

OXFORD

A RIGHT TO CARE?

UNPAID CARE WORK IN
EUROPEAN EMPLOYMENT LAW

Nicole Busby

OXFORD MONOGRAPHS ON LABOUR LAW

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OXFORD MONOGRAPHS ON LABOUR LAW

General Editors: PAUL DAVIES, KEITH EWING,
MARK FREEDLAND

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General Editors: Paul Davies, Fellow of Jesus College and Allen and Overy Professor of Corporate Law in the University of Oxford; Keith Ewing, Professor of Public Law at King's College, London; and Mark Freedland, Fellow of St. John's College, and Professor of Employment Law in the University of Oxford.

This series has come to represent a significant contribution to the literature of British, European, and international labour law. The series recognizes the arrival not only of a renewed interest in labour law generally, but also the need for fresh approaches to the study of labour law following a period of momentous change in the UK and Europe. The series is concerned with all aspects of labour law, including traditional subjects of study such as collective labour law and individual employment law, but it also includes works which concentrate on the growing role of human rights and the combating of discrimination in employment, and others which examine the law and economics of the labour market and the impact of social security law and of national and supranational employment policies upon patterns of employment and the employment contract. Two of the authors contributing to the series, Lucy Vickers and Diamond Ashiagbor, have received awards from the Society of Legal Scholars in respect of their books.

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Series Editors' Preface

The aim of our series of labour law monographs has been to publish works which are, on the one hand, of the highest quality of scholarship, and, on the other hand, innovative or experimental, serving to expand the boundaries of the subject or to throw bright new light upon established areas of discussion. We feel sure that the present work will be regarded as maintaining that by now established tradition, and as continuing the progressive extension of the series from labour law, as previously understood, towards a wider understanding of the discipline.

Nicole Busby begins this work with the arresting but not exaggerated assertion that '[t]he reconciliation of paid work and unpaid care is arguably the most pressing problem currently facing labour law'. By so doing, she immediately locates her work within two greatly intersecting genres of labour law studies which are currently very prominent and which are well represented in our series, that is to say the genre which is focused upon the issue of flexibility and atypical employment, and the genre which is focused upon the situation of women in the workplace.

In that situation, we are, as Series Editors, inevitably concerned to ensure that monographs presented within those genres have fresh contributions to make to an already impressive body of literature. We have felt fully satisfied that this criterion of inclusion in our series has been amply fulfilled. The author's idea of canvassing the possibilities of developing a 'right to care' in European employment law is a fruitful and topical one.

The work is all the more significant for being presented not in the traditional sense of a right on the part of the dependent person to be cared for, but in the very different though interestingly correlative sense of a right on the part of the would-be carer to be enabled to discharge her or his caring responsibilities. The author's decision to survey the regulatory scene from that particular perspective of inquiry is validated by the freshness and liveliness of approach which is sustained through the work.

So we warmly welcome this work into our series and look forward to the debates and the policy developments which we think it will serve to provoke.

Paul Davies, Keith Ewing, and Mark Freedland

Preface

Although this book started its life in a period which preceded the current economic crisis, the relevance of the subject matter has only been enhanced by the circumstances of the last two years. The recession which has swept through Europe, predicated by the meltdown of financial institutions and accompanied by high unemployment rates, and the inevitable threat to further economic integration has left the future of European social policy vulnerable to budgetary restrictions and protective practices by Member States. In times of economic downturn, the pursuit of workplace equality is likely to suffer as the types of work undertaken by groups of vulnerable workers become more precarious. However, at the same time, the current circumstances in which the European Union finds itself do offer all of Europe's citizens an opportunity for reflection and a chance to reassess the future priorities of the integration project. In taking stock of the EU's achievements so far and in identifying and prioritizing future goals, it is at least possible that we might engage in the reassessment of work and the different values attributed to its various components in order to provide a law and policy framework capable of encompassing all aspects of individual effort and achievement. I hope that the ideas presented in this book might, in some small way, contribute to that task.

