specify what the status of agency workers should be for the purposes of employment protection law, leaving the matter to be decided under the common law tests of status. Although the Conduct Regulations 2003 provided that employment bureaux must provide contractual information to temporary workers that they engage, whether the contract is a contract of employment or not continues to be a matter for case law to be determined on the individual facts.

The definition of ‘employee’ in UK employment law is a problematic one that a number of legal tests have been developed to try to deal with. In practice where a dispute arises, the issue of employment status is to be determined by application to an employment tribunal, which must decide the employment status on the facts of the individual case. This is unsatisfactory for a number of reasons:

It is an individualistic and legalistic response, which may only be applied where employment status needs to be determined as a preliminary issue in a dispute as to entitlement to a specific employment right or benefit. As decisions depend so much on the individual facts of each case and the degree of discretion regarding the tests is so wide, it is hard to overturn cases on appeal and many inconsistent decisions stand. The resulting lack of clarity is not in the interests of any party: worker, employer, agent or government.

Each case requires recourse to the employment tribunal system for determination. This is costly both in terms of time and resources for the parties involved.

There is much case law on this. One of the key tests to be applied to determine employment status is whether there is any ‘mutuality of obligation’ – to offer and to accept work. This is a particular stumbling block for agency workers, as agencies often insert a clause into contracts claiming that there is no obligation on either party to offer or accept an assignment. Although tribunals are required to look at the reality of the situation and not just the wording of the contract, the existence of such a term can be problematic for the agency worker.

The TUC would welcome measures to deal with the problem of employment status for agency workers, and other atypical groups of workers, outlined in our response to question 8.

11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working
time should be tackled as a matter of priority by the Community?

When the rationale of 'flexicurity' is applied to working time it is clear that there must be robust minimum standards to prevent excessive working time, which are a proven health and safety hazard and tend to have an adverse effect on morale and productivity.

The TUC believes that the response of the European Parliament to the Commission's review of the Working time Directive took an approach that was strongly rooted in 'flexicurity', combining as it did the strengthening of the 48 hour limit with the creation of offsetting flexibility for employers.

The TUC can envisage a number of solutions to the on-call issues raised by the European Court of Justice but they will not be deliverable as long as the opt-out provisions remain. To move this issue forward, the Commission might now consider changing the political equation by taking legal action against selected member states, concentrating on those who are deliberately ignoring certain aspects of the directive.

There is certainly no need to consider weakening the existing legislation. The conversations that are going on in certain countries about working time are largely about whether the full-time working week should be 37, 38, 39 or 40 hours. No serious commentator really believes that growth, job creation and high productivity depend on working more than 48 hours on a regular basis.

Indeed, in the EU context long hours are more clearly associated with low productivity, poor management and lack of investment and training. In addition many women still bear the greater part of caring responsibilities in European society, so reliance on long hours contributes to the exclusion of many women from the labour market and helps to explain their continued under-representation in managerial and skilled manual occupations. Thus it also contributes to the gender pay gap in the UK, which is in part attributable to occupational segregation.

Although the UK government is still tied to a political deal to defend the opt-out, it has privately recognised the force of some of these arguments and has therefore tried to help companies to move away from long hours in order to boost their productivity.

Turning to measures to promote more flexibility over working time, it is important to note that the benefits of flexibility will not be reaped if it were to mean that employers can simply dictate changes to working patterns. Such a state of affairs would lead to low morale and low productivity.

In contrast, measures that give workers some say over their hours and patterns of work would aid recruitment and retention and boost morale and productivity. In the UK, legislation that allows the parents of young children and, from April 2007 those with caring responsibilities, to request a change in their working patterns has been a success. The UK legislation requires employers to take such requests seriously.

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22 Managing Change: Practical Ways to Reduce Long Hours and Reform Working Practices, DTI, 2005

23 Flexible Working and the Work life Balance, DTI
Although requests can be turned down for business reasons, there is often a discussion about the exact details of how flexibility can be made to work both for the employer and for the employee alike. Compromises are common, but most requests are agreed in some form.

The TUC is also involved in the WorkWise UK coalition 24, which brings together business leaders, trade unions and local authorities to promote high-quality teleworking and flexible working more generally. Mutually beneficial high-quality flexible working can also have desirable financial and environmental effects, as it can reduce commuting costs and city congestion.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

The TUC believes that rules relating to employment in a transnational context could be improved in three key ways.

Firstly, the TUC believes that there is a need to strengthen the Posting of Workers Directive and in particular to strengthen the enforcement of the Directive. We believe that the UK Government has failed to implement this Directive effectively. The lack of separate posting of worker regulations means that awareness of the protections for posted workers is very limited in the UK. The absence of a Government agency gathering information relating to the number of workers posted to the UK at any one time also undermines the enforcement of the Directive. Further the TUC has concerns about the narrow territorial scope tests which apply to different UK employment legislation, which have the effect of excluding posted workers from their entitlements under the Directive. The absence of legally enforceable sectoral agreements in some industries, in particular construction, means that the spirit of the Directive is not observed within the UK. Migrant workers are often paid less than UK workers for doing the same job.

Secondly, subject to the outcomes of the litigation in the Viking and Laval cases, there may be a clear case for the introduction of new rules governing cross-border industrial action.

Thirdly, the TUC supports the ETUC framework for improved protections for migrant workers. The framework would assist in ensuring that migrant workers are not subjected to discrimination or exploitation.

13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?

24 For more information, see http://www.workwiseuk.org/
The TUC would support improvements in the administrative co-operation between relevant authorities. In particular, we believe that improvements could be made in the enforcement of the Posting of Workers Directive. We do see a role for social partners in such cooperation; indeed they could be determinative in the success of such improvements.

14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

The TUC supports the ETUC framework for improved protections for migrant workers.