



Mair, Jane (2013) *An ideal balance?* Employment Law Bulletin, 117 . pp. 2-4. ISSN 1352-2159

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Deposited on: 19 February 2014

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Employment Law Bulletin

2013

An ideal balance?

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Subject: Employment. **Other related subjects:** Family law

Keywords: Employment policy; EU law; Family law; Flexible working; Gender

***Emp. L.B. 2** Once upon a time, not so long ago, the rules of the game were clear in both the market and the family: men went to work and women stayed at home particularly when the men became husbands and fathers and the women became wives and mothers. This gendered model was reflected in employment law where men earned a family wage and women, if they worked at all, did so for “pin money” and often part-time. In family law too, sex-specific roles were clearly defined and divided, with marriage based on the dominant model of male breadwinner and female homemaker. Recent decades have witnessed significant shifts in both work and family and these characters now seem out of date and of little relevance. Equality legislation prohibits different treatment and different pay for male and female workers and family law favours gender-neutral language, treating husbands and wives as spouses and mothers and fathers as parents. Not only have the old fashioned, gendered distinctions been questioned but the very split between work and family has been challenged. Men and women, fathers and mothers are increasingly encouraged to adopt interchangeable roles as employees and parents and to move freely between the spheres of workplace and home. The outdated stereotypes of male employee and female carer have been replaced by a modern gender-neutral ideal: the individual with work/life balance.

The idea of family friendly employment and work/life balance came to prominence in the UK when New Labour came to power (Department for Trade and Industry, *Fairness at Work* (The Stationery Office, 1998) Cm.3968 Ch.5). Prior to that, pregnant employees were provided for by way of statutory maternity rights but these rights had long been associated with strict entitlement thresholds and notoriously complex regulations and they were widely perceived as a burden on employers. Pregnant employees were a fact of life and they merited some accommodation but they were quite clearly a problem. The introduction of family friendly employment rights signaled a break with the old. Unlike maternity rights, these new rights were not just for women, so the burden and the benefits could be more evenly spread, and they were presented with a positive spin. Facilitating the accommodation of work and family promised benefits for all with: increased gender equality; better motivated and more productive employees; higher rates of employment; and lower welfare costs. The work and family agenda has developed through various consultations and sets of regulations; most recently the Department for Business, Innovation and Skills (“BIS”), *Consultation on Modern Workplaces* (BIS, 2011) and the statutory changes resulting from it.

This UK shift is situated within a broader EU context. At a European level, the recognition of family responsibilities was initially constructed within the confines of sex equality (e.g. in *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* (Case C-177/88) [1991] I.R.L.R. 27), it then developed through special rights for pregnant workers (Directive 92/85/EC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348) and provision for parental leave (Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L 145, replaced by Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC [2010] OJ L 68/13) and burgeoned into a key policy concern around the reconciliation of family and professional life (see e.g. European Council, *Managing Demographic Challenges Through Better Reconciliation of Work and Family Life - Conclusions of the Council* (“Council conclusions”) (European Council, 2011)). The challenge is no longer restricted to the individual employer trying to arrange cover for the occasional female employee on maternity leave: it has grown to encompass the social, political and personal imperative to make “two spheres of life [work and family] mutually compatible” (Council conclusions p.6). The benefits are no longer presented merely in terms of individual employees or their families but the reconciliation of work and family now sits at the heart of EU policies for growth and inclusion, central to the achievement of increased employment targets (Europe 2020 growth ***Emp. L.B. 3** strategy) and a key strategy for

tackling problems associated with demographic change.

If success was measured in terms of the number of statutory provisions and the volume of policy documentation, then we might be forgiven for thinking that the ideal of work/life balance had become a reality. Over the last 20 years or so, there have undoubtedly been improvements and many individual employees, dependants and businesses, benefit from greater protection of employment rights and flexibility in working practices. Despite legislation having been in place now for some time, there remains considerable workplace evidence of pregnancy and family-related discrimination and disappointing take up of family leave. The stereotypes of men as full-time permanent employees and women as part-time workers with interrupted career paths have been challenged but the ideal of fully flexible worker/carers remains a work in progress. But what of the picture from the other side of the balance: the sphere of families and family law? The European Foundation for the Improvement of Living and Working Conditions ("Eurofound"), *Second European Quality of Life Survey: Family Life and Work* (Eurofound, 2010) at p.2 found that:

"Europeans are more dissatisfied with the amount of time they spend with their family than with the amount of time spent at work, family life being more adapted to employment requirements than work arrangements are to family life."

