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CHAPTER 5
FROM BREADWINNER TO EMPLOYEE WITH CARE DUTIES: THE CONSEQUENCES OF A CHANGE IN PARADIGMS

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The way in which an employment contract draws a line between work on the one hand and the private and public spheres on the other implies that, in principle, care duties performed by an employee fall outside the scope of the employment contract. However, in the past few decades there have been developments in this area that have led to a new relationship between the work, private and public spheres. Esping-Andersen argued that the relationship between the post-industrial welfare state and the private domain would be the most important topic of investigation of the future.1 The ‘work and care’ issue is an excellent example in this respect. In this context, the present chapter will focus on the instrument of the employment contract.

Governments are facilitating increasing participation by women in the labour market, partly through care arrangements that are linked to the employment contract. In principle, employment contracts relate solely to the provision of work and do not involve any ancillary matters necessary to provide that work. The limits are set by the time during which the employee is available to perform the work in question. This simple principle still applies: the European Directive governing working hours dating from 1993 (later included in the 2003 Directive) clearly divides time into two distinct categories: there is work time and there is rest time, and nothing else. Work time is the time during which the employee works, i.e. is at the employer’s disposal. Rest time is all the remaining time that is not spent performing work for pay.

Supiot has criticised this view of time as being an outdated economic fiction that assumes that work is separate from the individual and the rest of the

1 Esping-Andersen, 1999: 9; see also Wilthagen with Grünell, 1999.
working person’s life.\textsuperscript{2} It ignores the actual role of work in a person’s life, and by assuming that only paid work is economically productive it fails to recognise the social importance of care duties. He accuses the European legislature of applying a unilateral mathematical approach that ignores the actual state of affairs, especially when it comes to women. Moreover, that approach ignores the fact that employee productivity varies in the course of the working life.

This chapter will focus on the socio-legal regulations that are intended to promote combining work and care. Three instruments have been chosen within this umbrella policy, geared to create time for employees to perform care duties: (a) promoting flexible yet predictable working hours; (b) allowing employees to decrease or increase the contractually agreed number of working hours; and (c) paid care leave. All three of these facilities focus on time for care and on making such time for care available.

An opposing option would be to contract care out, for example in the form of childcare. In fact, both forms are combined in many European countries. Contracting care out in full is not considered a worthwhile objective, even in the Scandinavian countries where this is generally considered more acceptable than in other countries. The difference between the two options (‘making time available’ and ‘contracting out’) is also relevant in connection with varying opinions on the division of responsibilities. From the dogmatic perspective of the employment contract, employers can still argue that employee’s contracting out of care falls within the private sphere and that they, in principle, are not involved in such matters.

However, the three ‘care’ facilities chosen in this context have a direct impact on the relationship between employer and employee regarding the time during which the employee works and is at the employer’s disposal. The employer may be forced to acquiesce to employees’ claims on allocation of time, both in terms of work organisation and in financial terms. None of the three facilities implies that this necessity arises directly from the statutory rules. It is more akin to a procedural ‘empowerment’ of the employee, intended to put the employee in a stronger position if he wishes to discuss a change in working hours with the employer. If an employee requests a change in working hours in connection with care duties, the employer still has a

\textsuperscript{2} Supiot, 1999: 119. The European Directive will be discussed in more detail below in section 5.1.2.
certain degree of discretion in determining his policy, but the grounds for refusing the request are limited and can be assessed by the courts.

This chapter will first discuss how the 'work and care' theme has been handled at the international, the European and the national levels. The definition of the policy with respect to this issue will be analysed, the social background will be discussed briefly and an attempt will be made to determine whether there has been a shift in the division of responsibility between employers, employees and the government. Before discussing the national level a brief comparison will be made with other European countries in order to determine whether the employment contract is considered an adequate instrument to deal with the work-and-care issue in those countries. We can then determine whether the introduction of facilities linked to the employment contract has generated exclusion mechanisms. Are new 'outsiders' being created? Has the character of employment contracts changed due to the inclusion of new provisions and changes in the employee category to which they relate?

5.1. CARE IN AN INTERNATIONAL CONTEXT

Developments within the UN and the ILO will first be addressed before discussing those at the European level. This sequence follows from the level of argumentation of the agencies involved, from universal and abstract (the ILO's principles) to the more concrete European Directives and the national policy instruments that implement them. Although the three instruments under discussion are not relevant as such at the international or sometimes even at the European level, the unifying idea that care duties must be taken into consideration within the context of paid work does appear to be a shared perspective.

5.1.1. CARE DUTIES IN THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN AND IN ILO RULES

The subject of workers with family responsibilities was on the ILO's agenda in the 1950s already. Back then, the subject was seen first and foremost from the perspective of women’s equality compared with men. At the time it was already acknowledged that protective measures for women would not be able
to remove all forms of inequality, but that more thought should be given to promoting women’s participation. The tension between family and work responsibilities was acknowledged in 1965, when the recommendation on job opportunities for women with family responsibilities was accepted:

All measures to promote equal rights may prove meaningless for a vast majority of women if – as a result of their family responsibilities – they must either give up their jobs entirely or lose any chance of advancement because they can give only a smaller portion of their attention and energy to their professional work. ³

At that time it was acknowledged that addressing only issues involving discrimination would be too limited, and that policies and regulations should be aimed at removing obstacles in particular for women with family responsibilities. The question of whether there should be incentives for men to accept some of those responsibilities was not raised.

