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The Unemployed and the Moral Case for Benefit Sanctions

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☞ keywords to be inserted by the indexer

This article assesses the Conservative-led Coalition Government's (2010–2015) record on benefit sanctions and work-for-your-benefit (workfare) policies. It is argued that while the schemes largely built upon previous Labour Governments' (1997–2010) policies, the Coalition Government also switched back to a traditional Conservative discourse, according to which jobseekers are part of a “work-shy” minority who live at the expense of the “hard working” taxpaying majority. The crackdown on unemployment benefits was broadly popular with the public, which explains why the Coalition Government was able to implement a relatively harsh benefit sanctions regime. Work-for-your-benefit policies, by contrast, were faced with a series of political and legal challenges.

Introduction

Based on original research involving documentary analysis and interviews with policymakers, this article analyses the evolution of contemporary welfare to work schemes in the UK with a particular emphasis on work-for-your-benefit (workfare) schemes and benefit sanctions for the unemployed. These policies revolve around the centrality of sanctions for ensuring that claimants are available for work, actively look for work and comply with the requirements imposed by public employment services. Labour Governments (1997–2010) endorsed a work-first approach, according to which jobseekers should access the paid labour market as quickly as possible, and also stepped up benefit sanctions. To a large extent, the Coalition Government (2010–2015) built upon previous Labour policies, but it also used an aggressive rhetoric according to which the unemployed, characterised as the undeserving poor, have no legitimate claims on the public purse. The Secretary of State for Work and Pensions, Iain Duncan Smith MP—who was reappointed in May 2015 after the victory of the Conservatives in the May 2015 general election—has switched back to a traditional Conservative discourse, according to which jobseekers are part of a “work-shy” minority who live at the expense of the hard-working taxpaying majority. This narrative has been at the heart of the Conservative Party rhetoric on the unemployed and social security since the 1980s. For instance, in 1987 the Conservative Secretary of State for Social Security, John Moore MP, justified targeted social spending on those in greatest need in these terms:

“The indiscriminate handing out of benefits not only spreads limited resources too thinly, it can also undermine the will to self-help, and builds pools of resentment among the taxpayers who are footing the bill, often from incomes barely larger from the money benefit recipients receive. By targeting our welfare resources we will be able to provide more real help where need is greatest.”¹

Iain Duncan Smith MP has adopted a similar divide-and-rule rhetoric, pitching “hard working taxpayers” against “people on tax credits and benefits”.²

This article is divided into four sections. First, it presents the evolution of welfare to work policies in a historical perspective (from 1942), with a brief characterisation of the contractarian model of welfare endorsed by successive Labour Governments (1997–2010). Secondly, it analyses the rationale for introducing new benefit sanctions for recipients of jobseeker’s allowance (JSA) under the Welfare Reform Act 2012. Thirdly, it presents the evolution of work-for-your-benefit schemes under the Conservative-led Coalition Government. Finally, it assesses the Coalition Government’s record on welfare to work policies for JSA claimants between 2010 and 2015.

The sections on benefit sanctions and workfare schemes draw upon the research findings regarding the evolution of the Coalition Government’s policies between 2010 and 2015. The objective of the research was to identify the legal and political arguments as well as the twists and turns in the decision-making process surrounding workfare and benefit sanctions schemes. The research used a qualitative case-study approach based on documentary analysis as well as approximately 25 semi-directed interviews with senior civil servants from the Department for Work and Pensions (DWP), members of the House of Commons Work and Pensions Select Committee (2010–2015), members of the Joint Committee on Human Rights in the House of Lords as well as members of the Social Security Advisory Committee (SSAC). The interview schedule included questions regarding the evolution of workfare schemes, as well as questions regarding the degree of political consensus between Labour and Coalition Government actors (with an assessment of Labour and Coalition Government policies).

Welfare to work policies in historical perspective

The UK represents a hybrid model of welfare that combines liberal and social-democratic elements.³ In practice, especially since the 1980s, the country has increasingly endorsed a liberal model of welfare that provides relatively low unemployment benefits and relies extensively on targeted means-tested social assistance.⁴

¹ John Moore MP, Secretary of State for Social Security, Conservative Party political conference, speech of September 26, 1987, *Conservative Party News*, quoted by D.King, *Actively seeking work?* (Chicago: The University of Chicago Press, 1995), p.180.

² I. Duncan Smith wrote in the *Daily Telegraph* in 2012: “This Government is on the side of hard-working taxpayers, the people across the country working in the private and public sectors who have seen their pay frozen or cut, as businesses have struggled to keep them in work. And all the while these people have watched those on tax credits or benefits see their income rise, outstripping their earnings.” “We’ve brought back fairness to welfare”, *Daily Telegraph*, December 30, 2012.

³ A. Cochrane, J. Clarke and S. Gerwitz, *Comparing Welfare States*, 2nd edn (Sage, 2001).

⁴ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, 1st edn (Polity Press, 1989).

The history of the welfare state in the UK has been characterised by a permanent tension between universalist principles, according to which individuals are entitled to protection against a wide range of social risks, such as unemployment, ill health and age, as well as selectivity principles, whereby individuals can only have access to social protection when they satisfy certain eligibility criteria (particularly to be below a certain level of income) and behavioural requirements (such as being actively looking for work). The universalist model of welfare is best defined by Marshall,⁵ who portrayed the social rights of citizenship as involving “an absolute right to a certain standard of civilisation which is conditional only on the discharge of the general duties of citizenship”.⁶ Social rights meant that everyone should have access to a minimum standard of living in order to be fully able to exercise his or her civil and political rights.⁷

This universalist vision was at the heart of the modern British welfare state established by William Beveridge, who stated the Government’s duty to provide for social security. One of the guiding principles of the Beveridge Report was co-operation between the state and the citizen:

“The third principle is that social security must be achieved by cooperation between the State and the individual. The State should offer security for service and contribution.”⁸

Beveridge had expected citizens to rely mostly on national insurance contributions with the advent of a full employment society. National insurance was intended to deal with marginal employment, including casual labour, seasonal work and short-time working. Means-tested social assistance (“National Assistance”) was seen as a subsidiary scheme to social security, which would naturally disappear over time. However, this did not happen. Indeed, as unemployment benefit was of limited duration (12 months), many people fell through the insurance system, especially as the value of unemployment benefits fell below subsistence levels in the 1950s. In the 1960s, the rediscovery of poverty coupled with problems of low take up of National Assistance and stigma contributed to the creation in 1966 of the Supplementary Benefit scheme, administered by the Supplementary Benefits Commission (SBC). Instead of strengthening the insurance principle that had been at the heart of Beveridge’s vision, the Labour Government chose to expand social assistance. This represented a historical point of departure that would prove very difficult to reverse. As a result, unemployment insurance coverage had been especially low in Britain since the mid-1960s. As mass unemployment grew in the 1970s and 1980s, more people came to rely on means-tested benefits, with a clear acceleration in the decline in coverage of contributory unemployment benefits:

“In the early 1980s, unemployment benefit was available only to a minority in the UK: in 1983 thirty two percent of unemployed people received unemployment benefits, and this fell to 23 per cent in 1993.”⁹

⁵ T.H. Marshall, *Citizenship and social class* (Pluto, 1949).

⁶ Marshall, *Citizenship and social class* (1949), p.29.

⁷ D. King and J. Waldron, “Citizenship, social citizenship and the defense of welfare provision” (1988) 18 *British Journal of Political Science* 415, 431.

⁸ W. Beveridge, *Social Insurance and Allied Services* (HMSO, 1942).

⁹ J. Clasen, A. Gould and J. Vincent, *Voices Within and Without: Responses to Long-Term Unemployment in Germany, Sweden and Britain* (PolicyPress, 1998), p.87.

As unemployment benefits were hardly earned through insurance contributions, they became increasingly portrayed as handouts given to essentially passive welfare recipients, encouraging the growth of what was classed as a “dependency culture”.¹⁰ The Conservatives resurrected the “actively” looking for work rule in 1989, when “unemployed benefit claimants lost the right to refuse job offers based on low pay after thirteen weeks of unemployment”.¹¹ This represented to a large extent a resurrection of the “genuinely seeking work rule” for those claiming unemployment benefits under the National Insurance Act 1921, when claimants were obliged to accept any work paying a fair wage.¹² The idea according to which poverty was due to a lack of moral character, and that unemployment, save in exceptional circumstances, was in effect sinful, had been a common theme throughout the 19th century, especially under the Poor Law.¹³ It reappeared cyclically in the 20th century, particularly at times of economic crisis and rising unemployment, as in the 1920s and the late 1980s.