During the writing of this book, the Lisbon Treaty came into force and the changes that it made to EU law, including the renaming of European Court of Justice as the Court of Justice of the European Union and the renumbering of the pre-existing Treaties and, in the case of the EC Treaty, its renaming as the Treaty on the Functioning of the EU (TFEU), have been incorporated into the text as appropriate. The law is stated as at 1 December 2010. All errors and omissions are entirely my own.

It is not possible to list all of those who, in various ways, have contributed to the book and to the wider project from which it originated and I thank all of those whose ideas have been incorporated and who have offered assistance and support over the years. However, I must pay specific tribute to some key individuals. This book started out as a PhD thesis and, although little remains of that original work in this text, the ideas formulated here have their roots in my postgraduate studies. Mike Sanderson has provided a valuable and enduring friendship throughout. Noreen Burrows has remained a source of inspiration and I will always be in her debt for providing an early opportunity that has enabled me to pursue a career that I love. My supervisor and friend Jane Mair deserves special thanks for her invaluable support and advice. Evelyn Ellis and Rosa Greaves provided useful feedback and encouragement. In recent years, the participants and discussants at various streams and panels of the Socio-Legal Studies Association's annual conferences have provided a friendly yet challenging environment for the testing and development of new ideas. My gratitude is due to Grace James and Morag McDermont who, as

good friends and collaborators, have provided tireless assistance and enthusiasm for various offshoots enabling the continuing development of certain aspects of the work presented here.

I am indebted to the editorial team at OUP for their encouragement and support, not least the editors of the Oxford Monographs on Labour Law series, Paul Davies, Keith Ewing, and Mark Freedland, for adopting and endorsing the text. Two anonymous reviewers provided insightful comments that enabled me considerably to refine the original proposal. Gwen Booth and Chris Champion assisted at an earlier stage and Natasha Knight, Ela Kotkowska, and Ceri Warner have been extremely helpful and patient in guiding the manuscript towards publication.

Finally, my greatest debt is to my family who have lived with this book for as long as I have. My daughters Eve, Eleanor, and Màiri have kept me grounded and have helped me to experience at first hand the value of giving and receiving care within a supportive environment. I dedicate this book to them and to my husband Calum who, through his love and encouragement, has made it possible to achieve both personal and professional fulfilment.

Nicole Busby
The Stirling Law School
February 2011

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1

Unpaid Care and Paid Work in European Employment Law

Introduction

The reconciliation of paid work and unpaid care is arguably the most pressing problem currently facing labour law. The need to develop suitable legal strategies that enable individuals to combine informal care-giving with paid employment matters to the individuals themselves, the recipients of their care, employers, and the State. It matters to society as a whole, to each and every citizen and is of fundamental importance in ensuring the continued sustainability of developed economies. Recognition of the need to facilitate informal care-giving within formal workplace structures has led to the development of a plethora of laws and associated policies aimed at providing support for carers to remain in paid employment, largely by assimilating into established practices and procedures. As a result, there is now a greater number of pre-school childcare places available in the EU than at any time¹ and the provision of paid or partially paid periods of maternity leave available following the birth of a child has increased incrementally at the EU level over the last 20 years.² Rather than resulting from a new political awareness of the needs of worker-carers, such recent additions to the law and policy mix are part of a slow, incremental movement towards targeted State support for the management of unpaid care and paid employment within a social welfare framework. However, despite the development of a complex and apparently sophisticated web of law and policy, worker-carers face an ongoing conflict between meeting the requirements of those for whom they care and the demands of an often inflexible working environment. In attempting to meet these competing demands, carers themselves face a deficit in support which can have many negative effects on their personal well-being. This discord between the two facets of an individual's life can be labelled 'the

¹ Eurofound (2006) *Childcare Services in the EU—What Future?*, available at <http://www.eurofound.europa.eu/emcc/content/source/eu06015a.htm?p1=ef_publication&p2=null> accessed 7 December 2010.

² At the time of writing, a proposal for a directive to further extend the minimum period of paid maternity leave from 14 to 18 weeks is working its way through the EU legislative process. See *Proposal for a directive of the European Parliament and the Council amending Council Directive 93/85/EEC*, COM (2008) 600/4, discussed in Chapter 5.