In 1979, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) led the ILO to place the subject of equality for men and women in a broader perspective in a Declaration and two Resolutions. The emphasis shifted from protection to promoting chances for women. The Declaration has an interesting underlying principle:

While pregnancy, maternity confinement and breastfeeding are unique to women, reproduction is itself a social function that should be protected by society. ⁴

This view cautiously suggests a specific division of responsibilities: since having children is in the interest of society as a whole, other parties such as the government or employers can also be expected to bear some of the burden. Government facilities should in any event take into consideration the risks and consequences that arise from biological facts such as pregnancy.

In 1981, ILO Convention 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities was passed, and it was ratified by the Netherlands on 24

⁴ Declaration on Equality of Opportunity and Treatment for Women Workers; resolution concerning a plan of action with a view to promoting equality of opportunity and treatment for women workers; resolution concerning equal status and equal opportunity for women and men in occupation and employment. Adopted by the ILC, 60th session, Geneva, 1975.
March 1988. The Convention builds on the CEDAW, whose underlying principle is that a change in the traditional division of roles between men and women, in society and in the family, is necessary to achieve full equality between men and women. The Convention acknowledges that caring for children, as well as necessary care of other family members, can be an enormous burden on employees, hence caring for members of that group also falls within the scope of the Convention. Each member state that ratifies the Convention undertakes to pursue a policy that enables persons who have family responsibilities and who work or want to work to exercise their right to work without being confronted with discrimination and, insofar as possible, without that leading to a conflict between work and care duties. The Convention does not prescribe what instruments (including policies) must be used for that purpose, but it does oblige member states to permanently place the subject on their national policy agendas, thereby obliging the government, as administrator and legislator, to address it together with social partners in the corresponding member state.

5.1.2. CARE IN EU REGULATIONS

In addition to economic development, the EC has as its goal the optimal participation of all Europeans by means of gainful employment. The subject of 'reconciliation of family responsibilities and work' has been on the EC's policy agenda since the 1970s, for example in the Social Action Programme. However, that has not led to a universal and cohesive package of binding provisions to facilitate combining work and care.5

In the EC, promoting the position of women in the labour market has been given shape primarily through a legal approach, i.e. combating unequal treatment of men and women. In that context, the man constitutes the 'norm' that the woman can achieve with the aid of antidiscrimination regulations. The standard was the actuality of men's lives rather than the lives of women and their related care duties.

Case law within the European Union has played an important role in this context. The prohibition against salary discrimination between men and women was already included in the first version of the EC Treaty. The Court of Justice of the European Communities then lent a broad scope to those

5 Caracciolo, 2001: 327.
provisions. Much of the case law handed down by the Court of Justice on equal treatment relates to the treatment of part-timers. By condemning the discrimination of part-timers as an indirect form of discrimination against women, the Court significantly contributed to the de-marginalisation of this form of women’s labour.

Since the beginning of the 1990s, directives governing part-time work and fixed-term employment contracts have been intended to structurally deal with an unjustified distinction based on the form of the employment contract, which has often led to discrimination against women compared with men. Part-time work and other forms of flexible work are no longer to be viewed as merely a suspect criterion for an indirect differentiation between men and women, but also as a way to allow women to participate in the labour market on a broader scale by giving them more time to care for their families. Moreover, at the macro-economic level flexible work could contribute to the EU’s competitive position. The ambivalence is clear from the preamble to the Foundation Directive concerning the Framework Agreement on Part-time Work, which provides that part-time work is beneficial for both the employer and the employee provided that there is no discrimination against part-timers with respect to their employment conditions.

But this is more than merely ambivalence: seen from the perspective of equal treatment of men and women, making working hours more flexible can even be paradoxical. Flexibilisation of working hours was not introduced for the sake of employee needs, but rather by employers who wanted to ensure themselves of the most efficient production methods possible. Flexible working relationships involving constructions such as part-time work, temps, telecommuting and on-call contracts, which often relate to low-quality work performed by women, were used as a means of evading obligations under employment law because such relationships were not qualified as being subject to an employment contract for legal purposes. Hence the use of what were in principle legal tools contributed to a dichotomy between first-class and second-class employees. In contrast to Dutch law, the EU’s non-discrimination regulations have been unable to combat this problem.

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6 This did not lead to the facilitation of conditions for employees with family responsibilities, both inside and outside the workplace. For example, in the Hofmanna case, which arose in the early 1980s (C-184/83, Jurisprudentie 1984, p. 03047), a father was unsuccessful in claiming ‘maternal leave’ based on the fact that he was the partner who would actually care for the child after his partner’s prenatal and postnatal maternity leave had ended.