Each time, the rediscovery of “voluntary unemployment” was used as a moral justification for the introduction of tougher labour market conditions and the restriction of access to state social benefits. In the 1990s, this was couched in the language of mutual obligations, under the rhetoric of a welfare contract, as encapsulated by the reform of unemployment benefits and the introduction of jobseeker’s allowance (JSA), which represented a major step towards the unification of working age benefits. In order to qualify for unemployment benefits claimants had to sign a contract, the jobseeker’s agreement. The agreement encapsulated the contractual approach to welfare, since each individual was committed to a pattern of active jobseeking behaviour, the details of which were to accord with secondary legislation. Benefit advisers could issue jobseekers’ directions that required claimants to improve their employability. The parties to a jobseeker’s agreement were the benefit recipient and the Employment Service, now Jobcentre Plus (JCP), but it remained a contract in name only, since it did not encapsulate the “contractual norms of consent and voluntariness”.¹⁴ Indeed, at the heart of JSA was a fundamental imbalance of power between the Employment Service and the benefit claimant.¹⁵

After some initial opposition to the scheme, Labour eventually endorsed JSA and supported the contractual model of welfare based on mutual obligations between the state and the beneficiary of social services. In 1997 the new Labour

¹⁰ H. Trickey and R. Walker, “Steps to Compulsion Within British Labour Market Policies” in I. Lodemel and H. Trickey (eds), *An Offer You Can’t Refuse. Workfare in International Perspective* (Policy Press, 2001); J. Clasen, *Reforming European Welfare States: Germany and the United Kingdom Compared* (Oxford: OUP, 2005); A. Daguette, *Active Labour Market Policies and Welfare Reform: Europe and the US in Comparative Perspective* (Palgrave Macmillan, 2007), pp.58–65.

¹¹ J. Clasen, “The United Kingdom: Towards a Single Working-Age Benefit System” in J. Clasen and D. Clegg (eds), *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe* (Oxford: OUP, 2011).

¹² L. Lundy, “Social Security and Employment” in N. Harris (ed.), *Social Security Law in Context* (Oxford: OUP, 2000), p.301.

¹³ P. Larkin, “The new Puritanism: the resurgence of contractarian citizenship in common law welfare states” (2014) 41 J. Law & Soc. 227, 235.

¹⁴ A. Eleveld, “The duty to work without a wage. a legal comparison between social assistance legislation in Germany, the Netherlands and the United Kingdom” (2014) 16 E.J.S.S. 204, 219.

¹⁵ J. Fulbrook, “The Jobseekers Act 1995: consolidation with a sting of contractual compliance” (1995) 24 I.L.J. 395; Lundy, “Social Security and Employment” in *Social Security Law in Context* (2000), p.304; Eleveld, “The duty to work without a wage: a legal comparison between Social assistance legislation in Germany, the Netherlands and the United Kingdom” (2014) 16 E.J.S.S. 204, 219.

Government pledged to rebuild the welfare state around work. The denunciation of welfare dependency, the need to develop people's employability through the right balance of sticks (benefit sanctions in case of non-compliance with programme requirements) and carrots (work incentives) featured prominently on the legislative agenda at that time. Under the new welfare contract, each individual had a duty to take advantage of their human potential and to take up available opportunities. The rapid integration of the unemployed into paid work was made possible by the changing conditions in the labour market, namely the development of part-time, flexible work, which provided opportunities for reforming the social security system along the lines of a demanding conditionality regime centred on active job search and backed up by benefit sanctions.

The rhetoric of rights and responsibilities was most clearly articulated under Labour's New Deal programmes. The New Deals entailed a combination of work incentives, compulsory training and work-related programmes for young people and the long-term unemployed, and use of benefit sanctions in case of non-compliance with programme requirements.

Between 2001 and 2010, policymakers aimed at integrating all working age claimants into the labour market, with benefit entitlement becoming increasingly conditional on participating in work-related activities.¹⁶ A partial overhaul of the benefit system resulted in the extension of work-related activities to new categories of claimants, single parents and people with disabilities, who had been previously exempted from work-related activities. The New Deal gradually involved the implementation of a more stringent regime of work-related activities for incapacity benefit (IB) claimants and single parents. In 2006, the Green Paper *Empowering People to Work*¹⁷ set out the Government's aspiration of achieving an employment rate of 80 per cent of the working age population, with the targets of a reduction by one million in the number of claimants of IB and helping 300,000 single parents into work. To increase the numbers leaving IB and returning to work, the Green Paper proposed the introduction of a new "employment and support allowance" (ESA) from 2008, to replace IB. The Green Paper proposed a two-tiered system that distinguished between severely disabled and temporarily unfit to work individuals. New benefit claimants, except those with the most severe disabilities and health conditions, would be required to participate in work-focused interviews, produce action plans and engage in work-related activities, or see their benefit level reduced. Non-compliance would result in benefits being reduced in slices, ultimately to the level of JSA. The Green Paper proposals were included in the Welfare Reform Bill 2006, which became an Act in May 2007.

The Welfare Reform Act 2007 restricted the coverage of income support and IB in order to submit the vast majority of claimants to the more stringent conditionality rules that traditionally applied to JSA. Many of the people who had been previously considered to be outside the labour market and exempt from work requirements (including people with an illness, disability, or care responsibility, especially lone parents) were to be treated as part of the economically active population. A work capability assessment (WCA) was used to determine eligibility

¹⁶ Clasen, "The United Kingdom: Towards a Single Working-Age Benefit System" in *Regulating the Risk of Unemployment: National Adaptations to Post-Industrial Labour Markets in Europe* (2011), p.22.

¹⁷ DWP, *A New Deal for Welfare: Empowering People to Work* (HMSO,2006), Cm.6730.

for ESA. A claimant could have three outcomes: if he or she was found fit for work, the ESA claim closed and the claimant was moved to JSA (or could appeal the decision); if the claimant was found to have limited capacity for work, he or she was placed in the Work Related Activity Group (WRAG); finally, if the claimant was found to have limited capability to work and in addition limited capability for work-related activity he or she would be placed in the support group and receive benefits on an unconditional basis.¹⁸

The Welfare Reform Act 2009 realised the vision of the Gregg Report,¹⁹ according to which conditionality should be extended to the vast majority of the working age population so that virtually no one may claim benefits without taking active steps to address their barriers to work. The legislation was couched in a strong personal responsibility language with the key notion that there was a need for a much clearer sanction regime for those who failed to attend an interview or failed to sign on without a good reason.

These changes to entitlement rules were accompanied by an escalation of benefit sanctions. Sanctions through loss of benefits had been in effect since the introduction of JSA in 1996, when (as noted above) claimants could be denied up to two weeks' benefits or four weeks' for repeat offences. But these sanctions were applied through terminating the JSA claim, forcing the individuals to begin the application process again, resulting in a high administrative cost for the DWP.²⁰ The Welfare Reform Act 2009 intended to make the sanctions system more consistent, automatic and escalating: missing a mandatory appointment resulted in a benefit sanction of no less than one full week and subsequent failures in two-week sanctions. The legislation also introduced new sanctions for JSA claimants, notably in case of violence against Jobcentre Plus staff. The Act also made provision for problem drug users, involving compulsion to declare a drug problem and follow a rehabilitation plan.²¹ The Labour Government introduced Welfare Reform Drug Recovery Pilots, but these pilots were cancelled by the Coalition Government in 2010.²²

In addition, the Act introduced compulsory "work for your benefit" (work or work-related activity) schemes for long-term claimants of JSA, to be piloted from November 2010. The Act allowed regulations to provide that claimants were required to undertake "work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment". The regulations²³ allowed the Secretary of State to select claimants in pilot areas for participation in the scheme if they met specified conditions. The explanatory memorandum to the Work for Your Benefit Scheme (WfYB scheme) stated:

¹⁸ OECD, *Connecting People with Jobs. Activation Policies in the United Kingdom* (July 15, 2014), p.169.

¹⁹ P. Gregg, *Realising potential: a vision for personalised conditionality and support*, DWP Independent Reports (2008).

²⁰ N. Barker and S. Lamble, "From social security to individual responsibility: sanctions, conditionality and punitiveness in the Welfare Reform Bill 2009: Part 1" (2009) 31 J. Soc. Wel. & Fam. L. 321, 325.

²¹ Part 1 of Sch.3 to the Welfare Reform Act 2009 "makes provision for or in connection with imposing requirements on claimants for a jobseeker's allowance in cases where (a) they are dependent on, or have a propensity to misuse, any drug, and (b) any such dependency or propensity is a factor affecting their prospects of obtaining or remaining in work". For a detailed analysis of the provisions related to problem drug users, see N. Harris, "Conditional rights, benefit reform, and drug users: reducing dependency?" (2010) 37 J. Law & Soc. 233.

