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Family-friendly employment laws (re)assessed: the potential of care ethics

Article

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Family-friendly employment laws (re)assessed: the potential of care ethics.

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Abstract

In light of various reforms in recent years, this article provides a (re)assessment of the broad package of family-friendly employment rights and relevant dispute resolution procedure now available to pregnant workers and working carers. It exposes how the realities of working life for many pregnant workers and carers and the long standing desire to promote gender equality in informal care-work remain at odds with the legal framework. An argument is presented in favour of an approach that, based upon the concept of care ethics, better engages with the impact of the provisions upon crucial interdependent care relationships.

1. Introduction

In many ways, since the introduction of shared parental leave (SPL) in 2015[1], the family-friendly framework of rights now *appears* complete: mothers and fathers can 'take advantage of additional flexibility in the way they choose to care for a new arrival to the family'[2] and this builds upon a fairly generous maternity leave entitlement, a right to paternity leave, a right to request flexible working and protection against discrimination on the grounds of pregnancy or maternity. The EU has also developed its reconciliation agenda over the years and this, in the main, has positively influenced national laws.[3] But, as will be argued in the following section, appearances can be deceptive and the existing package of rights available to working parents is flawed: it remains focussed, in practice, on new mothers and does little to help challenge traditional constructions of care as a female responsibility or challenge the dominant ethos of the labour market, which promotes the

*I would like to thank Nicole Busby, Eugenia Caracciolo di Torella, Simon Deakin, colleagues at Reading School of Law and the anonymous reviewers for useful feedback on previous drafts of this article. Any errors are, of course, my own.

[1] See the Shared Parental Leave Regulations 2014 SI 2014/3050. For further details see ACAS guidelines (www.acas.org.uk) or Maternity Action's information sheet at http://www.maternityaction.org.uk/wp/wp-content/uploads/2015/02/Shared-parental-leave-and-pay-2015.pdf. For comment see G. Mitchell, 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44 *Industrial Law Journal* 123.

[2] ACAS (2015) *Shared Parental Leave: A Good Practice Guide for Employers and Employees*, 1.

[3] However, for an interesting special issue critiquing EU reconciliation measures see *Journal of Social Welfare and Family Law* (2015) Vol 37(3).

unencumbered worker[4] as ideal and fails to reflect the interdependence of care across our life course. Moreover these (flawed) laws are not adequately supported by the current dispute resolution infrastructure and processes, and exist at a time when successive governments have failed to effectively tackle pregnancy and maternity related workplace discrimination. In addition, austerity measures and related reforms have increased the vulnerability of many workers, weakening the ability of these laws to adequately protect those who are mistreated in the workplace as a result of pregnancy or care-giving responsibilities.[5] These key concerns are discussed in detail below: section 2 considers (a) the legal framework of rights[6] and (b) the dispute resolution procedures in place. In the latter, particular attention is given to their ineffectiveness as a means of supporting those who experience unlawful treatment at work due to pregnancy and maternity. Section 3 then outlines how an alternative approach, based upon care ethics, could potentially help promote a framework that better reflects the inter-dependence of care and better challenges gendered constructions of care-work and labour market participation.

2. The limits of existing provisions

Overall, many of the inadequacies of family-friendly employment laws and the processes that support their enforcement reflect the fact that developments in this area of social policy are precarious: vulnerable to economic downturns and often shelved or diluted when perceived and presented as a burden on business. Family-friendly policies are rarely prioritised for long enough to ensure that policy makers engage with the issues in a meaningful way. Indeed, the topic fell out of the policy spotlight when priorities shifted in light of economic hardship. This may be, as Rubery and Rafferty have noted more generally

[4] S. Berns, *Women Going Backwards: Law and Change in a Family-Unfriendly Society* (Alderhot, Ashgate,2002); J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford, OUP, 2000) and C. McGlynn, 'Work, Family and Parenthood: The European Union Agenda' in J. Conaghan, R. Fischl and K. Klare (eds) *Labour Law in an Era of Globalization: Transformations, Practices and Possibilities* (Oxford, OUP, 2005).

[5] For a discussion of how austerity cuts following the 2008 crisis impacted on reconciliation in the EU see R. Guerrina, 'Socio-Economic Challenges to Work-Life Balance in times of Crisis' (2015) 37 *Journal of Social Welfare and Family Law*, 336. See also special issue of *International Journal of Sociology and Social Policy* (2013 Vol.33(9 /10)critiquing work/life balance during economic crisis and J. Rubery and A. Rafferty, 'Women and Recession Revisited' (2013)27 *Work, Employment and Society* 414 and J. Lewis, 'Work/family reconciliation, equal opportunities and social policies: The interpretation of policy trajectories at the EU level and the meaning of gender equality 1997-2005' (2006) 13 *Journal of European Public Policy* 13, 420.

[6] Although, given that the majority of established rights have received considerable academic attention, the majority of critique in this section is of the new shared parental leave provisions.

in relation to work-life balance policies across the EU, a weakness in framing legislation by focussing, as this area of social policy often does, on the business case. As they put it, 'significant changes in priorities can be expected in a context where businesses can afford to be less concerned about retaining staff, welfare state expenditure is being cut back and the EU and national governments can no longer assume that work is available to all who seek it'.[7] An example in the UK is the shelving by New Labour of plans to extend the payment of statutory maternity pay (SMP) to a full year due to the economic instability caused by recession. Such re-prioritisation reflects the continued undervaluing of parenting and care in general.[8] In this section, two examples demonstrate the inadequacy of the current approach: the limits of the legal framework of rights available and the dispute resolution procedures are discussed.

a. Limits of the current legal framework

At the core of the package of rights on offer is a generous maternity leave entitlement[9] that has been extended several times and is available to employees[10] including those who adopt and, more recently, those who have a baby through a surrogacy arrangement.[11] Currently available for a maximum period of 12 months, the leave is divided into ordinary (26 weeks) and additional (26 weeks) leave. SMP is paid, to those who qualify, for 9 months, earnings related for the first six weeks at 90% of her weekly earnings and then payable at SMP rate, or 90% of average earnings if that is less, for the remaining 33 weeks. Those who do not qualify for SMP may claim maternity allowance. The final three months are unpaid. Whereas

[7] J. Rubery and A. Rafferty, 'Women and Recession Revisited' (2013) 27 *Work, Employment and Society* (2013) 27(3) 414, 418.

[8] See for example, S. Fredman, *Women and the Law* (Oxford, OUP, 1997). See also J. Herring, *Caring and the Law* (Oxford, Hart Publishing, 2013) and N. Busby, *A Right to Care?: Unpaid Care Work in European Employment Law (*Oxford: OUP, 2011).

[9] See S71-75 ERA 1996 and Regulations 4-12A of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312).

[10] Of course, many working parents and carers are not employees and, as Fredman points out, formulating rights for these remains a central challenge: see S. Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10 *International Journal of Law in Context*, 442.

