LABOUR LAW

Reconciling work and care responsibilities

JILL MURRAY compares Europe with Australia in relation to the role law plays in making work more permeable to family responsibilities.

Internationally, significant changes have occurred in relation to the extent to which law is used to assist workers adapt their working lives to the requirements of their care responsibilities.[1] Australian industrial law is currently digesting a claim by the Australian Council of Trade Unions for better federal award provisions in this regard. However, with the resounding success of the Coalition parties in the federal election, the future of the lead institution, the Australian Industrial Relations Commission, and the governing legislation are not certain.

This Brief is written from a labour law perspective and seeks to highlight some of the legal changes which may hold lessons for both labour law and social security law in Australia in the future.

In the European context, a number of key developments are making work more *permeable* to care responsibilities. A key driver has been the European Community directive ('EC directive'), which requires the member states to permit workers to take time off work to attend to 'care emergencies'.[2] While the directive is formally binding on the member states within the European Union, it leaves the discretion regarding its implementation to member states.

In the United Kingdom (UK) this directive has been addressed by permitting workers to take 'reasonable time off' during working hours. This includes:

- when a dependant 'falls ill, gives birth or is injured or assaulted' (includes mental illness or injury)
- on the death of a dependant
- because of 'an unexpected disruption or termination of arrangements for the care of a dependant'
- where there is an unexpected need to attend the school of a child who is dependent.[3]

A 'dependant' in the law of the UK refers to the expected categories of spouse, child or parent. It also includes 'a person who lives in the same household' (other than tenants, borders or lodgers). Further, the definition of dependant has been extended to include 'any person who reasonably relies on the employee (a) for assistance on an occasion when the person falls ill or is injured or assaulted, or (b) to make arrangements for the provision of care in the event of illness or injury.'

These definitions represent a significant increase in the scope of the legally recognised care responsibilities of a worker. The UK law recognises that life is often more complicated than the nuclear family model on which much traditional labour law has been based. Here, the idea of 'family' is no longer the key organising principle around which the worker's access to leave will be shaped. The radical concept of the person who 'reasonably relies' on the worker is a major step forward in the humanising of labour law. The UK Department of Trade and Industry has provided guidelines for the definition of dependant which state that the emergency leave could be taken to care for an elderly neighbour who has been injured in a fall, and the worker is the only person available to look after them at this critical moment.

In addition to greater permeability, a number of European states have been inspired by the EC directive on part-time work to institute schemes that help workers adjust their working hours to meet various needs including care needs.[4] The most advanced legislative schemes are in the Netherlands and Germany. In these states, what has colloquially but erroneously been called a 'right to part-time work' has come into effect.[5]

In these states, workers who wish to change their hours of work (up or down), or alter the distribution of hours, may place a request with their employer. The law specifies a process of meeting and response which must be adhered to. Failure by the employer to follow this process means that the law deems the change requested by the employee to have been approved. The law provides that the employee's request can only be refused on certain grounds, essentially that the request is impossible for 'serious business reasons'. Workers whose requests have been rejected may seek to overturn the employer's decision in court. Early reports of cases have shown that the courts tended to reject the employer's reasons for refusal. It has been argued that:

> It turns out that the courts are generally willing to acknowledge the fact that by the enactment of the [Adaptation of Working Time Act] the legislator restricted entrepreneurial freedom of the employer. Serious business reasons are therefore not easily established in court.[6]

Once again it is notable that these laws have broken free from a focus on traditional family responsibilities. Indeed, workers in Germany and the Netherlands do not have to present a reason for their change of hours under the legislative schema. The 'right to part-time work' therefore applies generally to any worker who wishes to adapt their working time for whatever reason.

REFERENCES

1. Jillian Murray, *International Trends in the Reconciliation of Work and Family Life*, (Report for Australian Council of Trade Unions for use in the Test Case before the Australian Industrial Relations Commission, 2004) <http://www.actu.asn.au/public/papers/jill_murray.html>

2. Parental Leave Directive 96/34/EC, OJL145/9.

3. *Employment Rights Act 1996* (UK) as amended by the *Employment Act 2002* (UK), ss 56, 57.

4. Part-Time Work Directive 98/23/EC, OJ L131/1.

5. The Adaptation of Working Time Act (*Wet op de aanpassing van de arbeidsduur*, or WAA) (Netherlands); Act on Part-Time Work and Fixed-Term Contracts (*Gesetz uber Teilzeitarbeit und befristete Arbeitsvertrage*, or TzBfG) (Germany).

6. S Burri et al, 'Work-family Policies on Working Time in Practice. A Comparison of Dutch and German Case Law on Working-time Adjustment' (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 321, 332.

7. *Employment Rights Act 1996* (UK), as amended, ss 80F, 80G.