²² DWP Press Release, *Radical rethink on getting problem drug users back to work* (June 17, 2010).

²³ Jobseeker's Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010 (SI 2010/1222).

“the scheme will consist of work experience and job search support for up to six months, delivered by organisations through contract with the DWP. This aims to help those furthest from the labour market develop work habits and routines, giving them experience of work in order to increase their employability.”²⁴

The scheme was aimed at the long-term unemployed, that is, individuals who had been on the Flexible New Deal (as the main welfare-to-work programme was now called) for at least 12 months. It was couched in a relatively supportive language for claimants, although failure to comply with the rules could lead to a referral for a benefit sanction of up to 26 weeks.²⁵

The official view was that there were plenty of jobs in all parts of the country and that it was the responsibility of the unemployed to take up these opportunities, a message that was reinforced in the mid-2000s²⁶ by Secretaries of State for Work and Pensions John Hutton MP (2005–2007) and James Purnell MP (2008–2009). In a speech delivered in December 2006, John Hutton MP declared that there was

“a small group of benefit claimants without the major physical or health barriers to work associated with Incapacity Benefit — who live in areas where there is no shortage of vacancies, particularly for low-skilled jobs but who nonetheless remain on benefits for long periods of time ... Our welfare reform must confront head on the ‘can work won’t work’ culture in our country.”²⁷

Similarly, James Purnell MP declared in February 2008 that

“for the small number of people who refuse to take up the opportunities available, we will be looking at how we can develop a strict sanctions regime, including either cuts in benefits or an option of permanent work for benefits ... if you can work you should work, and that will be a condition of getting benefits.”²⁸

This emphasis on the obligation to take up work as a condition of receiving benefits echoed a speech made by the future PM David Cameron when describing the Conservative welfare contract:

“We’re going to change the whole way welfare is done in this country so everyone takes responsibility and plays their part. This is our new welfare

²⁴ Explanatory Notes to the Jobseeker’s Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010.

²⁵ In particular, the statutory instrument established “the range of acts or omissions for failing to participate in the scheme that will result in a person losing their benefit or receiving it at a reduced rate. These include giving up a place on the scheme, and failing to attend either the work experience or the job search element of the scheme. It specifies the duration of such sanctions as 2 weeks for the first act, then 4 and 26 weeks for the second and subsequent act within 12 months of a previous sanction. Following imposition of a 26-week sanction, JSA will become repayable when the person agrees to take part in the scheme, subject to a minimum of 4 weeks being served.” Explanatory Notes to the Jobseeker’s Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010 (SI 2010/1222), p.3.

²⁶ House of Commons Education and Employment Committee, *Employability and jobs: is there a jobs gap?* (TSO, 2000), HC Paper No.60.

²⁷ J. Hutton, *Welfare Reform: 10 years on, 10 years ahead* (December 18, 2006), Keynote speech delivered at an IPPR North conference, Leeds, pp.18–19, http://www.ippr.org/uploadedFiles/events/john_hutton_ippr.pdf.

²⁸ J. Purnell, cited by S. Driver, “Work to be done? Welfare Reform from Blair to Brown” (2009) 30 *Policy Studies* 69, 77.

contract: do the right thing and we will back you all the way. But fail to take responsibility — and the free ride is over.”²⁹

The Coalition Government’s narrative on benefit sanctions

The narrative of personal responsibility for people capable of working has grown in the past decade, together with the idea that work is the best form of welfare. Although the change of government in 2010 brought new policy and legislation, there has been an underlying continuity in the “hard line” on long-term benefit claimants taken by the Secretaries of State for Work and Pensions John Hutton MP, James Purnell MP and Iain Duncan Smith MP (2010–present). Both the Labour and Conservative Parties have promoted work-first active labour market programmes based on the quick reintegration of benefit claimants into unsubsidised employment.

The predominance of a work-first approach

Since the 1990s active labour market policies characterised by the emphasis on relatively cheap employability measures combined with strict job search rules have accompanied the adoption of deregulatory employment policies. This has resulted in the creation of highly flexible, decentralised, localised and individualised labour markets that provide a wide array of job opportunities in the service sector.³⁰ An aggressive work-first activation regime has been portrayed as sustaining strong employment growth, including for people with low skills, due to the highly flexible and diverse work patterns predominant in the labour market. In fact, it has been suggested that

“the UK labour market has shown greater resilience than other countries during and after the recession and that the combination of a ‘light and even’ employment regulation system and a successful activation regime has contributed to this.”³¹

Post-1997 Labour Governments and the Conservative-led Coalition Government thus pursued a similar strategy of increasing the supply of cheap, flexible labour. To a large extent, welfare reforms post-2010 have simply strengthened the predominant work-first logic where the focus is on strict job search, and where there is less focus on more intensive—and costly—active labour market policy interventions, such as training. Job-matching rather than up-skilling represents the cornerstone of active labour market policies. In this context, the welfare-to-work system is designed to condition and coerce benefit claimants into jobs through tougher and more widespread benefit sanctions for those who are closest to the

²⁹ D. Cameron, “Ending the Free Ride For Those Who Fail to Take Responsibility” (Conservative Party, 2010) http://www.conservatives.com/News/News_stories/2010/04/Ending_the_free_ride_for_those_who_fail_to_take_responsibility.aspx [Accessed October 16, 2015].

³⁰ For instance, a report by the Department for Business, Innovation and Skills states: “As well as having a very dynamic labour market compared to other countries the UK also has one of the most diverse. The lack of regulation on work patterns provides greater opportunity for businesses and workers to decide on types and patterns of work that suit them”: *Employment regulation, employment and growth: consideration of international evidence*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/34611/12-1147-employment-regulation-and-growth-international-evidence.pdf, p.12 [Accessed October 16, 2015].

³¹ Department for Business, Innovation and Skills, *Employment regulation, employment and growth: consideration of international evidence*, p.13

labour market (JSA claimants). This was the policy announced by the Conservative manifesto in 2010. The manifesto stipulated that:

“Anyone on Jobseeker’s Allowance who refuses to join the Work Programme will lose the right to claim out-of-work benefits until they do, while people who refuse to accept reasonable job offers could forfeit their benefits for up to three years.”³²

Benefit sanctions and conditionality

The new policy framework for benefit sanctions was introduced by the 2010 Green Paper, *21st Century Welfare*, and the White Paper, *Universal Credit: Welfare that Works*, and was consolidated in the Welfare Reform Act 2012 and subsequent regulations.³³ Although the drive towards the adoption of a more stringent sanctions regime had started well before 2010, there is a significant qualitative and quantitative difference between the benefit sanction regime prior to 2010 and the policy framework post-2012. The length of sanction periods was extended at the end of 2012. The minimum sanction period increased from one week to four weeks and the maximum from 26 weeks to three years. Higher level sanctions represent a “very much more stringent sanctions regime than those previously applicable”.³⁴ The new sanctions were applied to JSA claimants from October 2012. Under the Welfare Reform Act 2012 changes were made to the Jobseekers Act 1995, with a replacement s.19 and additional ss.19A, 19B and 19C. Section 19 provides for higher level sanctions where the claimant fails to comply with the labour market and employment-related conditions.³⁵ Higher level sanctions apply when a claimant:

- loses employment through misconduct;
- leaves work voluntarily;
- refuses to take up or apply for a job notified by the DWP;
- neglects to avail herself or himself of a reasonable chance of a job;
- or
- fails to participate in a prescribed course.

A series of escalating sanctions applies:

- 13 weeks for the first failure; 26 weeks for a second failure within 52 weeks of a previous failure;
- three years for a third failure within 52 weeks of the most recent failure.

The second set of sanctions is applied to claimants who fail to meet the conditions in s.19A. These include where the claimant:

- fails to sign on as required;
- fails to attend an interview at the DWP when notified to do so;
- fails to participate in a prescribed course;

³² Conservative Manifesto (2010), *Invitation to join the government of Britain*, p.15.

³³ DWP, *21st Century Welfare* (TSO, 2010), Cm.7913; DWP, *Universal Credit: Welfare that Works* (TSO, 2010), Cm.7957.

³⁴ P. Wood et al., “Volume II, Income Support, Jobseeker’s Allowance, State Pension Credit and the Social Fund” in David Bonner (ed.), *Social Security and Legislation* (London: Sweet & Maxwell, 2013), p.93.

³⁵ M. Williams, “Sanction Busting — Appealing Work Programme Sanctions” (2012) 229 *Welfare Rights Bulletin*.

- fails to carry out a reasonable jobseeker's direction; or
- fails to take up a training scheme or employment programme when notified, gives up a place on such a course or programme without good reason, or loses a place on such a course or programme due to misconduct.