5.1.2.1. Working Hours

The introduction to this chapter referred to the European Directive governing working hours, which neatly divides time into work time and rest time, and nothing else. The EU Working Hours Directives of 1993 and 2003 do not contain a provision such as the one included in Article 4.1a of the Dutch Working Hours Act (Arbeidstijdenwet), pursuant to which employers are obliged to take employees’ family responsibilities into consideration when drawing up the work schedule. Article 13 of the Directive merely instructs employers to take into consideration the general principle of adjusting the work to the person when drawing up the work schedules, primarily to alleviate monotonous and time-bound work. The revision proposals discussed in 2005 and 2006 were more akin to a liberalisation of the existing regime.⁸ According to the European Women’s Lobby, acceptance of those proposals would lead to longer and more irregular working hours and to more problems for women trying to combine paid work and care duties, despite the fact that the organisation of working hours should be an important component of a socially-minded Europe.⁹

Nonetheless, the preamble to the draft directive, which was discussed in 2006, did refer to the necessity of being able to combine work and care, albeit as part of a set of relatively irreconcilable objectives.¹⁰ Protection of employee health and safety must be improved, there must be more room for flexibility in the organisation of working hours, particularly with regard to on-call duty (and waiting and sleeping times during on-call duty), and a new balance must be found between combining work and family on the one hand and a more flexible organisation of working hours on the other. Member states should encourage the social partners to reach agreements at the appropriate level, with rules that will allow employees to better combine their professional and family lives. They should also ensure that employers inform employees in a timely manner regarding changes in work schedules, and that employers handle employees’ requests to have their working hours changed with a view towards the parties’ mutual needs in terms of flexibility.¹¹

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⁸ Supiot, 1999.
¹¹ Ibid.
If these proposals were accepted, the Directive would be less open-ended. However, given that negotiations have been underway for a considerable period of time without result, the chances of acceptance appear to be slim. A European regulation would not make much difference for Dutch legislation, but the options for penalising failure to comply with such a regulation could be improved at the European level, particularly if the European Court of Justice were also to take an activist position in this respect. Moreover, the draft, unlike national legislation, provides that a better combination of professional and family life is a subject for collective labour agreements, which could also contribute to enforcement, especially if the trade unions were to take responsibility for supervision or were to communicate more on the subject.

5.1.2.2. Adjustment of Working Hours

The 1997 Directive on Part-time Work, which was drawn up by the European social partners and adopted by the Foundation, prohibits unequal treatment of full-timers and part-timers and prescribes that employers must consider employee requests to switch from full-time to part-time work and vice versa. The Directive was intended to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working hours, taking into consideration the needs of both employer and employee. The Directive is completely neutral and reciprocal, and makes absolutely no reference to the reasons why an employee may wish to adjust his working hours.

Like most laws governing equal treatment, the Directive is formal in nature and thus does not acknowledge sex-specific circumstances such as the need to fulfil care duties. Any differentiation between persons having certain characteristics is prohibited; whether the person that has been treated unequally is in a subordinate position is irrelevant. As a result, occasionally persons belonging to groups that, according to the preparatory documents, were not intended to benefit from the law will nonetheless do so. The case law arising from the Dutch Adjustment of Working Hours Act (Wet Aanpassing Arbeidsduur) shows that, in relevant cases, the courts have permitted men to increase their working hours rather than women working part-time who were trying to improve their economic position. However, it has generally been women who have sought and been permitted to decrease

12 See note 7.
their working hours on the basis of this facility.\textsuperscript{13} The prohibition against unequal treatment of men and women (Article 141 of the EC Treaty) and the secondary regulations based on that prohibition have been incredibly effective as protective measures for part-timers, who are primarily women.

On the other hand, working part-time means that the risk related to care duties is not included in the employment contract, since the caregiver resolves the problem herself by ‘voluntarily’ decreasing her working hours. It is therefore all the more important to determine the extent to which ways of adjusting working hours and care leave are prescribed at the workplace, which do not by definition leave the caregiver to bear the burden.

5.1.2.3. Care Leave

EU law clearly prescribes the right to unpaid parental leave, \textit{inter alia} in Article 33 of the Charter of Fundamental Rights of the European Union and even more specifically in a special directive that was enacted at the initiative of the European social partners. They concluded an agreement on the ground of Article 139 of the EC Treaty, and the Foundation incorporated that agreement in EC Directive 96/34.\textsuperscript{14} Although at first glance it would appear that the purpose of the Directive is much more limited than the ILO Convention pertaining to workers with family responsibilities, upon closer examination it appears to extend even further than parental leave. Its purpose is to provide minimum requirements to enable working parents to combine their professional and familial duties (Clause 1 of the Directive). Parental leave forms part of that, which incidentally is much more extensive and concrete under the Directive than the second issue, \textit{i.e.} absenteeism due to circumstances beyond the worker’s control (Clause 3). On the ground of that provision, member states and/or the social partners must take the measures necessary to allow employees to be absent from work if unexpected circumstances in connection with illness or an accident necessitate the employee’s immediate presence. Member states must specify the conditions of this facility and limit them to a particular duration in a given year and/or per event. Due to the limits on the scope of the EC Treaty, the Directive prescribes only unpaid forms of leave.

\textsuperscript{13} Burri, 2004: 502-510.
5.1.3. CARE IN OTHER EUROPEAN COUNTRIES

How have other European countries used the employment contract as a device to handle the three work and care facilities? Most Western and Northern European countries have legislation in place governing care facilities as well as arrangements contained in collective labour agreements, through which such arrangements are placed within a legal framework. Nineteen EU countries and Norway recently took part in an investigation into leave facilities, which focused on the instrument of care leave; the facilities relating to the workday and workweek were addressed less specifically in view of the relevant information in that respect.