[11] The Children and Families Act 2014. Thus providing a new right for this cohort of surrogate parents who have, in recent years, been unable to establish equal treatment with birth mothers: the CJEU ruled in *C.D. v S.T C-167/12 CJEU* (2014) that denial of maternity or adoptive leave and pay to surrogate parents is not contrary to EU law as it doesn't fall within the EU Pregnant Workers Directive (as the claimant was not pregnant) and is not discriminatory contrary to ETD as a man entering a surrogacy arrangement would be treated in the same way. See further, E. Caracciolo di Torella and P. Foubert, 'Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity For a More Coherent Regime of Parental Rights in the EU?' (2015) 40 *The European Law Review* 40, 52.

maternity leave entitlement is fairly generous the ability to take advantage of the full right to twelve months leave still varies according to personal economic wellbeing. A maximum of ten keep in touch (or KIT) days are available to new mothers, and can help boost household income during leave, but only if she has agreed with her employer that they are paid at full contractual rate.[12]

Laws are also in place to protect pregnant women from detrimental treatment at work. Pregnancy and maternity are a protected characteristic under the Equality Act 2010, and s.18 clearly states that it is discriminatory to treat a woman unfavourably during the 'protected period',[13] because of pregnancy, illness suffered as a result of pregnancy or because she is on compulsory maternity leave or is exercising, seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave. If the 'unfavourable treatment' is a dismissal it is also likely to be automatically unfair contrary to s.99 of the Employment Rights Act 1996.[14] Such treatment is also contrary to relevant EU legislation[15] and there is ample progressive EU case law on the issue reflecting an approach which, although not devoid of criticism,[16] has been generally purposive over the years. However, the ineffectiveness of the available legal protection is reflected in recent research findings: the Coalition Government funded a major joint investigation by the Equality and Human Rights Commission (EHRC) and Department of Business, Innovation and Skills (BIS) to

[12] See G. James, 'Enjoy your leave but "keep in touch": help to maintain parent/workplace relationships' (2007) 36 *ILJ* 313.

[13] Defined as beginning 'when the pregnancy begins, and ends — (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; (b)if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy' (s18(6)). The employer does however need to be aware of the pregnancy in order to trigger legal protection – see *Del Monte Foods v Mundon* (IRLR 224 EAT), discussed in G. James *The Legal Regulation of Pregnancy and Parenting in the Workplace* (London, Routledge, 2009) at 59. For an interesting re-writing of the judgment from a feminist perspective see R. Horton and G. James 'Mundon v Del Monte Foods Ltd: judgment' in R. Hunter, C. McGlynn and E. Rackley (eds) *Feminist Judgments: from Theory to Practice* (Oxford, Hart Publishing, 2010).

[14] Hence it doesn't require 2 years continued service, as is the case for the majority of unfair dismissal claims: ERA 1996 S108(1).

[15] Protection for pregnant and new mothers at work has been a focus of 2 key Directives: The Equal Treatment Directive 76/207/EEC (now, Recast Directive 2006/54/EC) and the Pregnant Workers Directive 92/85/EEC. For a discussion, see N. Busby and G. James 'Regulating Working Families in the European Union: A History of Disjointed Strategies' (2015) 37 *Journal of Social, Welfare and Family Law* 295 and P. Foubert and S. Imamovic 'The Pregnant Workers Directive: Must Do Better: Lessons to be Learned from Strasbourg'(2015) 37 *Journal of Social, Welfare and Family Law* 309.

[16] See ibid N. Busby and G. James; P. Foubert and S. Imamovic. See also, E. Caracciolo di Torella and A. Masselot 'The ECJ case law on issues related to pregnancy and maternity: an attempt of classification' (2001)26 *European Law Review* 239; -260; C. McGlynn 'European Union family values: ideologies of "family" and "motherhood" in European Union law' (2001)8 *Social Politics* 325; G. James, supra n.12.

consider the prevalence and nature of pregnancy and maternity discrimination and disadvantage in the workplace.[17] The findings are depressingly familiar.[18] The research estimates than around 54,000 women are annually dismissed, made compulsorily redundant while others are treated so poorly that they feel they have to leave their jobs, opening potential claims to constructive dismissal and discrimination. Around 100,000 women a year experience harassment and negative comments relating to pregnancy and flexible working from employers and colleagues. One in three felt unsupported by their employer at some point when pregnant or returning to work and one in ten are discouraged from attending antenatal appointments.

For new fathers or partners, the right to ordinary paternity leave was introduced in 2002.[19] It was heralded as a new focus in family-friendly employment laws but, being of two weeks duration, paid at a flat rate equivalent to SMP and restricted to employees with 26 weeks continuous service at the 15th week before childbirth, the provisions were never comparable to maternity entitlement and never likely to dramatically alter father's traditional patterns of engagement in household chores, parenting or paid work.[20] However, in 2010 the Coalition Government introduced the right to additional paternity leave (APL),[21] now

[17] See EHRC/BIS (2015) *Pregnancy and Maternity-Related Discrimination and Disadvantage First Findings: Surveys of Employers and Mothers* (BIS Research Paper No 235), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448162/BIS-15-447-pregnancy-and-maternity-related-discrimination-and-disadvantage.pdf.

[18] The true extent of this was first aired publicly in a EU funded report by the, then, Equal Opportunities Commission (EOC – now the Equality and Human Rights Commission, EHRC) in 2005: *Greater Expectations: Final Report of the EOC's Investigation into Discrimination against New and Expectant Mothers in the Workplace* (EOC (2005) *Greater Expectations: Final Report of the EOC's Investigation into Discrimination Against New and Expectant Mothers in the Workplace*, Manchester: EOC available at http://www.maternityaction.org.uk/wp/wp-content/uploads/2013/09/eocpregnancydiscrimgreaterexpectations.pdf) provided damning evidence of 'one of the most hidden and damaging forms of workplace injustice' (at p7). It reported that almost half of all pregnant workers and those on maternity leave experienced some kind of discrimination and that, annually, over 30,000 women were sacked, made redundant or left work as a result.

[19] Under the Paternity and Adoptive Leave Regulations (2002) SI 2788.

[20] See E. Caracciolo di Torella 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers' (2007) *Industrial Law Journal* 318. For a discussion of how fathers are often ignored in relevant legal frameworks E. Caracciolo Di Torella 'Men in the Work/Family Reconciliation Discourse: The Swallows That Did Not Make Summer?' (2015) 33 *Journal of Social Welfare and Family Law* 334. R Collier 'Feminising the Workplace? Law, the 'good parent' and the 'problem of men' in A. Morris and T. O'Donnel (eds) *Feminist Perspectives on Employment Law* (London, Cavendish, 1999); R. Collier and S. Sheldon *Fragmented Fatherhood* (Oxford, Hart Publishing, 2008); Fredman, supra n.10.

[21] Additional Paternity Leave Regulations 2010. For comment, see M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010: A New Dawn or More "Sound Bite" Legislation?' (2011) 33*Journal of Social Welfare and Family Law*, 25.

replaced by shared parental leave (SPL). APL was, at the time, a momentous step forward in terms of father-friendly employment rights. It allowed fathers and partners to take paternity leave of up to 26 weeks (minimum of two weeks) before the child's first birthday. The father had to satisfy the same continuity criteria as for paternity leave. Significantly though, it was only available if the mother returned to work early and transferred the remainder of *her* leave entitlement to him and it could be paid if the mother transferred leave where she would have been eligible for SMP. The APL provisions were, thus, tangled up with the mother's leave and did little to challenge the normative expectation that mothers are primarily responsible for, and that they are the most naturally inclined towards and most adept at, caring for children - a patriarchal construction that has long been contested in feminist literature.[22]

The EU parental leave provisions add another layer of rights to these parental entitlements. The Maternity and Parental Leave Regulations[23] offer some parents the opportunity to take up to 18 weeks leave[24] before the child's 18th birthday.[25] However, the entitlement is restricted in a number of ways: it is only available to employees with a year's continuous employment, has to be taken in blocks of one week minimum and 4 weeks maximum, can be delayed by employers if to grant it would unduly disrupt the functioning of the workplace, and, most significantly, it is unpaid. Its use is therefore fundamentally limited, reflecting the significantly weak engagement with work-care issues at EU level.[26]

To this framework of employment rights the previous (Coalition) Government recently added the SPL provisions, which came into force in December 2014 and apply to parents of children due on or after 5th April 2015. SPL replaced the APL provision and is also available

[22] See, for example, M. Fineman, *The Neutered Mother, the Sexual family and Other Twentieth Century Tragedies* (London, Routledge, 1995); M. Nussbaum, *Women and Human Development* (Cambridge, CUP, 2000); S Ortner, 'Is female to male as nature is to culture?', in J. Landes (ed.) *Feminism, the Public and the Private* (Oxford, OUP, 1998); C. Patemen, 'Feminist Critiques of the Public/Private Dichotomy', in S. Benn and G. Gaus (eds) *Public and Private in Social Life* (New York, St Martin's Press, 1983); A. Rich, *Of Woman Born*, *(*London, Vigaro Press, 1977); C. Smart, 'Deconstructing motherhood' in E. Silva (ed.) *Good Enough Mothering? Feminist Perspectives on Lone Motherhood (*London: Routledge, 1996) discussed further in James, supra n.10 at [9-18].