In practice, the Coalition Government clearly delivered on its promise to implement a tougher sanction regime, with JSA sanctions reflected as a proportion of claimants after reconsiderations and appeals having stabilised at 5.5 per cent and 6 per cent of claimants per month in 2014 compared to an average of 2.2 per cent of claimants between 2000 and 2006. There was an upward trend in JSA sanctions between 2007 and 2008 from 2.2 per cent to 3.5 per cent, followed by a sharp decline with the start of the intense economic recession. JSA sanctions rates increased from 2.2 per cent in April 2010 to 4.3 per cent in December 2010, which corresponded with the increased use of sanctions once the Coalition Government took office. This was then followed by a sharp decline in JSA sanctions in 2011, when Work Programme providers become responsible for monitoring JSA claimants. But post-2011, and especially as a result of the implementation of the new sanctions regime under the Welfare Reform Act 2012, JSA sanctions increased from a low of 3.5 per cent in April 2012 to 5.8 per cent in December 2013, and have since then been slightly decreasing, to 5.4 per cent in December 2014.³⁶

Higher job search expectations have also been imposed on benefit recipients. For instance, under the pre-2012 regime, JSA claimants could extend the period during which they could restrict their job search to work their normal occupation at a similar level of pay from three months to six months. This flexibility is no longer available, and JSA claimants now have to take any job that pays at least the minimum wage and is within 90 minutes of travel from their home, after three months of unemployment.³⁷ This disposition increases the pressure on individuals to accept any employment offer even if the new job pays much less than the one they held before becoming unemployed. In line with this work-first approach, since autumn 2011 Work Programme participants³⁸ undertaking training for up to 30 hours a week will remain on JSA and are thus subjected to the work availability and work search rules. The key message is that JSA claimants must remain engaged with the labour market.³⁹

Finally, from September 2014, the Government started to roll out Universal Credit (UC)⁴⁰ nationally to new claims from single people who otherwise would have claimed JSA. The numbers remain small: as of February 2015, 63,690 individuals had made a UC claim, with 31,030 people on the UC caseload.⁴¹ New claimants have to sign a "claimant commitment". According to the Welfare Reform Act 2012, the claimant commitment "is a record of a claimant's responsibilities

³⁶ See D. Webster, *Briefing: The DWP's JSA/ESA sanctions statistics release* (February 18, 2015).

³⁷ Jobseeker's Allowance Regulations 2013 (SI 2013/378), reg.14(3).

³⁸ The Work Programme was announced in the 2010 Conservative manifesto and is essentially a revamped version of the Flexible New Deal, on a much larger scale and with the generalisation of employment and training programmes being contracted out to private providers following a payment by results approach.

³⁹ European Social Fund, *Work Programme Providers guidance, Training Allowance JSA claimants only* (December 2014), pp.2–3.

⁴⁰ Universal Credit brings together the main working age benefits, i.e. Income-Based JSA, Income-Based ESA, Income Support, child tax credits, working tax credits and housing benefits. As is well known, there have been considerable delays and difficulties in rolling out UC nationally.

⁴¹ DWP, *Universal Credit — monthly experimental official statistics to February 2015*.

in relation to an award of universal credit”; “is to be prepared by the Secretary of State, may be reviewed and updated as the Secretary of State thinks fit”; and “is to be in such form as the Secretary of State thinks fit”.⁴² In general, the claimant commitment includes an expectation that claimants will comply with a 35-hour work search rule, although the DWP may agree a reduced time if claimants have impairments or caring disabilities. The claimant commitment is part of the “cultural transformation” introduced by UC, whereby jobseekers “will have to account more clearly for their efforts to find work and will be given a weekly timetable of tasks to complete”.⁴³ The claimant commitment details the consequences in terms of benefit sanctions if claimants “fail to comply with their responsibilities”.⁴⁴

To a large extent, the Coalition Government was able to carry out the implementation of a tougher benefit sanction regime for JSA claimants. In fact, political opposition to the Welfare Reform Bill was stifled because the leadership of the Labour Party was reluctant to be portrayed as soft on welfare in the context of popular support for benefit sanctions. In addition, senior officials in the DWP held the view that the demanding conditionality regime explained to a large extent the strong labour market performance during and after the economic crisis from 2008. A senior civil servant in the DWP, who had been in charge of strengthening the benefit sanctions regime since the late 2000s, said:

“One of the reasons, we think, that we’ve been really successful in this recession is because we’ve been able to keep this regime going. So as well as helping people to look for work we are being quite directive in making them look for jobs because we are one of the only countries in the world in recession who have managed to keep unemployment falling which we are quite proud of.”⁴⁵

Another senior official in the DWP, who had been advising ministers on labour market policies since 2007, said that there had been a strong policy consensus in favour of JSA, that JSA was viewed as an effective instrument for engaging jobseekers:

“I think amongst officials one area where Treasury and DWP officials are in general agreement is, as a general statement, for jobseekers, we are talking about jobseekers here, that regime has been relatively cost effective in terms of how much benefit you save for the amount of administrative time you put in. So there is a starting point of agreement that having an active intervention regime and requiring things of jobseekers is, as a general statement, effective.”⁴⁶

The same official also expressed the view that prior to 2012 not enough requirements had been placed on jobseekers:

⁴² Welfare Reform Act 2012 s.14, claimant commitment.

⁴³ DWP press release, *Claimant commitment to spell out what jobseekers must do in return for benefits* (August 29, 2013).

⁴⁴ DWP press release, *Claimant commitment to spell out what jobseekers must do in return for benefits* (August 29, 2013).

⁴⁵ Interview DWP (January 2014).

⁴⁶ Interview DWP (January 2014).

“So speaking for myself personally and from some other DWP policy officials I think there will be agreement that the amount that we might have required of people two or three years ago was perhaps less than would be optimum.”⁴⁷

A member of the SSAC also expressed a favourable view of the increased expectations placed on JSA recipients as part of the claimant commitment:

“What I think is happening in the latest developments of policy and particularly in the roll out of this Universal Credit programme and conditionality that goes with it, a much used unfortunate phrase around ‘tough love’ but as I go round and as a committee we do visits to front line offices and seeing some very impressive examples of tough love ... I’ve seen some very good and positive examples of that where I think, in quite a tough way, front line advisors really spotting what it is that needs to shift in this person and giving them a lot of support but also making clear there is a deal here and there are some significant sticks involved as well.”⁴⁸

Perhaps just as importantly, not only were DWP officials confident that increased conditionality and clearer sanctions were on the whole effective policies to enforce compliance with job search requirements, there was also a strong sense that these policies were popular; and opinion polls regularly confirmed the government’s advantage in that regard. Indeed, the case for tougher benefit sanctions has been widely accepted by the public.⁴⁹ A member of the Work and Pensions Select Committee explained that the Government was probably right when they said that public opinion was on the side of benefit sanctions and that there was a general sense of “unfairness” attached to the way in which the welfare system worked:

“I mean the government is not wrong when it says that public opinion appears to be onside. I get it a lot from people who are not that well off or that far away from the position themselves, they do say there is far too much spent on benefits. They’ve usually got an example to give you which isn’t drawn from the newspapers but is drawn from their own observations and experience.”⁵⁰

The notion that there was a “small minority of JSA claimants who were capable of work but who refused to do so” was used as a rationale for tougher and longer benefit sanctions, especially the higher level sanction of three years. This had been a dominant theme in the Conservative Party policy proposals in the period 2008–2010.⁵¹ The Conservatives’ *Work for Welfare*, for example, stated that

“While the majority of out of work benefit claimants would like to work if they could, there is a significant minority who are playing the system.”⁵²

⁴⁷ Interview DWP (January 2014).

⁴⁸ Interview SSAC (January 2014).

⁴⁹ In fact, concerns about benefit dependency and welfare fraud had been rising between 2000 and 2007, with widespread support for financial sanctions for single parents on benefits, as noted by J. Griggs, A. Hammond and R. Walker, “Activation for all” in I. Lodemel and A. Moreira (eds), *Activation or workfare? Governance and the neo-liberal convergence* (Oxford: OUP, 2014), pp.91–92.

⁵⁰ Interview Select Committee Work and Pensions (January 2014).

⁵¹ As observed by Peck, “the origins of workfarism, U.K. style, lie in the essentially negative conception of the welfare scrounger”, J. Peck, *Workfare States* (Guildford: Guildford University Press, 2001), p.326.

⁵² Conservative Party, Green Paper, *Work for Welfare* (2008), p.24.