Undoubtedly there have been improvements in family-related employment rights but the real test is how they work in practice. No matter how reasonable and generous the rights may appear, they are only likely to be of long term benefit if they accommodate at least some of the practical challenges of real, every day family life.

For the work and family agenda to achieve its full potential, change is required not only in the workplace but also in the family. One of the apparent benefits of modern parental or family rights as opposed to previous maternity rights is that they challenge an entrenched view that childcare is the responsibility of the mother. While there have undoubtedly been changes in family life in recent decades, they may not be as significant as we have been led to expect. A recent European Commission report into *The Role of Men in Gender Equality - European Strategies and Insights* (European Commission, 2013) found evidence of "a remarkable change in men's participation in care" but only "in certain parts of Europe" (p.7) and even then, the position remained that "men with young children continue to have higher employment rates compared to those without children, while for women the opposite holds" (p.5). There are differences across Europe and the reasons and motivations are complex but the evidence is clear that, despite some change, family roles and family responsibilities remain gendered. A recent study in Scotland of separation agreements (J. Mair, F. Wasoff and K. Mackay, *All settled? A study of legally binding separation agreements and private ordering in Scotland* (2013)), for example, showed that, of those couples who made arrangements for post-separation childcare, 90 per cent agreed that residence of the children would be with the mother. To some extent in contradiction of the high media and policy profile of shared parenting, and despite employment policy which seeks to promote shared roles, practical responsibility in many cases appears to remain with mothers. There is a danger as employment rights expand and improve, and as policy becomes more ambitious, of assuming that work and family balance is within the reach of many employees. The effectiveness of employment law and policy must be assessed realistically against the background of family life, which may not be as equal as we sometimes assume.

Much of the focus of the work and family agenda has been on facilitating parents and other family members in maintaining and improving their access to employment. The Resolution of the European Parliament 3 February 2009 on non-discrimination based on sex and intergenerational solidarity (2010/C 67 E/05) offered a clear example of this work-centric perspective. With reference to the fact that women with dependent children had only a 62 per cent employment rate, well below the Europe 2020 target of 75 per cent, it was commented that "from the point of view of sustainability, it is intolerable to allow the resources in question and their potential to go to waste". From the feminist calls of the seventies for wages for housework to the recent media storm over coalition proposals for tax free childcare, and Nick Clegg's radio encounter with a "stay-at-home mum", the issue is the same: childcare and domestic work remain undervalued and often invisible within economic policy and political debate. Nicole Busby in her book *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) has argued that, in tandem with the right to work in EU law, there should also be a right to care.

Caring, traditionally, has had its place within the family but as the focus shifts to facilitating participation of both men and women in paid employment throughout the life cycle, unpaid care is increasingly invisible (although at the same time, in the market, care as a service for sale continues to

grow). Working parents may be given short term concessions at work in order to ***Emp. L.B. 4** facilitate their caring responsibilities but in the long term it is their participation in paid employment which is valued. Scots family law might be argued to undervalue care, particularly in its statutory framework for financial provision on divorce. The Family Law (Scotland) Act 1985 favours a financial clean break on divorce with limited scope for ongoing maintenance payments between ex-spouses. Even where one has been dependent on the other during marriage, most likely a wife with childcare responsibilities, a maximum readjustment period of three years is envisaged to allow her to become self-supporting (s.9(1)(d)). This system of family law reflects an employment model of equal opportunities and easy combination of work and care which for many remains more an aspiration than a reality.

Work/life balance or the reconciliation of private and professional responsibilities cannot be achieved by employment rights alone and family law should be wary of assuming that workplace equality exists. Each sphere needs to be aware of what is happening in the other. Changes in workplace organisation and employment rights must be matched by changes in family life if old stereotypes are to give way to modern ideals.

Emp. L.B. 2013, 117(Oct), 2-4

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