[23] Located in Part III of the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312.

[24] Increased in March 2013 from 13 weeks - see Parental Leave EU Directive Regulations 2013 SI 2013/238.

[25] Extended in April 2015 (Maternity and Parental Leave etc. (Amendment) Regulations 2014/3221).

[26] See *Journal of Social Welfare and Family Law* special edition, supra n.3.

to eligible adopting parents and those intending to have a child born through a surrogacy[27] arrangement. Although the first two weeks maternity leave following childbirth remain compulsory (four weeks for factory workers),[28] under the SPL provisions a woman who is eligible for statutory maternity/adoptive leave and pay is now entitled to bring both of these to an early end and elect for SPL instead. This new provision builds upon, but is subtly different from, the APL provisions.[29] Under the latter, a mother could transfer a block of up to 26 weeks maternity leave entitlement (post compulsory leave) if she chose to return to work early. SPL allows eligible parents more flexibility to share the leave in various ways: for example they may choose to take some leave at the same time or take it in turns to have periods of leave to look after the child. Indeed, even if the mother has no eligible partner with whom to share that leave, the provision may still offer her some flexibility in terms of when and how she uses her leave entitlement – perhaps returning to paid employment for a block of time whilst a partner or grandparent or other carer is able to care for her child. In addition, where a father is entitled to SPL and pay and a mother isn't, perhaps because she is self-employed, the father can take SPL while the mother returns to work – a situation that was not possible previously as the APL entitlement was intrinsically tied to and dependent upon the right of the mother to statutory maternity leave.

However, there are flaws in the new provisions. First, the core SPL rights are fairly complex. This, unlike maternity leave, is not a day-one right. There are separate criteria for the mother and father/partner and separate criteria for SPL and SPL pay and these also include various notice requirements. The scope for confusion in understanding these eligibility conditions and notice requirements is vast.[30] Both parties wanting to take SPL must give

[27] See Caracciolo di Torella and Foubert, supra n.11.There are also now plans to extend SPL to include working grandparents by 2018 (see https://www.gov.uk/government/news/chancellor-announces-major-new-extension-of-shared-parental-leave-and-pay-to-working-grandparents)

[28] S.72 ERA.

[29] Set out in the Additional Paternity Leave Regulations 2010 SI 2010/1055. For a discussion of the controversy surrounding compulsory maternity leave see J. Suk, 'From Antidiscrimination to Equality: Stereotypes and Life Cycle in the United States and Europe' (2012) 60 *The American Journal of Comparative Law* 76.

[30] Indeed, to be effective, such provisions require a very knowledgeable and supportive employer and line-manager, especially as refusal of blocks of leave does not need to be justified - see G. Mitchell 'Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44 *ILJ*, 123. It is telling that popular commentator, Daniel Barnett, referred in correspondence with those signed up to his email list to the provisions as 'the yukkiest, horriblest law ever' and the BIS guidance for employers lists no less than 96 frequently asked questions (see

effective notice to their employers. This, according to the Regulations, includes giving written notice of entitlement and intention to take SPL a minimum of eight weeks prior to each SPL period. The detailed notice provisions are confusing and cumbersome. They, as is the case with so much of the law that relates to this area, are insensitive to the realities of parenting and reflect a lack of consideration of the unpredictable nature of childbirth and needs of parents during what can be an incredibly emotionally and physically draining period. For example, a working couple may have planned, pre-birth, to organise their leave so that the mother avails herself of maternity leave for the first 3 months before they opt for shared parental leave and divide the remaining leave between them. However, if the birth is more traumatic than anticipated, or the baby or mother requires extra care, they may need to exchange the maternity leave and pay for SPL straight away, following ordinary paternity leave and compulsory maternity leave entitlements, so as to allow both parents to take leave at the same time during what may be, or may become, a critical and stressful time – especially if they have other care-giving responsibilities. Given these notice periods, they would not only have to understand and comply with these procedures during a stressful time, they would have to wait two months from the delivery of these notifications to begin SPL. It is clear that this is an area where the needs of employers are prioritised: whilst the benefit of adequate notice to workplace functioning is clear, the reality of childbirth and parenting – workplace reconciliation is at odds with this dogmatic approach. The implications of this in the light of cuts in legal aid funding and the closure of many legal advice centres is of particular concern (see further below) and tarnishes the initial gloss of SPL.

Second, SPL is paid at the flat statutory rate from day one, whereas SMP is linked to the mother's earnings for the first six week. Hence, a couple contemplating sharing the childcare during this initial period following the birth may well be reluctant to elect for SPL if to do so has negative financial implications for the family. This period post the birth can be particularly intense for most couples but even more so where, for example, the birth was by caesarean or complicated in some way, there were multiple births or the family have other care-giving responsibilities. Adopting parents might also feel that this period of

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417505/bis-14-1329-Employers-technical-guide-to-shared-parental-leave-and-pay-1.pdf).

adjustment would benefit from having both parties present. Yet, the flexibility provided in theory by SPL is, because of the financial consequences, unlikely to be a realistic option for many. The equal parenting ideal at the heart of SPL is, in practice, compromised by restricted financial practicalities during the first six weeks - and potentially longer if the mother is able to access a preferential occupational maternity leave package.

In addition to the core leave provisions outlined so far, a key initiative that gives working parents, and carers with elderly dependants, a group that is often underrepresented in this debate,[31] a useful right, beyond legislation that focusses on the first 12 months post birth is the right to request flexible working.[32] It allows eligible employees to ask for modifications to be made in terms of how, when and where they work, providing these parents with the opportunity to re-structure their working lives in a way that eases the pressures involved with providing daily informal care and participating in employment. An employee must have been employed continuously for 26 weeks before s/he can request to work flexibly. Employers now, since 2014, have a duty to deal with requests in a 'reasonable manner' and within a 'reasonable' period of time[33] but if an application is refused, and there are several broad acceptable reasons for refusal,[34] the employee is not eligible to re-apply for 12 months.