Care leave has been legally provided for in approximately three-quarters of those countries. That is not the case primarily in the former Eastern European countries. In 13 countries the leave exceeds the level of collective and individual employment contracts. Leave is explicitly defined in the law, as well as the related payment and duration. Payment varies from nil to full, and duration varies from five to 60 days a year (the latter for ‘care of a child’ in Ireland or ‘care in connection with private circumstances’ in Sweden). Thus, the leave laid down in the law does not always have a financial effect on the employment contract, but it does have a financial effect on the organisation of the work.

In nine of the 20 European countries, leave is also a subject of collective labour agreement negotiations. However, this tenor varies greatly among countries and usually involves supplementations to and expansions of the leave already provided for in the law. In two countries the arrangements made in collective labour agreements play a major role within the legal framework, i.e. in Denmark and the UK, although those agreements are placed in different legal frameworks. In the UK employees are expected to provide for their care leave arrangements themselves at the organisational level, on the basis of a rather meagre legal framework. In Denmark there is an opposing tendency to collectivise, to combat the unequal division of costs among employers, and to oblige all employers to contribute to a fund for employee leave. The coverage ratio in Denmark, where many work and care facilities are provided for in

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16 Austria, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Slovakia and Sweden.
collective labour agreements, is much higher than it is in the UK. Danish collective labour agreement negotiations generally relate to the duration and payment of care leave. The chosen instruments are also discussed in those negotiations, *i.e.* adjustment of working hours and flexibility in taking leave and reorganising the job or the working hours.

In Denmark and in many other European countries these instruments are handled together with maternity or parental leave. The connection between the three facilities is expressed in facilities that link leave to the right to limit the number of working hours or to distribute the working hours differently throughout the week. The ability to combine parental leave with part-time work is a legal right in nine of the 20 countries investigated. In addition to leave, there is a legal right to reorganise and limit the number of working hours in six European countries. Workers must substantiate a request to modify working hours, and employers may reject such requests on the ground of a limited number of considerations. The working day itself and its length are the subject of legislation in all the countries with the exception of Denmark and Ireland. The European directives governing working time and the implementation of those directives probably explain why legislation on these issues has now been implemented in all but only a few cases.

It is clear from this brief European comparison that most countries have legislation in place, and that countries that relegate these matters solely to collective labour agreements are the exception. The fact that virtually all Northern and Western European countries have created a legal framework to enable care facilities expresses the consensus that care facilities represent a social interest that cannot be left to the social partners.

### 5.2 WORK AND CARE FACILITIES IN THE NETHERLANDS

The three facilities or instruments under discussion, intended to combine work and care, were put into place in the Netherlands within a period of five years, between 1996 (the Working Hours Act, *Arbeidstijdenwet*) and 2001 (the Work and Care Act, *Wet arbeid en zorg*). This is quite late compared

17 Austria, Belgium, Finland, France, the Netherlands, Norway, Portugal, Spain and Sweden.
18 Finland, France, the Netherlands, Norway, Slovenia and Spain.
with other Western European countries. With respect to the Netherlands it can be said that in that period there was a change in paradigms, which was set in motion by the Childcare Incentive Scheme (Stimuleringsmaatregel Kinderopvang) in 1989 and the implementation of unpaid parental leave in 1990. The change consists in the replacement of the partially implicit standard of the ‘employee-breadwinner’ with a different benchmark: the employee with care duties. While the prior assumption was that the employee was free of care duties, the premise is now that employees also have care duties. In light of the ‘breadwinner society’ that was the ideology in the Netherlands 70 years ago and has been a fact of life for decades, this constitutes a fundamental change whose import cannot be understated. Although in principle the social partners could make arrangements in collective agreements regarding working hours, length of the working week or care leave, the three facilities have now acquired a legal framework in the Netherlands.

Two of the three facilities initially formed part of the ‘Work and Care’ legislative operation, which ultimately led to the enactment of the Work and Care Act on 1 December 2001.\(^\text{20}\) The Dutch government intended the act to offer a comprehensive facility to combine work and care, but ultimately only leave facilities were included in it. The act provides for more flexibility in taking a basically unpaid parental leave and ‘attachment’ leave for adoptive parents, an expansion of the existing urgent leave and the introduction of short-term care leave for 10 days a year.\(^\text{21}\) The law was enacted by the Dutch Parliament in 2001, at which time the Lower House forced the centre-left government to provide for payment of care leave at minimum-wage level.\(^\text{22}\) The facility governing the legal right to modify an employee’s specific hours of work was ultimately incorporated in a separate law, the Adjustment of Working Hours Act (Wet Aanpassing Arbeidsduur).\(^\text{23}\)


\(^\text{21}\) Ministerie van Sociale Zaken en Werkgelegenheid, 1999: Memorandum for part 2 & appendices.

\(^\text{22}\) The facility for long-term care leave entered into effect in 2005. Stb. 2005/274. The leave is unpaid; employees can draw on insurance under their life-course savings scheme in order to support themselves. See also Chapter 7 on pensions for the life-course savings scheme.