In his speech on the Welfare Reform Bill in February 2011, David Cameron declared that the Bill was placing “some real responsibility on the unemployed to ensure they try to get a job”:

“So if you’re unemployed and refuse to take either a reasonable job or to do some work in your community in return for your unemployment benefit you will lose your benefits for three months.

Do it again, you’ll lose it for 6 months.

Refuse a third time and you’ll lose your unemployment benefits for three years.”⁵³

In 2011, during the House of Commons debate introducing the Welfare Reform Bill, Chris Grayling MP, then Minister for Employment, clearly subscribed to the traditional Conservative view according to which a minority of benefit claimants were “playing up” the system, which justified the adoption of a three-year benefit sanction. The Shadow Employment Minister (Labour MP) Stephen Timms moved an Opposition amendment to change the maximum sanction period from three years to one year. Stephen Timms MP asked the Minister to explain what many would consider a “pretty harsh proposal”.⁵⁴

Chris Grayling MP stated that the higher level sanction was about sending a message to people

“who have committed the most significant offence: those who refuse to apply for jobs that they are suited to do; those who wilfully turn down job offers and opportunities; and those who are referred to an activity as part of their job search but systematically refuse to turn up — again and again and again. There must be a point at which we turn round and say ‘No. That is not good enough’.”⁵⁵

A senior policy adviser in the DWP explained that the three-year sanctions were discussed at length internally at the time but that Chris Grayling MP had stood by his position:

“He didn’t expect many people to be sanctioned that long ... So I suppose from his perspective he would either say that is a sufficiently long time to darn well make sure that if you’ve done it twice you ain’t gonna do it a third time or if you do that must, in his view, indicate that as an individual you don’t feel you need to rely on that benefit — for whatever reason that might be.”⁵⁶

Ministers felt emboldened by the fact that

“there was a lot of public support generally for tougher welfare reform and tougher sanctions. So to that I can only really speculate whether ministers

⁵³ D. Cameron, Speech on Welfare Reform Bill, London (February 7, 2011).

⁵⁴ House of Commons Library Research Paper, 11/48 (June 8, 2011), *Welfare Reform Bill: Committee Stage Report*, p.24.

⁵⁵ House of Commons Library Research Paper, 11/48 (June 8, 2011), *Welfare Reform Bill: Committee Stage Report*, p.25.

⁵⁶ Interview DWP1 (January 2014).

feel like that has given them a stronger platform to do more, to be more robust.”⁵⁷

The British electorate has endorsed administrative and political elites’ messages according to which some JSA claimants have a problematic attitude towards employment.⁵⁸

In this context, although there had been multiple calls for reviews of the benefit sanctions regime between 2013 and 2015, ministers essentially ignored these criticisms. There was, however, one exception to the rule: in March 2013, as the Government needed the support of the Opposition to agree to the emergency timetabling for the Back to Work Act 2013,⁵⁹ it accepted setting up a review into benefit sanctions. The terms of the review focused almost exclusively on the issue of communication of JSA sanctions and whether claimants understood the reasons why they had been penalised.⁶⁰ In September 2013, the Government appointed Matthew Oakley, a member of the SSAC, as the independent expert to conduct the review into benefit sanctions.⁶¹

The Work and Pensions Select Committee was critical of the terms of reference of the review and recommended in its January 2014 report the establishment of a second independent inquiry into benefit sanctions, stating in particular

“that the second review of sanctions investigate: whether sanction referrals are being made appropriately, fairly and proportionately, in accordance with the relevant Regulations and guidance, across the Jobcentre network; and the link between sanctioning and benefit off-flow, including whether benefit off-flow targets have an influence on sanctioning rates ... We further recommend that this review is launched as a matter of urgency and reports before the end of 2014.”⁶²

Ministers refused to conduct another review into benefit sanctions over and above the Oakley Review, which they deemed sufficient. The Government, in its response to the Work and Pensions Select Committee’s January 2014 report, wrote that the Oakley Review was already under way and that they would “be publishing further information on sanctions through the forthcoming Work Programme Evaluation”,

⁵⁷ Interview DWP4 (March 2015).

⁵⁸ A. Dunn “Activation workers’ perceptions of their long-term unemployed clients’ attitudes towards employment” (2013) 42 *Journal of Social Policy* 800.

⁵⁹ On Monday 18 March, the Shadow Secretary of State for Work and Pensions, Liam Byrne MP, posted an article on the website *Labourlist.org*: “Our young people need a real chance to work in a real job paying a real wage” “We won’t be voting for a bill that is rammed through the House at lightning speed ... What’s more I’ll be insisting on crucial concessions to the Bill ... Ministers must launch an independent review of the sanctions regime with an urgent report to parliament.” Quoted in S. Kennedy et al., *Jobseekers (Back to Work Schemes) Bill 2012–13* (2013), House of Commons Library, standard note SN06587, p.14.

⁶⁰ In a press release issued on May 15, 2013, the DWP announced the setting up of an independent review into benefit sanctions as the Jobseekers (Back to Work Schemes) Act 2013 “requires the Secretary of State for Work and Pensions to appoint an independent person to review the operation of sanctions validated by the Act. This review will provide the Secretary of State for Work and Pensions with a report evaluating the operation of the provisions relating to the imposition of benefit sanctions that are imposed as a result of, or have been validated by, the Jobseekers (Back to Work Schemes) Act 2013.”

⁶¹ M. Oakley, *Independent review of the operations of Jobseekers Allowance Sanctions Validated under the Jobseekers Act* (London: DWP, 2014).

⁶² Committee for Work and Pensions, *The role of Jobcentre Plus in the reformed welfare system: Second Report of Session 2013–14* (TSO, 2014), HC Paper No.479, p.105.

and would “assess whether any further evaluation is needed once the current evaluation programmes have concluded.”⁶³ An interviewee in the DWP stated that

“there could have been a case made for going back and doing yet another piece of work on Jobcentre Plus but actually ministers felt there was enough evidence there from what we’d learnt from the Work Programme.”⁶⁴

In March 2015, the Select Committee on Work and Pensions pointed out that the Government had never conducted an evaluation of the impact of benefit sanctions: in particular, the Committee wrote that experts had

“noted a lack of evidence that the application, or deterrent threat, of longer sanction periods is any more effective than that of shorter ones.”⁶⁵

The Coalition Government was able to carry out most of its essentially Conservative programme regarding financial sanctions for jobseekers. However, the Government’s record was more mixed in relation to workfare schemes, as ministers faced a series of political and legal challenges.

Workfare schemes: political and legal challenges

On workfare, or work-for-your-benefit schemes, the Conservative manifesto document of 2010 declared:

“So, with the Conservatives, long-term benefit claimants who fail to find work will be required to ‘work for the dole’ on community work programmes.”⁶⁶

In 2011 the Coalition Government introduced new WfYB schemes.⁶⁷ The Employment, Skills and Enterprise (ESE) scheme initially covered four initiatives: (1) Skills Conditionality was aimed at improving the take-up of help and support for those claimants with an identified skills need; Jobcentre Plus was to refer claimants to a skills training provider; (2) Service Academies aimed to support jobseekers who were close to the labour market but who would benefit from participating in pre-employment training and work experience leading to a guaranteed interview to help them move into sustained employment; (3) the New Enterprise Allowance aimed to promote self-employment under the guidance of a business mentor, providing access to a weekly financial allowance and business start-up loan finance; and (4) the Work Programme provided back-to-work support for a wide range of claimants, including JSA claimants, and claimants on ESA,

⁶³ Committee for Work and Pensions, *The role of Jobcentre Plus in the reformed welfare system: Government Response to the Committee’s Second Report of Session 2013–14: Third Special Report of Session 2013–14* (TSO, 2014), HC Paper No. 1210, p.9.

⁶⁴ Interview DWP (March 2015).

⁶⁵ Work and Pensions Committee, *Benefit sanctions policy beyond the Oakley review* (TSO, 2015), HC Paper No.814, p.21.

⁶⁶ Work and Pensions Committee, *Benefit sanctions policy beyond the Oakley review* (TSO, 2015), HC Paper No.814, p.15.

⁶⁷ Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations (SI 2011/688), the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917), which replaced the Jobseeker’s Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010 (SI 2010/1222), introduced as part of the Welfare Reform Act 2009.

income support and IB.⁶⁸ Mandatory Work Activity Regulations prescribed mandatory work activity schemes, the purpose of which was to

“to target the small number of customers who do enough to meet the conditions of their claim while at the same time continually failing to demonstrate the focus and discipline that is a key requirement of finding, securing and retaining employment.”⁶⁹

The language of the explanatory note made it clear that there was a minority of JSA claimants who failed to engage with employers and who had neither the work ethic nor the discipline that was required to find, secure and retain employment.