If accepted, contractual changes are permanent,[35] which can be detrimental and, ironically, stifle flexibility longer term: for example, a father's employer agrees to a schedule that allows him to take his son to school in the morning and work later to make up the hours, but as the child grows the family find that he is better able to attend pre-school care, but benefits from support with homework or escorting to clubs in the evenings so the arrangement is no longer as useful as it initially was and modification would better enable

[31] See G. James and E. Spruce 'Workers with Elderly Dependants: Employment Law's response to the Latest Care-giving Conundrum' (2015) 35 *Legal Studies* 463.
[32] S80F-80I ERA 1996, the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 (SI 2002/3236) and the Flexible Working (Procedural Requirements) 2002 (SI 2002/3207). For comment see Anderson, L (2003).
[33] ACAS has produced a statutory code of practice on the meaning of 'reasonable' - http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf
[34] Including the burden of additional costs and detrimental impact upon work quality.
[35] Compare with New Zealand - see A. Masselot, 'The rights and realities of balancing work and family life in New Zealand' in N. Busby and G. James (eds) *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Cheltenham, Edward Elgar, 2011) at 69.

them to function as a family. Moreover, although originally restricted to parents and then extended to those with caring responsibilities for adults the right to request has now, since 2014, been extended to all eligible employees.[36] This recent change is both a blessing and a curse. It is a blessing because it increases the potential for all workers to experience a healthier work-life balance and helps normalise the notion that we all have a need to do so. It is a curse however, because the extension to non-carers potentially dilutes this law's use for working carers. Employers are under no obligation to prioritise the *needs* of working carers above the *desires* of other workers for flexibility. Using the example above, the carer's request to start a shift later to enable care-work may be rejected more easily if the employer has already agreed to allow another worker, who perhaps likes to leave home later in order to avoid rush hour traffic or attend a class at the company's gym, the right to do so. Moreover, the right to request continues to place the onus on the individual, carer or non-carer, to opt out of what is constructed as 'full' and 'valued' labour market participation - so rigid and demanding workplace structures, and the cultural biases that permeate and perpetuate them, are presented as the norm to be challenged on an ad hoc and individual basis.

b. Dispute resolution procedures

Any package of rights, to be effective,[37] needs to be supported by a solid dispute resolution infrastructure that compliments the general tenet of those rights. Unfortunately, as the following discussion reveals, the ability of current structures to offer adequate support has never been strong in the UK and has been seriously curtailed in recent years. We have witnessed a catastrophic shift in the UKs employment dispute resolution provisions that has sealed the fate of many who experience unlawful treatment at work. This, it is suggested here, has a particularly detrimental impact on those who wish to bring a claim in light of unlawful treatment due to pregnancy or maternity – a cohort of workers who have historically experienced discrimination and disadvantage at work[38] and whose experiences are often ignored and unappreciated in mainstream critiques of dispute resolution

[36] The Flexible Working Regulations 2014 (SI 2014/1398).
[37] See L. Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in Dickens, L (ed) *Making Employment Rights More Effective: Issues of Enforcement and Compliance* (Oxford, Hart Publishing, 2012) at 29.
[38] See discussion above.

procedures.[39] As discussed in the remainder of this section, their journeys as potential litigants are often hampered in ways that can cause individual hardship and reveals the inadequacy of the current system as a means of enforcing their legal rights.

First, in order to bring an action, potential litigants need to be aware of and understand their legal rights. Although more accessible in recent years, not least because of the enactment of the Equality Act 2010 that consolidated relevant legislation and aided by the availability of legal information on-line,[40] the law relating to pregnancy and maternity leave remains fairly complex and can prove to be an unsurmountable obstacle for some, especially the most vulnerable, workers. Those with no access to the internet or those for whom English is not a first language or for whom time to research and digest this law is a luxury they simply do not have are at a disadvantage. The latter is highly likely if they have recently given birth or have other care-giving responsibilities and they are less able to begin the journey of evaluating their personal situation within this legal framework. Access to legal advice and support is arguably essential to ensure that these individuals can begin to evaluate whether or not they have a potential claim: as McDermont and Busby suggest, 'the encounter between advice agency and client is often the point at which a personal issue becomes realised as a legal matter as the client is advised that there might be some resolution in law to his or her grievance'.[41] The significance of professional legal advice in the translation of the dispute into a legal claim is also important for maximising the scope of the claim and it can mean the difference, for example, of including a claim under the Equality Act s18 in the event of a dismissal and hence the possibility of greater compensation,[42] or realising that the recently imposed two years qualifying period for unfair dismissal does not apply in relation to their claims, or assessing the potential for remission of tribunal fees (see below).

However, despite the core benefits of free employment advice, this service has been overstretched for many years and all but diminished with the abolition of almost all civil legal aid in April 2013: austerity measures mean that approximately £320 million has been

[39] See James, supra n.10.
[40] Websites such as ACAS, the EHRC and Maternity Action offer up to date information in an accessible format, as do some practitioner sites.
[41] M. McDermont and N. Busby 'Workers, marginalised voices and the employment tribunal system: some preliminary findings' (2012) 41 *ILJ* 166, 174.
[42] See also James, supra n.10 at [99].

cut from the annual legal aid budget [43]and another £220 million is to be taken out each year until 2018[44]. Law centres and CAB offices[45] are struggling to stay open and far too many have already closed down or turn people away, leaving a void that it is impossible to replace. The EHRC, a core source of useful information and advice, has also had its budget drastically reduced in recent years: from £70 million to £17.1 million.[46] Charities, such as Maternity Action and Working Families offer useful on-line support when accessed, but on the whole, the gap in terms of legal advice available to workers with a grievance that might lead to a claim has, in recent years, become a chasm that is undermining the ability of individuals to translate their personal grievance into a potential legal action. Many, unfortunately, when faced with the prospect of doing so without any specific legal guidance and support are, understandably, reluctant to do so. This is a long standing and common problem that has yet to be effectively addressed. In 2005 this 'litigation gap'[47] was stark - only about 3% of women who had experienced discrimination of this type took employers to employment tribunals and less than 10% took any kind of formal action.[48] The 2015 EHRC/BIS research found that only one in five of those who experienced problems at work while pregnant, on maternity leave or returning following maternity leave raised issues, formally or informally, with employers.[49] Recent cuts jeopardise what is already a precarious situation.

Secondly, the introduction, in 2013, of compulsory early conciliation through ACAS adds another layer of potential complexity and elongates the dispute resolution process in a way that places responsibility for understanding and articulation of legal rights firmly on the shoulders of claimants for longer. In force since May 2014, compulsory conciliation requires all claimants notify ACAS of any disputes via a form,

[43] Legal Aid, Sentencing and Punishment of Offenders Act (LASPO)
[44] See O. Bowcott, 'cash-strapped law centres turn clients away as legal aid cuts bite' (2013)*The Guardian* 18/09/2013 available at http://www.theguardian.com/law/2013/sep/18/law-centres-clients-legal-aid
[45] Most commonly cited for providing advice to employees: see Citizen's Advice annual advice statistics 2010/11 available at
[46] For a discussion of the impact of these cuts see http://www.uniteforoursociety.org/page/-/images/uploads/ehrc%20Proposed%20Cuts%20to%20the%20Equality%20and%20(1).pdf
[47] See G. James, 'Law's response to pregnancy/workplace conflicts: a critique' (2007) 15 *Feminist Legal Studies* 167 and James, supra n.10.
[48] See EOC *Greater Expectations: Final Report of the EOC's Investigation into Discrimination Against New and Expectant Mothers in the Workplace*, (2005) Manchester.
[49] EHRC/BIS (2015) *Pregnancy and Maternity-Related Discrimination and Disadvantage First Findings: Surveys of Employers and Mothers* (BIS Research Paper No 235) at 106-111.

available on-line. She will be contacted by a conciliation officer in due course and the time limit for bringing the claim to a tribunal is 'paused' for a month in the first instance and for a further 14 days if both parties consent. Hearings are confidential and settlements binding. If no settlement is reached a certificate is issued and the claimant may lodge a claim at an employment tribunal.