5.2.1. WORKING HOURS

On the ground of the Working Hours Act, in determining an employee's pattern of working hours the employer must take into consideration the employee's personal circumstances outside work insofar as he can reasonably be expected to do so, which in any event includes the care of children, dependent family members and relatives, and the social responsibilities the employee bears. Insofar as he can reasonably be expected to do, so, he must also organise the work in such a way that the employee can perform his work in a stable and regular pattern, partly with a view towards the individual employee's responsibilities outside work.

The act contains a standard norm and a more expansive consultation norm within which the social partners can agree on different working hours. The employees' care duties must be taken into consideration in subsequently determining working hours or schedules. As noted above, this is a change in paradigm: the employee with care duties has become the norm under the law. In that context it should be noted that there is no penalty for failure to comply with the statutory provisions. An employee would have to demand compliance on the basis of the general principle of good employership as laid down in Article 7:611 of the Dutch Civil Code (Burgerlijk Wetboek).

5.2.2. ADJUSTMENT OF WORKING HOURS

Since 1 July 2000, employees have been entitled to request that the contractually agreed working hours be adjusted, in which respect the number of hours can be either decreased or increased. An employer may reject a request to adjust working hours only if the request is opposed by weighty business interests. Unlike the other issues under discussion, in this case the employee's reason for making the request is irrelevant. The procedure and the

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24 Working Hours Act, supplemented in 2003 by the provision contained in Article 4:1a. With respect to this act it is worth noting that the objective aimed at care responsibilities outside work was added to it by a motion brought by the Lower House of the Dutch Parliament. The act was amended effective 1 April 2007, however not with respect to work and care. Stb. 2006/632 and 2007/89.


26 See e.g. Cantonal Division of the Court of Amsterdam, Jar 2004/224.

27 An earlier attempt to adjust working hours by means of legislation failed. At the end of 1997, an initiative legislative proposal by a small left-wing party, which was intended to lay down the right to shorter working hours, was rejected by the Upper House of the Dutch Parliament.
outcome are exactly the same regardless of whether an employee wishes to care for his child or go fishing in his free time. It is nonetheless wise for the employee to state the reason for the request when making it. When scheduling the number of hours in the week, the employer may deviate from the employee’s wishes only if he can demonstrate having interests such that the employee’s wishes must yield to them, following standards of reasonableness and fairness.

If the number of working hours is to be decreased, there will in any event be a weighty business interest if problems occur in the business operations with regard to a redistribution of the hours that have become available in terms of safety or scheduling. Courts seldom accept that argument. Arguments against allowing the number of working hours to be increased in any event include financial or organisational problems, if there is not sufficient work or if the number of positions or staff budget are insufficient. The social partners may make different agreements only when it comes to an increase in the number of working hours.

The policy considerations that form the basis of the facility are based on the assumption that women working in small, part-time jobs would want to increase their number of working hours and that men who currently work full time would want to decrease their number of working hours in order to have a four-day work week and play a more active role as fathers. Research results have supported these policy goals. Since the mid-1990s, those wishes have been ascertained year-in, year-out in a substantial percentage of employees, i.e. 30% of female and male employees who have working partners.28

5.2.3. CARE LEAVE

Paid short-term care leave has been provided for in Dutch legislation since 1 December 2001.29 Employees are entitled to leave for necessary care in connection with illness of their partner, a child who resides with the employee, a foster child or a first-degree blood relative. The maximum annual leave is twice the number of hours that the employee works on a weekly basis. During the leave the employee retains the right to receive at least 70% of his daily wage and in any event the applicable minimum wage (analogous to the facility that applies if the employee himself is ill).

28 Kunnen et al., 1998; Fouarge et al., 2004.
29 Stb. 2001/567 and 2001/569 (effective date).
5.3. THE DIVISION OF RESPONSIBILITY WITH RESPECT TO WORK AND CARE

With regard to the question of which party is responsible for realising new rules for the benefit of – in this case – employees who also have care duties, in principle there will always be a process in which the parties will have to acknowledge the subject matter as such. By acknowledging an issue as relevant, the parties must immediately determine their own responsibility towards the related problems and try to reach a consensus. This was also the case with issue of work and care. Therefore, in addressing the issue of the division of responsibility a brief outline will be given of how the problem must be defined and how the degree of responsibility on the part of the government and the social partners must be determined.

5.3.1. POLICY OF THE GOVERNMENT AND SOCIAL PARTNERS

The Dutch government motivated its policy for the Dutch Work and Care Act by stating:

The primary goal of the policy in the areas of work, care and income is to achieve a permanent situation in which as many people as possible can combine an economically independent existence with care responsibilities during the course of their lives.\(^{30}\)

This choice for a more balanced division of work and care among men and women is situated against the background of an increasing entanglement of social spheres, a development that a ‘modern government’ must take into consideration:

The increasing intermingling of the public sphere of work and the private sphere of care indicates a shift in responsibilities of the government and social partners. In the past, regulations were limited to the public domain; however, they now extend to domains that were formerly considered private, such as childcare and leave. Because more and more people are combining work and their private lives, it is also increasingly apparent that regulations governing the public domain, such as those governing working

hours, have a major effect on the manner in which people can organise their private affairs.\textsuperscript{31}

A new policy, aimed in part at the private sphere, is considered justified in this respect because it arises from societal developments: the legislature is not directing the course of events but rather following it.