The SSAC had raised some important concerns concerning the work-for-your-benefit regulations, both for the ESE scheme and covering Mandatory Work Activity. The main issues were related to the discretionary powers left to JCP advisers and Work Programme providers and the fact that the Secretary of State had very wide powers to mandate benefit claimants to participate in WfYB schemes. The underlying assumption was that there was a risk that discretionary, wide-ranging powers could be used in an arbitrary way. Regarding the ESE Regulations, the SSAC was concerned about the principle of imposing conditionality on Jobcentre Plus claimants who volunteered to participate in the schemes. For the Service Academies, claimants could opt in to the scheme but participation was mandatory from the point of referral; for the New Enterprise Allowance (NEA), whilst the choice to participate was voluntary, participation became mandatory once a mentoring placement had been agreed.⁷⁰ There was thus an original ambiguity in policy design: the Government seemed to hesitate between the principles of voluntary participation and compulsion. The fact that participation in a scheme could be voluntary up to the point of referral, after which time it became compulsory to participate, could also lead to some confusion in policy implementation.

Under the Work Programme, private providers could decide to place people in work-related activities such as work experience placements. The Work Programme was in most cases a mandatory programme: individuals aged 18–24 were to be referred to the programme after the nine-month point of their claim, while those aged 25 and over were to be placed on the programme after claiming JSA for 12 months.⁷¹ The SSAC expressed concerns

“about the breadth of the powers in draft regulation 3, which enable the Secretary of State to select a claimant for participation in the scheme.”⁷²

The SSAC raised four key objections to the Mandatory Work Activity Regulations. First, they introduced a new set of conditionality requirements that amended the body of case law regarding what “actively seeking work” actually means. Indeed,

⁶⁸ DWP, *Report by the Social Security Advisory Committee and statement by the Secretary of State for Work and Pensions The Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (S.I.2011 No.917) (TSO, 2011)*, Cm.8058, p.5.

⁶⁹ Explanatory Notes to the Mandatory Work Activity Regulations 2011 (SI 2011/688).

⁷⁰ SSAC, *The Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations 2011 (S.I. 2011 No. 688): report by the Social Security Advisory Committee (2011)*, p.33.

⁷¹ A. Dar and C. Watson, *Work experience schemes* (March 9, 2015), House of Commons Library Standard Note, p.7.

⁷² SSAC, *The Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations 2011 (S.I. 2011 No. 688): report by the Social Security Advisory Committee (2011)*.

it was assumed [*author: assumed by whom?*] that some claimants just “did enough” to comply with the “actively looking for work” rule but in practice did not do enough to find work. Secondly, the Committee noted that the Regulations failed to describe the prescribed circumstances of a “good cause” for not complying; there was some concern that discretion could lead to arbitrary decision-making. Thirdly, the Committee had concerns regarding the proportionality of benefit sanctions, as a failure to participate in a four-week programme could result in a sanction of 13 weeks (three months) for the first failure. Fourthly, the Committee noted the lack of guidance regarding expectations of contracted-out organisations taking such placements (health and safety, type of work that the referred jobseeker would be required to do), an approach that applied to the entire Work Programme rules for employers contracted out under the scheme.⁷³

The other work-for-your-benefit scheme was the Work Experience Scheme, which was targeted at 18–24 year-olds with little or no experience of work. Young people could participate in the scheme once they had been claiming JSA for 13 weeks. Work Experience Schemes started in January 2011. Participation was voluntary at the point of entry but became compulsory after the individual began his or her placement (see table 1 below).

Table 1. Main work-for-your-benefit schemes

Source: CESI, Government work experience schemes, what are the differences? <http://www.cesi.org.uk/keypolicy/government-work-experience-schemes-what-are-differences> [Accessed October 16, 2015]

Title	Eligibility	Length of placement	Mandatory or voluntary?
Work experience	Young people on JSA 13 weeks, no work experience	Up to 8 weeks	Voluntary, originally risk of sanction if leaving. Became voluntary after February 2012.
Sector based work academy	Any age on JSA	Up to 6 weeks	Deciding whether or not to take part is voluntary but once placement starts participation is mandatory.
Work Programme	Aged 18–24: 9 months on JSA Aged 25+: 12 months on JSA ESA recipient, WRAG group, when assessed as being close to work	Up to 4 weeks	Mandatory
Mandatory Work Activity	Any age on JSA	Up to 4 weeks	Mandatory.
Help to Work (post Work Programme provision)	JSA claimants who complete 104 weeks on the Work Programme	Placement of 30 hours a week for up to 26 weeks	Mandatory

⁷³ SSAC, *The Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 (S.I. 2011 No. 688): report by the Social Security Advisory Committee* (2011).

The Coalition Government was faced with political and legal challenges in relation to work-for-your-benefit schemes, mainly because they had been assimilated with forced, unpaid labour.⁷⁴ During the autumn of 2011, Shiv Malik, a *Guardian* reporter, tried to find evidence of people working for free for Sainsbury's and other major retail stores under the government workfare programmes:

“*The Guardian* put out a form asking people who had experience about working in the government working schemes. Cait Reilly contacted us; I wrote that up a few weeks later, there were a thousand comments. We put her in touch with lawyers.”⁷⁵

In autumn 2011, judicial review proceedings were brought by Ms Reilly, who took part in the “sector-based work academy” against her wishes, and Jamieson Wilson, who refused to participate in the Community Action Programme after he was told that he had to clean furniture for 30 hours per week for six months without pay. Wilson’s JSA was stopped for six months. The litigation proceedings coincided with media pressure following protests organised by organisations such as Boycott Workfare and Right to Work against work experience schemes. Indeed, the schemes became unpopular as it transpired that big retail stores and chains could have jobseekers work for them for free under the work experience scheme. On February 16, 2012 Tesco abandoned a job-for-benefit advert posted on the website of JCP in Suffolk.⁷⁶ Firms pulled out of the scheme partly for ethical reasons and partly because it was bad for their corporate reputation. Although Iain Duncan Smith MP publicly and forcibly defended the work experience scheme,⁷⁷ it became untenable to safeguard the original policy intention: which was clearly, in this case, to compel jobseekers to participate. The DWP, under instructions from Chris Grayling MP, amended the scheme so as to make it voluntary: this U-turn can be interpreted as a loss of face for the Government. Indeed, a DWP source explained:

“Despite the best efforts, I think the team here were working with the employers already on the Work Experience Scheme trying to shore them up and give them confidence to try and stay with the scheme. The decision was taken to make it completely voluntary so you can turn up, give it a couple of days and if you don’t like it you can just pull out.”⁷⁸

The media focused on Reilly’s claim, according to which work-for-your-benefit schemes such as mandatory work activity or sector-based work academy could constitute forced labour, but this claim was never taken seriously by the courts. In August 2012 Foskett J held that the Secretary of State had failed to give Wilson sufficiently detailed information about the consequences of a failure to participate

⁷⁴ For a detailed explanation of the protests regarding work experience schemes, see A. Daguerra and D. Etherington, *Workfare in 21st Century Britain* (2014), pp.61–67, http://workfare.org.uk/images/uploads/docs/Workfare_in_21st_century_Britain_Version_2.pdf [Accessed October 16, 2015].

⁷⁵ Interview with S. Malik, *Guardian* (January 2014).

⁷⁶ BBC News, “Tesco drops job for benefit advert posted on website of Job Centre Plus in Suffolk” (February 16, 2012), <http://www.bbc.co.uk/news/uk-england-suffolk-17066420> [Accessed October 16, 2015].

⁷⁷ I. Duncan Smith, “Meanwhile, we are caught in a battle between those who think young people should work only if they are able to secure their dream job, and those like myself who passionately believe that work in all shapes and forms can be valuable, for it gives people a sense of purpose and opens up further opportunities.” “The Delusions of X Factor and Sneering Job Snobs Who Betray the Young”, *Daily Mail* (February 20, 2012).