Overall, the ability of early conciliation to deliver an effective service that responds to the needs of the individual parties has been questioned.[50] For those who have experienced pregnancy or maternity related discrimination, this additional stage of the process presents a huge challenge – especially as the commitment required is so lengthy and isolating. Claimants are estimated to spend an average of 27 hours on the dispute which is a huge commitment for most, especially those with newborns[51]. Moreover, ACAS guidance states that the conciliator does not 'take a view on the merits of a claim or advise whether a claim should be made' or 'help prepare either a case for tribunal or a defence to a claim'.[52] Hence what is marketed as being 'quicker, cheaper and less stressful for all concerned than a tribunal case'[53] might be perceived negatively by individuals for whom resolution equates to correct enforcement of relevant law, as opposed to a means of simply bringing the dispute to an end regardless of the merits of the claim. As Dickens notes in relation to the older system of ACAS pre-claim conciliation before it was compulsory, but the point is even more poignant in this new context, the claimants might look to the conciliation officer to redress the imbalance of power that they experience but ACAS 'act as a broker' rather than 'an advisor'.[54] ACAS administrators have also been perceived as formal and managerial in style and prone to push for a speedy resolution of claims and negotiation of a financial settlement, with the ultimate aim of preventing a claim from reaching a tribunal. Furthermore, it is likely that agreements reached at this stage will

[50] See discussion in McDermont and Busby, supra n.41.
[51] ACAS (2015) Research Paper: Evaluation of Early ACAS Conciliation 2015 available at http://www.acas.org.uk/media/pdf/5/4/Evaluation-of-Acas-Early-Conciliation-2015.pdf.
[52] ACAS (2014) Conciliation Explained (at p9), available at http://www.acas.org.uk/media/pdf/o/g/Conciliation-Explained-Acas.pdf.
[53] Ibid, 4.
[54] See Dickens, supra n.37, 37. See also M. Hudson, H. Barnes, S. Brooks and R. Taylor *Race Discrimination Claims: Unrepresented Claimants' and Employers' Views on ACAS Conciliation in Employment Tribunal Cases* Research Report 04/07 (London, ACAS, 2007); McDermont and Busby, supra n.41.

award less compensation than the claimant would have been awarded if it had been successful at tribunal.

Third, even if a potential claimant is, in the current climate, able to grapple with the legal framework and willing to engage with compulsory conciliation – if she does not reach a satisfactory agreement her propensity to enforce her legal rights at an employment tribunal is now significantly reduced by the fact that she will probably need to pay a substantial fee to do so.[55] For many this is the last nail in the coffin and there is growing evidence of aggrieved workers with well-founded claims feeling unable to pursue an action once aware of the fees.[56] In force since July 2013[57] these fees apply to all potential claimants and EAT appellants, unless they qualify for a remission which, according to ministers, protects the lowest paid workers, but analysis by the TUC has shown that very few households actually benefit from this scheme.[58] There are two levels of fees – issue and hearing fees and the fee level differentiates between straight forward (type A) and more complex (type B) claims: for type A cases an issue fee of £160 and a hearing fee, if applicable, of £230 is imposed and for type B cases an issue fee of £250 and hearing fee of £950 is imposed. If, in due course, the claimant wants to appeal the ET decision a further fee of £400 is charged to lodge the case at the EAT and £1,200 is charged for the hearing. Pregnancy and maternity related discrimination claims, especially when there is a claim for unfair dismissal, are likely to be categorised as type B. It is unsurprising that, since the introduction of these fees, tribunal claims have reduced significantly. Initial downturns were stark – there was a 79% drop in the number of applications lodged from October to

[55] The government is reviewing tribunal fees: (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434207/tor-employment-tribunal-fees.pdf) – an announcement made only weeks before UNISON's judicial review claim was due to be heard at the Court of Appeal. The Commons Select Committee is also investigating court and tribunal fees, with a particular focus on access to justice and, unlike the MOJ investigation, plans to engage with external bodies as part of its assessment (see http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/courts-tribunals-fees-charges-inquiry/). Fees are to be scrapped in Scotland – placing greater pressure on the government to re-think the current provisions.

[56] E.g. see R. Dunstan, *Overdue: A Plan of Action to Address Pregnancy Discrimination Now* (London, Maternity Action, 2013), 9-10; McDermont and Busby, supra n.41; A. Gentleman, 'Priced out of Court: Why Workers can't fight employment tribunals' *The Guardian* Sunday 17th August 2014.

[57] Employment Appeal Tribunal Fees Order 2013 SI2013/1893

[58] TUC (7 October 2013) 'Low paid prudent savers will now have to raid their savings to take a bad boss to court' cited in Dunstan, supra n.56 at [10].

December 2013, compared with the same period in 2012[59] There was a further decline as claims for the period October to December 2014 was down 12% on the same period the previous year and there has been no revival since.[60] These fees, of course, need to be placed in the context of a significant rise in the cost of living – which has been compounded by widespread pay freezes, and cuts to social security benefits (such as child benefit) and the new Conservative Government has announced plans for further significant cuts to welfare expenditure, described by the Institute for Fiscal Studies as 'regressive'.[61] These fees are a huge deterrent to legal action for many,[62] but for pregnant and new parents the fees have repercussions beyond that of other litigants and compounds the difficulties faced when deciding whether or not to pursue a claim. Pregnancy and maternity related discrimination 'disproportionately affects low-paid women workers, who have less economic bargaining power and are more likely to be in precarious employment'.[63] Moreover, the arrival, or imminent arrival, of a new baby has additional financial repercussions – such as baby merchandise, the likely cost of leave without the security of paid employment and the potential loss of future earning capacity and/ or the future cost of childcare.[64]

Flaws in the dispute resolution framework present a challenge for *all* claimants but pregnant workers and new parents,[65] albeit to different degrees, face additional considerations that make contemplating litigation incredibly difficult. Indeed, it also significantly reduces the deterrent effect of the law which could result in increased incidence.[66] I suggested, in 2009, that pregnant women and new mothers when faced with the reality of bringing an action

[59] See MOJ (March 2014) *Tribunal Statistics Quarterly: October to December 2013* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289342/tribunal-stats-oct-dec-2013.pdf

[60] See MOJ (June 2015) *Tribunal and Gender Recognition Statistics Quarterly* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434176/tribunal-gender-statistics-jan-mar-2015.pdf

[61] See http://www.ifs.org.uk/uploads/publications/budgets/Budgets%202015/Summer/opening_remarks.pdf.

[62] See N. Busby, M. McDermot., E, Rose and A. Sales, A (eds) *Access to Justice in Employment: Surveying the Terrain* (London, IER, 2013).

[63] Fredman, supra n.10 at [443].

[64] See Family and Childcare Trust (2015) *Childcare Cost Survey 2015* available at http://www.familyandchildcaretrust.org/childcare-cost-survey-2015.

[65] Indeed, although under-researched, it is likely that many of the hurdles identified here would apply to working carers in general – who are often constrained in terms of time, energy and financial resources. See James and Spruce, supra n.13.

[66] Maternity Action (2012) *Maternity Action response to the Ministry of Justice consultation CP22/2011 Charging fees in Employment Tribunals and Employment Appeal Tribunals* available at http://www.maternityaction.org.uk/sitebuildercontent/sitebuilderfiles/maternityactiontribfees2012.pdf.