In the Netherlands, the Work and Care Act marks a turning point in legislation and policy, a change that can be understood as a response to changes in society in general and in the labour market in particular. The essence of this is the increased participation of women (in particular married women) in the labour market, from 30\% in 1980 to 55\% in 2003.\textsuperscript{32} Partly due to the fact that since the end of the 1960s the taboo against married women (especially those with children) working outside the home has gradually dissipated, women, men and employers began to see the potential of women in the workforce.\textsuperscript{33} It has often been noted that women in the Netherlands entered the labour market relatively late, \textit{i.e.} starting in the late 1980s, compared with women in large portions of northern, Western and southern Europe. It is characteristic of the Dutch situation that social partners did not issue their first joint recommendation on ‘Women and Work’ until 1991.

Within the framework of its emancipation policy, in the course of the 1970s the Dutch government had already determined its position and revised outdated views. Increasing the participation of women in the labour market and their directly related economic independence was one of the primary goals within the framework of the emancipation policy. Attention to the economic independence of women and their ability to develop themselves resulted in policy measures in the area of education and training, and facilitating measures such as childcare and parental leave.

In the 1980s, increasing the participation of women in the labour market became an even more explicit part of economic policy, both in the Netherlands and the rest of Europe. Women entered the labour market in large numbers and the need to facilitate this development legitimated new policies. This was ultimately also supported by society at large and by employers. Economic considerations have also inspired the policy objective of

\textsuperscript{31} Ibid: 9.
\textsuperscript{32} Portegijs Boelens & Keuzenkamp, 2002. The percentages relate to jobs involving 12 hours or more a week.
\textsuperscript{33} Grünell, 1998.
increasing the participation of women in the labour market to 65% by 2010 (2000 Long-term Policy Plan). This is in accordance with the objectives of the EU, which have been reconfirmed in various agreements and implemented in the European Employment Strategy. Increasing the participation of women in the employment market has gone from being an emancipatory argument to being an economic one, thereby penetrating to the core of labour market policy.

The three facilities under discussion are all legal in nature. With respect to working hours that is only reasonable, if for no other reason than the legislature seeing this as its concern for more than a century. Things are different with respect to the other two statutory facilities – differentiation in working hours and leave – because they involve the sovereignty of the social partners, which is unchallenged in the Netherlands. Employment conditions continue to be primarily an issue to be handled by employers and employees, even if in this case they are ultimately ‘overruled’ by the legislature.

The social partners first spoke jointly in 1990, through the Dutch Labour Foundation (Stichting van de Arbeid or STAR), about the instruments that were intended to stimulate the participation of women in the labour market. In Nota Vrouw en Arbeid (‘Memorandum on Women and Work’) they expressed their appreciation of the increase of the number of women working in paid employment and referred to the similarity of interests: ‘… from the perspective of emancipatory considerations, the position of women in the labour market must be improved, and based on the importance of ensuring sufficient staffing improving the position of women in the labour market is one option to solve the problem of personnel shortages’. Both the government and the social partners must contribute to giving shape to these developments, in which context the relevant policy must be developed and supported within companies and business sectors. Apart from the government's full or partial financing of childcare, in this context it is the social partners who must make the first move in shaping this policy by means of consultations at the business sector and company level.

Social partners are attempting to reconcile the new ‘preferences’ of employees with old and new interests of employers. The various employee preferences on the amount of work and the time at which that work is to be performed

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35 Stichting van de Arbeid, 1990: 1.
implies an organisational load increase, but at the same time provides companies with a competitive advantage in terms of greater flexibility, for example due to the expansion of operating hours. However, the increase in flexibility and individual choice is delimited by another important point taken into consideration by the Labour Foundation, namely that ‘fixed, regular and predictable work’ creates the best conditions for enabling and ensuring the continuity of care. In this context there is tension between the interests of employers and employees, as well as between the various categories of employees. More flexibility can be attractive for employees if they only have to care for themselves. If they also have to care for others, however, fixed, regular and predictable work is more in line with their needs.

The Labour Foundation’s 1990 Memorandum on Women and Work explicitly discusses the three facilities that are central in this context. Part-time work is the first option considered when differentiating the scope of the working week. Historically speaking, employees and employers speaking out about part-time work and expressing a desire to stimulate part-time work is a new development. They reached agreement in this respect in 1993. The social partners have also indicated their wish to stimulate ‘full-fledged part-time work’, i.e. part-time work with full employment conditions and at ‘every possible job level’, not only at the lower end of the job scale. The various forms of leave (including care leave) were also considered in those 1993 consultations, albeit only theoretically. According to the social partners, it is the responsibility of the parties negotiating the collective labour agreements and the individual employees and employers to incorporate care duties into the employment conditions in the broadest sense. But how have the social partners actually contributed to collective labour agreement negotiations since 1990?