Legal culture in the UK has resulted in a more muted response to the EC directive on part-time work. There is now a 'right to request' flexible work (that is, more or less hours, or a different distribution, or a change in the place in which work is done) available to parents of children under six (or disabled children under 18).[7] The law creates a process by which such requests must be processed. If the request is agreed, then the law states that the worker's contract of employment is thereby varied. However, unlike the schemes in Germany and the Netherlands, in the UK workers whose requests are rejected cannot seek a review of the employer's decision in court. Complaints about the failure of employers to adhere to the procedures of the scheme can be heard by the Employment Tribunals, but they are not empowered to investigate the veracity of the employer's reasons for refusal. Despite this apparently negligible intrusion into managerial prerogative, the UK Government reports that out of some 900,000 requests, 800,000 were granted, allegedly halving the number of refusals which would have occurred without the legislation.[8]

These developments are part of an increasingly dynamic international picture in which many jurisdictions are extending the capacity of workers to attend to care responsibilities without losing their jobs, and in some cases, also without losing all income. The concept of emergency leave is utilised in the laws of some Canadian jurisdictions. The UK and New Zealand now provide paid maternity leave.[9] In the UK, this is now 12 months paid leave. In Ireland, a category of long-term carer's leave has been created. This provides for 65 weeks leave to provide 'full-time care and attention to a relevant person', or up to a total of 130 weeks leave to care for two 'relevant' persons.[10] Relevant person is defined under the *Social Welfare Act* as a person who has 'such a disability that he or she requires full-time care and attention'. A worker with two disabled parents, for example, may be able to take up to 130 weeks from work to provide the necessary care.

Where does Australia stand in relation to these developments? First, our failure to institute paid maternity leave means that Australia is, with the USA, out of step with the rest of the industrialised world. Second, we have a system of emergency leave created through test cases before the Australian Industrial Relations System.

Federal awards contain a provision which entitles workers to take up to five days each year of their *own* leave to care for a member of their family, as defined. Since most carers are women, this system means that women are more likely to have to deplete their own leave to care for others. I have argued that the Australian federal awards may be instances of indirect sex discrimination for this reason. The Australian Council of Trade Unions is currently running a Test Case to seek to improve the 'safety net' of award provisions to bring Australia closer to the standards of comparable countries internationally, particularly those with whom we share a legal heritage, such as the UK. However, the *Workplace Relations Act 1996* (Cth) permits workers to 'opt out' of awards by making individual agreements (Australian Workplace Agreements or AWAs) or collective agreements which deviate from award provisions. The only protection the Act provides to test case standards is that the AWA or agreement must pass a 'no disadvantage test'. This, however, is a global test, and workers are permitted to win on the swings (say, take a pay increase) and lose on the roundabouts (say, agree to a deeper erosion of their own leave entitlements at the expense of creating new kinds of leave for care purposes). The future of the federal industrial institutions and laws will not be known until the Federal Government's agenda for change is articulated.

There are a number of obvious gaps in the Australian regulatory scheme. First, there is a failure to address issues around the quality of part-time work. Second, Australia has not moved as far as EU states in expanding the sphere of care responsibilities which is recognised by labour law. The narrow concepts of 'family' and 'household' have been broadened to include people between whom the law has never before envisaged a legal relationship (the concept of the person who 'reasonably relies' on the worker, discussed briefly above). In Germany and the Netherlands, significant inroads have been made into managerial power in relation to the organisation of working time, and these measures are not linked at all to care needs. Workers can seek a change in their jobs for any reason, or none.

The third important deficiency lies in our failure to recognise the amount of time needed to undertake long-term care tasks, and to institute an extension to periods of job-protected leave which may be used for this purpose. The Irish laws providing for extensive carer's leave are a case in point, and are a useful example of the ways in which labour laws and social security laws can articulate to provide better support for worker/carers. Finally, there are deficiencies in the way Australian law addresses the need for workers to attend to unpredictable care demands, such as the failure of care arrangements.

In Australia the protection and assistance for Australian workers who have care responsibilities is rather patchy (federal award coverage is not universal, and the test case provisions may be avoided if workers 'choose' to do so through individual or enterprise bargaining). The possibility of progressive change is currently unclear. Anti-discrimination law carries some of the legal burden of assisting workers reconcile their work and care responsibilities, but with mixed outcomes.[11] Further progress is required to develop positive legal mechanisms to help workers adapt their jobs, and to bring Australia into line with developments elsewhere.

JILL MURRAY teaches law at La Trobe University.

email: Jill.Murray@latrobe.edu.au

8. Rt Hon P Hewitt, Secretary of State for Trade and Industry, (Speech to Fathers' Direct Conference, London, 5 April 2004).

9. *Parental Leave and Employment Protection (Amendment) Act 2002* (New Zealand). In relation to the UK, see the regulations made under the *Employment Rights Act 1996*, as amended, the *Maternity and Parental Leave (Amendment) Regulations 2001*, *Statutory Instrument 2001*, No 4010.

10. *Carer's Leave Act 2001* (Ireland).

11. A deeply conservative view of the meaning of the contract of employment and managerial prerogative has emerged through the decision of the Victorian Court of Appeal in the Schou litigation: State of *Victoria v Schou* (2004) EOC 93-328.