'might understandably be exasperated by the whole ordeal'.[67] There are now new hurdles to be encountered, or at least existing ones have become ridiculously high, in bringing a legal action. In June 2013 a BIS Committee of MPs recommended abolition of the tribunal fees in pregnancy discrimination cases, noting evidence that 'the fees will effectively deter women with well-founded pregnancy discrimination claims from taking action in the tribunal' and evidence from Sarah Veale of the TUC suggests that 'women tend to be low-paid and will be much more likely to be put off litigation simply because they cannot afford the risk that they might not get those fees back'.[68] The Committee concluded that 'pregnancy discrimination, by definition, affects women only and such a financial burden on those women would be in direct contradiction with the Government's aim of removing inequality in the workplace'. In addition, the severity of these hurdles is compounded by the fact that very few of those who attempt them actually succeed if their cases get to a full tribunal hearing[69] and many of those who are successful do not receive their full award: one in three reported to receive none at all.[70]

At present, there is a real sense that far too many employers who discriminate against pregnant workers and new mothers still 'get away with it'[71] and ten years after the EOC declared that 'we all have greater expectations' very little has been done to tackle the problem. Nowhere is this more evident than in the voices of those who have experienced pregnancy and maternity related discrimination at work: the following anonymous extract from the website '*pregnantthenscrewed*'[72] was posted on June 23rd 2015. In many ways this individual represents the ideal litigant, willing to challenge unlawful behaviour through legal means. Unfortunately, she also epitomises the unacceptably high individual sacrifice that is needed in such cases and underscores why we need to re-think our approach to the issue as a whole.

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[67] James, supra n.10 at [91].
[68] Paragraphs 73-77 of *Women in the workplace: first report of session 2013/14*, House of Commons Business, Innovation & Skills Committee, HC 342, June 2013. Available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/342.pdf
[69] Dunstan, supra n.56.
[70] BIS press release – 'Government considering new powers to tackle non-payment of tribunal awards' (01/11/13).
[71] Dunstan, supra n.56.
[72] See http://pregnantthenscrewed.com/. The site was created in 2015 by Joeli Brearley who experienced horrific pregnancy related discrimination and wanted to create 'a place for women to tell their stories anonymously, giving victims a voice, while demonstrating how systematic the problem really is'.

‘Before I got pregnant, I had over 5 years continuous service… At the time that I notified my manager I was pregnant, I covered contracts nationally throughout the UK. I was held in high regard, my time was very sought after, and I was responsible for the performance of over 50 admin staff, as well as developing and maintaining relationships with our clients on multi-million pound contracts. Soon after I notified my employer I was pregnant, they informed me I would receive only SMP... My employer refused to adhere to the TUPE regulations... I raised [a] grievance, and while this happened, a company wide pay rise of 2.8% was implemented. I was not given the pay rise. I managed to find out that, in a company with over 1000 employees, only 7 people had not received that pay rise. 5 of them had recently had a promotion and an associated pay increase higher than 2.8%, and 1 was leaving before the pay increase would be implemented. The 7th person was me.

…I chose to take my case to tribunal…This was all throughout my pregnancy, and added a huge amount of stress, worry and upset during a really difficult time in my life. I did not enjoy my pregnancy at all… the [tribunal] date was set for when my son was 12 weeks old. I was representing myself up until this point and with a newborn I just couldn’t manage any more on my own... I found a local legal firm and sought advice, they agreed to represent me at my 5 day tribunal for a fixed fee of £4000. I …borrowed the money. Now I had the added worry of the debt.

…The tribunal went ahead. I had to leave my 12 week old baby for 5 full days. I had to pump breastmilk in a room with my legal representation and her student present (I used a cover but it’s not quite the same as privacy!) as that was the only available space. I had to ask the tribunal office to store my milk in their fridge. It was embarrassing and demeaning.

After a harrowing week… the tribunal… found that my employer [had] discriminated against me on the basis of my gender in 3 separate instances… They also ruled that the employer had excluded me from the national pay rise unlawfully and that they must apply it both immediately and retrospectively to the date it was originally issued… My employer offered me an out of court settlement and I accepted it.’

3. Care ethics

The discussion above provides a clear illustration of law's struggle to, in Herring's words, 'respond to issues which are not readily reducible to an economic value nor expressed in terms of individualised rights'.[73] The law here, as elsewhere, fails to reflect the interdependent nature of care relationships and constructs relevant provisions as a bundle of specific individual rights rather than a means of enabling realistic choices and agency within families[74]. In this section I argue in favour of an approach that helps challenge the current marginalisation of care, contending that care ethics might be utilised to help illuminate and counter the damaging trends discussed above.

Originally Gilligan's ethic of care[75] sought simply to challenge implicit gendered assumptions about moral development and reasoning in young boys and girls – arguing that they were 'different' but that females are not less efficient than males in this regard. Gilligan's work has since received considerable negative attention, especially from dominance theorists[76] and its valorisation of a 'female voice' has been viewed as problematic[77] - believed to associate care with women and hence perpetuate a norm that excludes men, or presents male carers as the exception to the rule.[78] One does not, however, have to subscribe to the view that all females are innately caring, self-sacrificing and nurturing (or any more capable of these traits than men)[79] to assert, as I do here, that greater promotion of an ethic of care could radically transform institutions and legal rights and the values that underpin them in this context. Indeed, her work has been developed from a range of perspectives[80] and its significance is in, as Herring put it, 'the hope that it offer[s] a new approach to ethical

[73] Herring, supra n.8 at[57].
[74] Ibid and see M. Fineman, *The Autonomy Myth* (New York, New York Press 2004).
[75] C.Gilligan, *In a Different Voice* (Cambridge, Harvard University Press, 1992).
[76] The argument being that 'women value care because men have valued us according to the care we give them' C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass, Harvard, 1987), 39.
[77] See discussion in V. Munro *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Oxford, Hart Publishing, 2007), 23-33.
[78] Something that Nelson feels ought to be challenged by the introduction of a notions of 'husbandry' – terminology that she feels would encourage and support masculine responsibility for care - see J. Nelson, 'Husbandry; A (feminist) reclamation of masculine responsibility for care' (2016) 40 *Cambridge Journal of Economics*, 1.
[79] Indeed, there is ample evidence that the voices of gender are far less different than Gilligan suggests – see D. Rhode, *Justice and Gender* (Harvard, Harvard University Press, 1989), 309.
[80] Leading works on ethic of care are now fairly diverse and include, for example, J. Tronto, *Moral Boundaries* (London, Routledge, 1993); D. Bubeck, *Care, Gender and Justice* Oxford, OUP, 1996); S. Sevenhuijsen, *Citizenship and the Ethics of Care* (London, Routledge,1998); D. Engster, *The Heart of Justice*, *Care Ethics and Political Theory* (Oxford, OUP, 2007). For an overview of the origins and central themes, see Herring, supra n.8 chapter 3.

analysis'.[81] At its core is a belief that care, although it varies across a person's life course, is a universal experience and need and a valuable endeavour that deserves to be better recognised. Hence, many care ethicists promote the view that mutual care is essential and dispute any claim that it is a gendered phenomenon. As Tronto put it, 'care is not a parochial concern of women, a type of secondary moral question, or the work of the least well off in society. Care is a central concern of human life'.[82] Those who favour an approach that centralises an ethic care challenge traditional liberal theories and their 'pretence' of independence and valorisation of the concept of 'choice' – traits that are often difficult for carers to relate to.[83] Once we accept these overarching traits of care ethics, its appeal in relation to critiquing law's engagement with care-work (formal or informal) is clear[84] as it calls us to 'change our political and social institutions to reflect this truth'.[85] In political terms Sevenhuijsen, usefully for the purpose of this piece, describes care ethics as encapsulating 'a constructive critical perspective on the norm of independent citizenship'[86] and suggests that it requires policies centred upon,

'the attainment of a situation in which everybody can take care of themselves and others, by practising in the course of their lives those combinations of economic responsibility and the responsibility for daily care which suit their situation and needs, and those of the persons who are dependent upon them'.[87]