In the course of the 1990s, the Dutch Labour Inspectorate (Arbeidsinspectie) paid special attention to work and care issues in their regular collective labour agreement investigations. The results were disappointing. With respect to the Working Hours Act, which was enacted in 1996, as of the end of 1998 only nine of the 121 labour agreements that were investigated contained a provision pursuant to which employees’ ‘private circumstances’ must be taken into consideration when determining working hours. A slightly higher number of labour agreements contained arrangements on the obligation to

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38 CAO (collectieve arbeidsovereenkomsten).
determine working hours in consultation.\textsuperscript{39} Although there were more facilities relating to care leave and urgent leave that were not yet differentiated in the Health and Safety Inspectorate’s investigations, surprisingly few agreements had been made: one-fourth of the agreements contained such a facility, either paid or unpaid. Far more agreements contained arrangements governing the scope of the working week: 67% of the 139 collective labour agreements investigated contained provisions offering employees the possibility to request a modification of their working hours. However, those provisions were not elaborated in most of the agreements.\textsuperscript{40}

The results of the investigation into the incorporation of emancipation issues in collective labour agreements were also disappointing.\textsuperscript{41} The party that commissioned the investigation, the Dutch Emancipation Council (\textit{Emancipatieraad}), concluded that the work and care issue cannot be left to the social partners. The Dutch State Secretary for Emancipation Issues concluded on that basis that the government’s responsibility should be expanded. During her term she succeeded in having the Dutch Parliament pass a comprehensive framework law, the Work and Care Act.

The new division of responsibility that this step implies does not appear to have given rise to any noteworthy opposition. In its recommendation regarding the legislative proposal, the Labour Foundation argued that the Work and Care Act should offer those conditions for implementing facilities that are geared to the actual situation. Collective facilities will have to provide more opportunities for choice at the individual level within the company’s organisational and economic options, but this does not detract from the essential role of collective labour agreements as such.\textsuperscript{42} That recommendation demonstrated a notable consensus in the analysis of the problem and a rather innocent openness regarding the division of responsibility, despite the fact that the hierarchy had clearly changed: it is now the government that takes the initiative and lays down the rules, and it is the social partners that are allowed to offer recommendations.

Still, Labour Foundation members differed on the legislative proposal intended to regulate the modification of working hours. The employers, known to be the most significant opponents to such a legislative proposal, did not openly involve themselves in the deliberations. In terms of care leave, the

\textsuperscript{39} Arbeidsinspectie, 1999; see also Mevissen, Knegt & Zwinkels, 2001.
\textsuperscript{40} Arbeidsinspectie, 2001.
\textsuperscript{41} Sloep, 1996.
\textsuperscript{42} Stichting van de Arbeid, 1999: 9.

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Foundation duly noted the sovereignty of employers and employees with regard to employment conditions, which is also endorsed by the government, but was inclined to maintain its good relations with the government. The Foundation offered a mixed recommendation on care leave: employee representatives support the government’s intention to implement a legal right to care leave with a limited duration, while employer representatives are against such a right and trust that, when appropriate, the parties will come up with a suitable solution. They are of the opinion that legal rights would limit parties’ negotiating options in collective labour agreements, which are considered extremely important in the Dutch consensus economy. The Foundation explicitly referred to its earlier recommendation of 1997, in which it argued for ‘agreements whose form and content are in line with the wishes and options within the relevant sector or company’.

The Dutch government has traditionally had a great deal of respect for the sovereignty of the social partners. Government action is considered legitimate only if those parties are unable to suitably handle issues involving the public interest in consultation with each other. It appears from the Labour Foundation’s recommendations that social partners have acknowledged the work and care issues and their consequences for collective labour agreements, but they have been unable to make agreements on certain issues. Their advice and recommendations have met with little response and have not had a substantial influence on labour agreements in that respect, and a facility for care leave at the central level has already been blocked by employers. Caution was required with respect to government action, and support was continually sought from the social partners. The tranche legislation relating to work and care was handled in the Dutch Parliament subject-by-subject, step-by-step, over the course of two years. Up to that point, such far-reaching involvement of the government in labour relations – particularly regarding these issues – was unprecedented. It is also exceptional because it took place at a time when government policy was generally aimed at decentralised decision-making, which underscores the importance of the issue. Employers were forced into a defensive position but nonetheless continued to contribute constructively, emphasise joint interests and offer solutions that also suited companies’ needs. The importance of continuing discussions, thereby attempting to influence each other, appears to be a social dynamic unique to

45 In 2005 long-term, unpaid care leave was finally implemented as part of the Dutch Work and Care Act.
the Dutch ‘polder’ consensus model, even if it is the legislature which sets the rules.

5.4. INCLUSION AND EXCLUSION

The integration of work and care in the package of employment conditions is first and foremost a process of inclusion: the inclusion of potential employees who were not perceived as such half a century earlier. Married women were legally and materially excluded from salaried employment well into the 1960s. The assumed presence of children, and thus care duties, constituted the most significant justification for this ‘outsider’ position in the labour market. Nowadays women, married and single, with or without children, are not only tolerated in the labour market, they are encouraged to participate. As a result, an employee aspect that until recently was ignored – care duties – has been incorporated into labour relationships.

Within the framework of emancipation policy the male breadwinner, exempted from care duties, loses not only his determinative position in laying down employment conditions. The redistribution of paid and unpaid work, which became one of the three central policy lines in the 1990s, raises a discussion on the entire concept of the breadwinner who is exempted from care duties. Since then it has been assumed that, in principle, male employees are also responsible for care outside work. The position of the insider, the male breadwinner, has thus been indirectly redefined through the position of the former outsider.