⁷⁸ Interview DWP (January 2014).

in the scheme and, in the case of Reilly, she did not receive any written notice at all.⁷⁹

The issue was whether the Regulations themselves were lawful, in as much as they respected parliamentary intention in primary legislation. In February 2013 the Court of Appeal declared the ESE Regulations *ultra vires*⁸⁰ because they failed to describe in sufficient detail the schemes, as required by primary legislation.⁸¹ An implication of this decision was that the state was potentially liable for repaying benefits unlawfully withheld from claimants. Ministers told civil servants that they did not want to pay back sanctioned claimants, so their advice was to introduce emergency legislation effectively to cancel the effects of the Court of Appeal decision, as explained by one DWP interviewee:

“Their instruction was that they don’t want to repay any money and 100% be as safe as possible and so we advised that the only way to do that is to pass emergency legislation in that parliamentary session.”⁸²

The Coalition Government’s case for retroactive legislation

Retrospective legislation is “legislation that operates on matters taking place before its enactment, e.g. by penalizing conduct that was lawful when it occurred”.⁸³ The Minister for Welfare Reform, Lord Freud, argued that there was a compelling reason to introduce retroactive legislation in the light of the court ruling, on three grounds:

“first, the cost involved; secondly, the claimants affected do not deserve a windfall payment; and, thirdly, this is an unusual case in social security legislation where a court or tribunal decision has a retrospective effect.”⁸⁴

To refer to the repayment of unlawful benefit sanctions as a windfall payment shows that the objective was to send a clear political message to claimants that they were not entitled to any compensation. The exact words of the Secretary of State when addressing his opponent in the House of Commons were:

“if the Gentleman supports the idea that people who have been mandated to do work, should take jobs and do work experience once they have volunteered without messing around otherwise they lose their benefit, I hope that we can look forward to his supporting the legislation that will ensure that we do not have to pay out money against a judgment that we never anticipated.”⁸⁵

In this speech, benefit claimants who were not complying with work requirements were portrayed as “messing around”. What was also unusual in this case is that

⁷⁹ *R. (on the application of Reilly) v Secretary of State for Work and Pensions* [2012] EWHC 2292 (Admin); (2012) 156(32) S.J.L.B. 31.

⁸⁰ *R. (on the application of Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66; [2013] 1 W.L.R. 2239.

⁸¹ To simply name a scheme, as the Regulations did, meant that they failed the statutory requirement laid out in primary legislation that the schemes must be prescribed in sufficient detail by the regulations, as explained by P. Larkin, “A permanent blow to workfare in the United Kingdom or a temporary obstacle? *Reilly and Wilson v Secretary of State for Work and Pensions*” (2013) 20 J.S.S.L. 110.

⁸² DWP interview (January 2014).

⁸³ E.A. Martin (ed.), *Oxford Dictionary of Law*, 4th edn (Oxford: 1997), p.406, cited by Standard Library Note, *Retrospective legislation* (June 14, 2013), SN/PC/06454, p.2.

⁸⁴ *Hansard*, HL Vol.xxx, col.730 (March 21, 2013).

⁸⁵ *Hansard*, HC Vol.xxx, col.19 (March 11, 2013).

ministers were adamant that they were not going to repay the claimants. In fact, the DWP could have made a special case to cancel the adverse decisions, which it chose not to, again on the basis of instructions from ministers:

“Perhaps operationally it probably would have been easier just to cancel the decisions just to get rid of them all and certainly people in operations wanted us to do that but in strategy there was no rationale for cancelling, for making special allowances on these cases.”⁸⁶

The Government argued that the retrospective legislation was needed to avoid a liability of an estimated £130 million in repaying claimants who had been sanctioned under the programmes and in being unable to impose sanctions retrospectively in stockpiled cases.⁸⁷ In the Government’s view, the main compelling public interest argument was the cost to the public purse. The Government’s argument was essentially flawed: as a result the legislation that was introduced—the Jobseekers (Back to Work Schemes) Act 2013—was vulnerable to criticisms, according to which it violated the human rights of the claimants because it interfered with their rights to a fair trial. Judicial review proceedings were brought on behalf of Caitlin Reilly and Daniel Hewston (who was not a party in *Reilly No. 1*) on the ground that the 2013 Act was incompatible with their rights under art.6 of the ECHR and art.1 of the First Protocol to the Convention (A1P1).⁸⁸ The protection of the right to a fair trial is at the heart of art.6 and is one of the most prolific areas of litigation in the European Court of Human Rights. The claimants considered that the Government’s statutory intervention in the ongoing legal proceedings was affecting their right to a fair determination of their rights. In July 2014, the Administrative Court found that although Parliament was not precluded from adopting retrospective legislation in civil matters to affect rights arising from existing laws, the principles of fair trial and equality of arms protected by art.6 “precludes any interference by the legislature ... with the administration of justice designed to influence the judicial determination of a dispute”.⁸⁹ Lang J criticised the portrayal of JSA claimants affected by the retroactive legislation as receiving an undeserved windfall when in fact “they are merely receiving their legal entitlement”.⁹⁰

The *Reilly* cases (1 and 2) arose out of an ideologically and politically driven agenda put forward by ministers who did not want to be seen as backing down at a time when the “tough on welfare” message was getting a lot of popular support.⁹¹ However, the fundamental government intention—to force unemployment benefits claimants to participate in work-related activities—was not legally challenged, because the courts always dismissed the claim that work-for-your-benefit schemes were equivalent to forced labour as defined by art.4 of the ECHR.⁹² In fact, the

⁸⁶ DWP Interview (January 2014).

⁸⁷ *Hansard*, HC Vol.560, col.822 (March 19, 2013).

⁸⁸ *R. (on the application of Reilly (No.2)) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin); [2015] Q.B. 573.

⁸⁹ *Reilly (No.2)* [2014] EWHC 2182 (Admin); [2015] Q.B. 573 at [81] per Lang J.

⁹⁰ *Reilly (No.2)* [2014] EWHC 2182 (Admin); [2015] Q.B. 573 at [126] per Lang J.

⁹¹ See C. Deeming “Foundations of the Welfare State — Reflections on the Political Transformation of the Welfare State in Britain”, *Social Policy and Administration*, article first published online (September 24, 2014), pp.17–18.

⁹² See Larkin, “A permanent blow to workfare in the United Kingdom or a temporary obstacle? Reilly and Wilson v Secretary of State for Work and Pensions” (2013) 20 J.S.S.L. 110.

significance of “popular and legal resistance” to workfare should not be overestimated.⁹³

Conclusion

From the mid-1980s onwards, the UK social security system became increasingly residual in nature, with the language of contracts pervading most areas of welfare, as evidenced by the creation of JSA in 1995–96. It was also at this time that a cross-party consensus emerged concerning the need to move away from a passive welfare system based on entitlement to unemployment benefits—which, as we have seen, had never been unconditional—to an active welfare model based on responsibilities, encapsulated in the notion of the moral obligations of citizenship. There has been a marked shift away from the duty of the state to support its citizens towards the enforcement of a citizen’s obligation to participate in the labour market.⁹⁴ Under the new welfare contractualism,⁹⁵ social rights can be understood as consisting of rights of reasonable access to benefits, rather than unconditional rights to welfare benefits as such.⁹⁶ This new welfare contractualism became a strong area of bipartisan consensus, not least because New Labour under Tony Blair promoted a “work first” approach based on the active monitoring of claimants.⁹⁷ In this respect, social attitudes surveys suggest that “Labour supporters, in particular, appear to have accepted the workfare line promoted by Labour under Blair”.⁹⁸

So what changed under the Coalition Government compared to the Labour legacy? Five shifts can be identified that represent to a large extent both an accentuation and acceleration of previous trends.

First, there has been a strong policy drive towards an increased use of financial penalties for unemployed claimants portrayed as “undeserving”.⁹⁹ Despite recurrent calls for public inquiries into the impact of benefit sanctions, the Coalition Government was able to carry out its programme without much resistance mainly because the electorate largely supported these policies. Indeed, public attitudes towards the unemployed have considerably hardened, with most people now “firmly believing that JSA claimants could get a job if they really wanted one”.¹⁰⁰ In this context, the Coalition Government was able to portray harsher benefit sanctions as essentially “fair”.

⁹³ Larkin, “A permanent blow to workfare in the United Kingdom or a temporary obstacle? Reilly and Wilson v Secretary of State for Work and Pensions” (2013) 20 J.S.S.L. 110.

⁹⁴ Harris, “Conditional rights, benefit reform and drug users: reducing dependency?” (2010) 37 J. Law & Soc. 233, 236.

⁹⁵ S. White, “Review Article: Social Rights and the Social Contract — Political Theory and the New Welfare Politics” (2000) 30 *British Journal of Political Science* 507.

⁹⁶ White, “Review Article: Social Rights and the Social Contract — Political Theory and the New Welfare Politics” (2000) 30 *British Journal of Political Science* 507; M. Freedland and D. King, “Contractual governance and illiberal contracts: some problems of contractualism as an instrument of behaviour” (2003) 27 *Camb. J. Econ.* 465.

⁹⁷ The appointment of Frank Field MP as Welfare Reform Minister in 1997 also signaled the symbolic shift towards a more “active” welfare state. Of particular significance was the fact that changes to social security were now couched in terms of welfare reform.

⁹⁸ Deeming, “Foundations of the Workfare State”, *Social Policy and Administration*, article first published online (September 24, 2014), p.19.