For the purpose of this piece, an injection of an ethic of care calls for the necessity of care-giving and inevitability of interdependence between all individuals across our life course to

[81] Herring, supra n.8 at [48].
[82] Tronto, supra n.80 at [180].
[83] Discussed by B. Clough, 'What about us? A Case for Legal Recognition of Interdependence in Informal Care Relationships' (2014) 36 *Journal of Social Welfare and Family Law* 129 and see further, E.F. Kittay, *Love's Labor: essays on women, equality and dependence* (New York, Routledge, 1999) and V. Yeates, 'Ambivalence, Contradiction and Symbiosis: Carers' and mental health users rights' (2007) 29 *Law and Policy*, 435.
[84] See, for example, J. Herring, 'Where are the carers in healthcare law and ethics?'(2007) 27 *Legal Studies* 51; J. Bridgeman, 'Accountability, support or relationship? Conceptions of parental responsibility' (2007) 58 *Northern Ireland Legal Quarterly* 307; T Pettersen, The Ethics of Care: normative structures and empirical implications' (2011)19 *Health Care Analysis* 51; Clough, ibid.
[85] Tronto, supra .80 at [180].
[86] S. Sevenhuijsen, 'The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy' (2003) 4 *Feminist Theory* 179, 183. Or as Kittay commented more generally, 'by excluding this dependency from social and political concerns, we have been able to fashion the pretence that we are all independent' Kittay, supra n.83at p xii. For a critique of an important piece of legislation, the Mental Capacity Act 2005, using the ethic of care see Clough, supra n.83.
[87] S. Sevenhuijsen, 'Het combinatiiescenario: kansen en bedreigingen voor de toekomst' (1999) 5 Nemsis 166 cited in Sevenhuijsen, *ibid* at [188].

be reflected more prominently within the employment laws and the processes and institutions that support this package of rights. Our historical and ongoing failure to include consideration of care in this way when drafting social policy and enforcing laws that impinge upon the lives of pregnant workers and working carers means that whilst we have created a superficially attractive framework of rights, it lacks the quality that might have been achieved had it been constructed with an ethic of care in mind. It might also, had care ethics informed the relevant policy formation agenda, have lessened the impact of dominant neo-liberal concerns that are apparent in the recent reform of dispute resolution procedures. Three examples illustrate how this (re)focus might alter key approaches to this area of social policy.

First, a greater commitment to care ethics can help promote men's role as care-giver. Caregiving is slowly becoming less gendered in terms of our approach to it and, in practice, male and female identities as carers and workers are beginning to shift[88]. The desire to encourage men to take on a greater share of care-work has been discussed for some time[89], often constructed as a means of helping promote equal parenting[90] and reducing the 'burden' of care[91] or enabling women to participate in the workplace more or at a higher level. More, however, needs to be done[92] in this field and an approach motivated by the core beliefs of care ethics could help transform the legal framework by challenging its individualistic approach and supporting the shifts we are witnessing by encouraging a better distribution of care responsibilities between individuals and communities: in fact helping (re)focus attention away from individual working mothers (or fathers) and onto families, communities and the welfare state. Women's participation in the labour market has been

[88] See G. James, 'Mothers and fathers as parents and workers: family-friendly employment policies in an era of shifting identities' (2009) 31 *Journal of Social Welfare and Family Law* 271 and see Sevenhuijsen, supra n.86 at [181], who argues that care is being 'relocated from women to men'.
[89] See n. 20.
[90] See for example C. McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' (2001) 7 *Columbia Journal of European Law* 241; C. McGlynn, *Families and the European Union: Law Politics and Pluralism* (Cambridge, CUP, 2006) Chapter 4.
[91] Indeed, even the most progressive of rulings, continue to construct childcare as a burden – to be overcome, so as to enhance workplace participation (*Roca Alvarez v Sesa Start Espana ETT SA* (Case C 104/09 [2011]) – discussed in G. James, 'Forgotten Children: Work-Family Reconciliation in the EU' (2013)34 *Journal of Social Welfare and Family Law* 34 363.
[92] For an interesting paper that considers how the notion of 'husbandry' might help in this endeavour, see Nelson, supra n.78.

compromised because care-work has been individualised and assigned to women[93] and care ethics challenge this construction. It requires a greater appreciation of the need to move beyond the traditional breadwinner/home-maker divide, not because of concern for equal parenting or women's (in)ability to function in the labour market *and* provide care,[94] but because it fundamentally recognises that we are *all* responsible for and *all* capable of providing care for others. Indeed, history demonstrates that the equality principle is still fundamentally incapable, without some radical reshaping, of advancing men's role in terms of care-giving.[95] Fredman calls for an explicit commitment to the social value of parenthood[96] and a greater commitment to care ethics could help facilitate this. In addition, care ethics can alter how we define care in this context by challenging the way that labour market participation and market values have been viewed as diametrically opposed to, and intrinsically in competition with, care-work.[97]

There have been various legal changes in the UK that have purportedly sought to encourage men's role as care-givers, including the paternity and APL provisions and, more recently, the right to claim SPL. All these attempts, whilst commendable at a superficial level, have been flawed in many ways and would have benefitted if they had been constructed with care ethics in mind. For example, whilst SPL offers some superficial recognition that parenting is, or should be, a gender neutral undertaking, the practical complexity of the provision, the poor payment available, and the fact that it has been developed alongside a long standing, more simplistic 'fall back' of relying solely on the traditional, 'tried and tested', maternity leave option, undermines its potential to promote more male care-giving during the first year of the child's life. A policy does not have to be overtly gendered to have normative cores that *are* implicitly gendered and perpetuate the notion that care work is, predominantly, a female undertaking.[98] SPL *appears* to promote a more gender neutral

[93] See N. Folbre, *Who Pays for the kids? Gender and the Structure of Constraints* (London, Routledge, 1994).
[94] As argued by many commentators – see, for example, Suk, J (2012) 'From Antidiscrimination to Equality: Stereotypes and Life Cycle in the United States and Europe' *The American Journal of Comparative Law* Vol.60, p76-98.
[95] Which Fredman, whose comments are limited to parenting but could be extended to cover care-work more generally, argues requires a distinction to be drawn between pregnancy and (parenting) care-giving: see Fredman, supra n.10.
[96] Ibid.
[97] See Nelson, supra n. 78.
[98] See J. Lewis, 'Gender and Welfare State Change' (2002) 4 *European Societies* 331. See also K. Rummery, ' A Comparative Analysis of Personalisation: Balancing an Ethic of Care with User Empowerment' (2011) 5 *Ethics and Social Welfare* 138.

approach to care that will challenge traditional ideologies of motherhood and fatherhood but in practice favours, and is likely to perpetuate, the current status quo whereby mothers predominantly undertake the majority of childcare responsibilities. The SPL provision has not been adequately funded or promoted and it remains difficult for working parents to, drawing on Williams's useful terminology, 'un-bend'[99] gendered constructions of childcare/workplace relations, and those that attempt to do so will have to overcome more hurdles and might be disadvantaged economically as a result. A commitment to care ethics might have helped provide a less complex piece of legislation that offered day-one rights, reduced the notification requirements and reconsidered the pay available. Indeed, such an approach might have led the Government to favour a different model entirely - such as a simpler, non-transferable gender specific allocation of leave subject to 'use it or lose it' conditions and paid at a rate that replaces a high degree of lost income.[100]

Secondly, care ethics could also provide a means of improving the current dispute resolution system because the value it places on care-work requires that we remain vigilant to the potential impact of the procedures upon those who are pregnant or have care-giving responsibilities. Here, the value of care-work and its impact on law enforcement and access to justice has been completely ignored. Compulsory conciliation, for example, is constructed as the first step of the employment tribunal system procedure and this recent reform, like others before it,[101] is more concerned with reducing recourse to tribunals than with improving the effectiveness of dispute resolution or promoting broader social policy objectives. This conceptualisation manifests itself in the way that success or failure is often measured[102]: there is an assumption that a speedy resolution of claims caters for the needs of all litigants and yet, as suggested elsewhere,[103] this is not always the case for pregnant workers and new mothers. Moreover, the current dispute resolution model demonstrates no willingness to investigate or accommodate the practical and emotional needs of women, like the litigant quoted above, who have been treated unlawfully because of pregnancy or

[99] J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford, OUP, 2000).
[100] See Mitchell, supra n. 1. For discussion of the Scandinavian policies that favour gender specific non-transferable quotas of parental leave see, for example, A.Z. Duvander., T. Lappegard and G. Andersson 'Family Policy and Fertility: Fathers' and Mothers' Use of Parental Leave and Continued Childbearing in Norway and Sweden' (2010) 20 *Journal of European Social Policy* 45.
[101] See Employment Act (Dispute Resolution) Regulations 2004 and Gibbons Review 2007 leading to Employment Act 2008.
[102] Dickens, supra n.37 at [32].
[103] James, supra n.12 at [101].

maternity. The debate surrounding tribunal fees, referred to above, provides further evidence of harm experienced as a result of a core failure to recognise the implications of care-work upon a person's ability to access justice following a dispute at work. The ramifications of this lack of attention to the lived reality for *these* individuals are difficult to quantify but potentially huge: as stated elsewhere, 'these well-intentioned procedures might operate in a way that marginalises those involved in pregnancy-parenting/workplace disputes'.[104] In sum, policy makers in this field still remain 'deaf', in Conaghan's sense of the word,[105] to the needs of *these* (potential) litigants and a greater regard for the care-work they undertake could shift our approach so as to enable their voices to be heard, and encourage investigations of a more innovative organisation of litigation support in general.[106]

Thirdly, care ethics can help promote a framework of rights that better incorporates the needs and perspectives of those receiving care. Care ethics view people as relational, recognising that their own interests are often tied up with a concern for the interests of others. Yet, as Herring suggests, laws often 'fall into the trap of isolating the interests of each party'[107] whereas 'approaches based on an ethic of care require the development of legal tools which recognise that separating interests into individual rights is impossible and undesirable'.[108] In relation to family-friendly laws, I have criticised elsewhere how child welfare and eldercare concerns[109] have been marginalised. Care ethics help challenge this marinalisation and the overall tenet of this legal framework's focus by allowing the complex realities of interdependence to be at its core: the reciprocity of care and its impact on everyone's lives including the needs of the children and adults for whom working carers

[104] James, supra n.12 at [89].
[105] J. Conaghan, 'The discipline of labour law' in Conaghan, J and Rittich, K (eds) *Labour Law. Work, and Families: Critical and Comparative Perspectives* (Oxford, OUP, (2005) at [26].
[106] For a thought provoking example of how litigation might still provide a useful means of encouraging social change (discussed here in relation to equal pay) see S.Deakin., S.F. Butler., C. McLaughlin and A. Polanska, 'Are litigation and collective bargaining complements or substitutes for achieving gender equality? A study of the British Equal Pay Act' (2015) 39 *Cambridge Journal of Economics* 381.
[107] Herring, supra n.8 at [59].
[108] Ibid at [60].
[109] See G. James and T. Callus 'Child Welfare and work-family reconciliation policies: lessons from family law' in Busby and James, supra, n.35. See also G. James, 'Forgotten Children: Work-Family Reconciliation in the EU' (2013) 34 *Journal of Social Welfare and Family Law* 363; James and Spruce, supra n31. Indeed the empowerment of adult recipients of care in this context is often overlooked – see Rummery, supra n.98 for a discussion.

care are not what has driven policy innovation in this area. If that were the case, we might be provided with provisions that better explore and facilitate children's needs beyond the first year - the focus of the majority of the legislation. As Fredman puts it, 'participative parenting is not confined to the first year of life, but extends throughout the child's school age years'.[110] We might also better encapsulate the realities of those with eldercare responsibilities – a type of care that differs, in so many ways, from childcare and requires a more nuanced approach.[111]

Care ethics could encourage, through recognition that care along with labour market demands 'does not have an unchanging place in today's society',[112] the development of more flexible policies so as to reflect that care needs change across time. It might, for example, facilitate changes to our current right to request provisions so that where conflicts arise between competing employees for flexibility the needs of working carers are prioritised above the desires of other workers, and this could be promoted in recognition of workers' needs but also, and preferably, to recognise the intermingled interests of those for whom they care. In addition, any agreed arrangement could also require ongoing review so as to accommodate the changing nature of care-giving and workplace demands and choices. At present there is little or no space given to this reality within the current legal framework. As a consequence, carers and recipients of care often have little choice but to resign themselves to traditional, often gendered, models of care-giving in order to accommodate care-work and workplace participation.

Conclusion

This discussion suggests how greater commitment to an ethic of care could alter the boundaries and nature of relevant laws and procedures in this field. Placing carers and recipients of care at the centre of dialogues can challenge the often unconscious, but resilient, over-privileging of the ideal unencumbered worker and allow a space for growth in awareness about, and a willingness to engage with the changing realities of

[110] Fredman, supra n.10 at [459].
[111] Indeed the empowerment of adult recipients of care in this context is often overlooked – see Rummery (2011) for a discussion. See also James and Spruce, supra n.31 at [479] and R. Horton, 'Caring for Adults in the EU: Work-Life Balance and the Challenges for EU Law' (2015) 37 *Journal of Social, Welfare and Family Law*', 356.
[112] Sevenhuijsen, supra n.86 at [179].

care-giving and workplace participation in the 21st century. This can, if incorporated into business 'good practice', challenge current constructions of what a 'good' worker looks like and allow all workers where, or rather when, relevant, to reveal the true implications of the interdependent realities of their lives and find means of accommodating that reality. This would allow us to progress beyond the façade that Bridgeman articulated when she suggested that,

'[the] work of caring for dependents and emotional interdependency with our children, spouses, partners and families must remain concealed lest we appear not to be independent souls suited for the public world'.[113]

Overall, had care ethics informed this area of policy formation we may have witnessed more meaningful progress in this area of employment law. Instead, we have created a ridged framework that continues to promote, prioritise and reward autonomy, individualism and market-making above informal (unpaid) care-giving: one that still expects families, often women, to absorb the majority of care work.[114] Moreover, dependence is still implicitly constructed as a negative and undesirable trait and its messy implications for laws, legal procedures and workplace practices are not aired let alone tackled. Working carers still need, in order to manage working life or gain legal redress when conflicts arise, to fit into systems and public spaces that were not designed with them in mind – spaces that have failed to respond to the changing realities of modern life. In sum, improvements require constant vigilance against any inherent biases that operate in such a way as to counter the needs of care-giving relationships – the 'blind spots to what caring entails on a daily basis'.[115] Yet, without a fundamental shift in our approach, it is unlikely that we will ever adequately challenge these 'blind spots' and 'create social spaces in which people can practise care, responsibility and trust in relation to material and immaterial things that matter in their lives'.[116]

[113] Bridgeman, supra n.84 at [308].
[114] See C. Pateman, *The Sexual Contract* (Cambridge, Polity Press, 1988) and Rummery, supra n.98 at [145].
[115] Svenhuijsen, supra n.86 at [183].
[116] Svenhuijsen, supra n.86 at [187].