⁹⁹ D. Webster, *Evidence submitted to House of Commons Work and Pensions Committee* (December 12, 2014), p.2.

¹⁰⁰ Deeming, “Foundations of the Workfare State”, *Social Policy and Administration*, article first published online (September 24, 2014), p.18.

Secondly, the Coalition Government used a divide-and-rule rhetoric along the lines of the hard-working majority versus the minority living on welfare benefits to justify both tougher benefit sanctions and the expansion of workfare schemes. Although the divide between the “deserving” and the “undeserving” poor is a classical theme in the history of social security, especially in the field of social assistance and unemployment benefits, ministers devised a new theme around the idea of “fairness to the taxpayer”. In particular, the notion that the “taxpayer” directly pays jobseekers to look for employment and accept job offers has been consistently used as a powerful rhetorical device to justify tougher benefit sanctions, as spelled out by Iain Duncan Smith MP in May 2010:

“The jobseeker’s allowance has a sanction at present. It just has not been used. If you simply are not going to play ball, then the taxpayer has a right to say: ‘You need to know there is a limit to the amount of support we are going to give you.’ The sanction comes into play.”¹⁰¹

This divisive rhetoric has also been used to justify the retroactive 2013 legislation to avoid paying back JSA claimants who had been either referred for a JSA sanction or sanctioned at a time when, prior to March 2013, the alleged failure to comply with work-for-your-benefit schemes did not justify the suspension of JSA.

Thirdly, there is a strong moral judgment attached to benefit receipt, as the state seeks to instil principles of good citizenship, such as self-sufficiency and the work ethic. Neither the Work Programme, mandatory work activity scheme nor community work placements significantly improve the chances of the long-term unemployed to get back into the labour market¹⁰²; instead, the focus of many of these programmes, especially community work or mandatory work activities, is on the duty to work without a wage.¹⁰³ These placements represent obligations laid on welfare recipients by the “community” to justify receipt of social assistance.

Fourthly, the goal of welfare reform under the Coalition Government is to produce self-reliant, autonomous citizens, whose dependency on the public purse can be reduced to a minimum. The idea is to foster “cultural change” to engineer personal responsibility and self-sufficiency through the implementation of the claimant commitment. The claimant commitment is in fact ill-defined, as it is supposed to be an “iterative” document, a record of a conversation between work coaches and claimants. Much emphasis has been put on the claimants and the work coach “co-producing” the agreement as part of an “adult” conversation between advisers and claimants, but a tremendous amount of discretion has been left to advisers. There is therefore an inherent political ambiguity in the Government’s plans, with a twin emphasis on personal responsibility and compliance.

Fifthly, work-for-your-benefit schemes tend to reintroduce the principle of less eligibility, according to which benefits have to be far below the minimum wage, so that only the destitute apply for poor relief—as expressed by the Royal Commission on the Administration of the Poor Law in 1834:

¹⁰¹ P. Wintour, “Coalition government sets out radical welfare reforms”, *Guardian* (May 26, 2010).

¹⁰² Research conducted by the DWP found that “Mandatory Work Activity referrals showed no employment impacts”, DWP research, “Early impacts of Mandatory Work Activity” (June 2012), cited by A. Dar and C. Watson, *Work experience schemes*, HoC Library standard note, p.5.

¹⁰³ Eleveld, “The duty to work without a wage. a legal comparison between social assistance legislation in Germany, the Netherlands and the United Kingdom” (2014) 16 E.J.S.S. 204, 215–219.

“The first and most essential of all conditions is that the able bodied person’s situation, on the whole, shall not be made really or apparently so eligible than that of the independent labourer of the lowest class.”¹⁰⁴

Of course, this is not to say that the schemes reproduce the conditions of the workhouse.

The expansion of WfYB schemes has, however, been relatively limited,¹⁰⁵ for three main reasons.

First, there has been some political opposition to work experience schemes targeted at unemployed youth, partially because of the strong ideological element attached to this programme. Indeed, working class youth have been the primary target of Conservative retrenchment efforts since the 1980s.¹⁰⁵ This remains an important political project for the Conservative Party. In 2008, the Shadow Secretary of State for Work and Pensions, Chris Grayling MP, announced that a future Tory government would bring in boot camps for unemployed young people aged 18 to 21 who refused to take a job.¹⁰⁶ These plans were shelved between 2010 and 2015, but reappeared in the Conservative Party manifesto in May 2015. The manifesto announced the introduction of a time-limited youth allowance (six months), “after which young people will have to take an apprenticeship, a traineeship or do daily community work for their benefits”.¹⁰⁷ The justification for requiring young people to work for their benefits was framed in terms of “fairness to the taxpayer”:

“it is not fair — on taxpayers, or on young people themselves — that 18-21 year-olds with no work experience should slip straight into a life on benefits without first contributing to their community.”¹⁰⁸

In August 2015, Matthew Hancock, chair of the government task force “Earn or Learn” announced the creation of a new three-week intensive programme to get claimants work-ready within six months. Young claimants will have to take a job, apprenticeship, traineeship or unpaid work experience or lose benefits. The objective of this policy is to “create a ‘no excuses’ culture to support youth unemployment” and to “end the welfare culture that is embedded in some of Britain’s most vulnerable communities”.¹⁰⁹ It remains to be seen whether the Government will be able to carry out its workfare policy for young people.

Secondly, work-for-your-benefit schemes have been subjected to the courts’ intense scrutiny, as shown by the legal challenges surrounding the relevant regulations (*Reilly No.1*) and the Jobseekers (Back to Work Schemes) Act 2013 (*Reilly No.2*). While there has been little media coverage regarding ongoing legal proceedings, especially in relation to *Reilly No.2*, the fact remains that the High Court issued a declaration of incompatibility with the ECHR concerning the 2013

¹⁰⁴ Quoted by A. Paz-Fuchs, *Welfare to Work* (Oxford: OUP, 2008), p.74.

¹⁰⁵ See N. Harris, “Social security and the transition to adulthood” (1988) 17 *Journal of Social Policy* 501.

¹⁰⁶ D. Hencke, “Tories plan boot camps for jobless youth”, *Guardian* (May 26, 2008).

¹⁰⁷ Conservative Manifesto 2015, p.118 .

¹⁰⁸ Conservative Manifesto 2015, p.18.

¹⁰⁹ Cabinet Office press release, “Hancock: Every young person should be in earning or learning from April 2017” (August 17, 2015).

Act, at a time when only three declarations of incompatibility had been made during the 2010–15 Parliament.¹¹⁰

Thirdly, the numbers of claimant participants in WfYB schemes have been much lower than the Government had anticipated. In relation to Mandatory Work Activity, while 251,200 referrals were made between May 2011 and August 2014, only 105,620 individuals had started a placement. Actual numbers of participants are probably much lower, as placement starts once the individual attends an initial interview with the placement provider.¹¹¹ In relation to sector-based work academies, 169,330 claimants had started a placement between August 2011 and November 2014.¹¹² Again, numbers of actual participants are probably much lower. Moreover, because providers administer the Work Programme under a payment-by-result black box model, monitoring the performance of private contractors has proved particularly difficult.¹¹³

To conclude, the expansion of workfare has been first and foremost rhetorical, with relatively little in the form of “make-work workfare”,¹¹⁴ that is, strictly speaking, work-for-your-benefit schemes. However, the Coalition Government has been successful in terms of gathering strong popular support for the principle of workfare, with the notion that access to social benefits should be limited to a tiny minority of vulnerable claimants. Indeed, workfare forms part of a “discursive struggle”¹¹⁵ in which social needs and concern for the disadvantaged have been displaced by an emphasis on individual responsibility and the market. As a result, exclusion from the world of paid employment is portrayed as a sign of moral or psychological failure. To a large extent, because the three mainstream political parties have subscribed to the idea of limited social support and personal responsibility for individual well-being, as opposed to collective solidarity, the Conservative-led Coalition Government has won the battle of ideas in the political arena, at least for some years to come.

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¹¹⁰ Joint Committee on Human Rights, *Seventh Report, Human Rights Judgement*, HL Paper No.130/HC Paper No.1088, p.17.

¹¹¹ See Dar and Watson, *Work experience schemes* (March 2015), House of Commons Library Standard Note, p.5.

¹¹² Dar and Watson, *Work experience schemes* (March 2015), House of Commons Library Standard Note, p.6.

¹¹³ See report by National Audit Office, *The Work Programme* (2014), HC Paper No.266.

¹¹⁴ M. Dostal, “The Workfare Illusion: Re-examining the Concept and the British Case” (2008) 42 *Social Policy and Administration* 19.

¹¹⁵ This expression has been used by Peck in *Workfare States* (2001).