However, the former outsider has made an unusual choice: she has chosen to work part-time. In the 1980s and 1990s, married and single women in the Netherlands chose part-time jobs en masse – in 1990, 50% of women worked part time, compared to 66% in 2003. This development provides a different perspective on the actual meaning of paid work in the pursuit of economic independence and implies the necessity to reconsider and reorient government policy, while at the same time the social partners have embraced part-time jobs that ‘have a reasonable degree of permanence, predictability and regularity, making it possible to organise private duties around them’. In

47  De Bruijn, 1989.
49  Those jobs consisted of 12 to 34 hours a week (Portegijs, Boelens & Olsthoorn, 2004).
50  Stichting van de Arbeid, 1997b: 7.
In other words, employees can and may provide care, but at their own expense. The part-time option accepts that care duties exist, but at the same time excludes them from the working relationship. Hence the care duties that are now included can in principle be left out of the employment relationships (of men). However, since the government has taken the lead the measures under discussion aimed at combining work and care will nonetheless be placed on the agenda and realised.

In light of the policy objective of economic independence for women, at the end of the 20th century the government argued for development towards significant part-time jobs, raising the issue of interference with care duties. The policy aimed at redistributing paid and unpaid work, in the process increasing the care duties of men, led to a new impulse at the turn of the century due to the emergence of a scenario in which paid work is combined with one's own care duties. In terms of women's and men's participation in the labour market, more participation on the part of women should be combined with less participation of men. This would be another way to better spread the responsibility for care. Part-time work for men and paid or unpaid parental leave for fathers are also, broadly speaking, options for male employees.

The three instruments under discussion, aimed at creating time for care duties within the working relationship, also generate new options for both female and male employees. This cumulative inclusion of care duties has been endorsed by the three parties involved, for different reasons. Employers, employees and the government have all expressed their support of the goal of equality between men and women, and this applies to both work and care. The view that care duties can be divided more equally is supported by a large percentage of employees and is also the dominant conviction within emancipation policy. That argument has also contributed to the explicit inclusion of male employees in the regulation of care duties within employment relationships.

At the same time, it must be said that today, in 2007, the process of including care duties has not yet been completed. Unpaid long-term care leave and childcare are among the facilities that remain meagre, ineffective and unequal:

51 Portegijs, Boelens & Olsthoorn, 2002.
53 Commissie Toekomstscenario’s Herverdeling Onbetaald Arbeid, 1996.
54 Grünell, 1997; 2002.
a large percentage of public servants are entitled to paid parental leave, but employees in the corporate sector only get unpaid leave. In addition, the ability of employees to actually take advantage of the new employment conditions is divided unequally, between economic sectors and companies and between highly qualified and less qualified employees. Various categories of workers, such as the self-employed, are also still excluded.

5.5. CONSEQUENCES FOR EMPLOYMENT CONTRACTS

The three legal facilities involving care duties have provided employees with rights that ensure that employers can no longer avoid getting involved in their employees' private lives. This is an essential change. What are the other consequences for the essential nature of employment contracts?

The constitutive elements of employment contracts – the relationship of authority, the stipulated work and the set time – have been affected by the facilities chosen to make time for care duties. The most striking changes are those involving the set time, which is not about the term in the sense of the duration of the employment contract but rather the number of agreed hours per week or per month. Whereas previously the principal of pacta sunt servanda gave employers the certainty that they could hire a fixed number of ‘man hours’ more or less in accordance with the needs of their production process, they are now less certain that those planned hours will actually be worked by a specific employee. Previously the employee’s own illness but now also the illness of the employee’s relatives constitute a reason why the employer may purchase working hours but not necessarily actually receive those hours worked. The relevant legislation also provides employers with less certainty regarding the number of contracted hours. Employees have a far-reaching possibility to unilaterally amend their employment contracts in terms of number of hours to be worked per week. Although employers must approve such an amendment, their options for rejecting such a change are extremely limited. Incidentally, the actual related costs must be paid by the employee: if he works less, he earns less. The certainty about the working

56 Nothing has changed in terms of the fourth constitutive element of employment contracts, the duty to perform work personally.
57 Flexibility needs of employers have changed. Production processes such as just-in-time production and work cultures in which attendance or availability have become more important now influence employers' desired forms of employee flexibility.
hours that are purchased is also diminished due to the obligation to take into consideration employees' familial circumstances.

Employees' rights are contained in clear and no uncertain terms in the relevant legislation. What does this mean for the relationship of authority, which is one of the constitutive elements of an employment contract? In order to ensure that the right is effective, the employee must submit a substantiated request to the employer. The request takes place within the relationship of authority in which the employee, due to the subordinate nature of his position, in many ways has much to lose if he is too vocal in invoking his legal right to modify his working hours or take care leave. Thus, these rights seem to work more as a basis upon which employees can raise their wishes regarding working hours, but they do not actually breach the relationship of authority.

What does this mean for the stipulated work? It is in any event clear that the stipulated time is no longer laid down indisputably – but does that affect the content of the work? The form of the procedure seems to appeal to a mutual willingness on the part of both employer and employee with respect to the work to be performed.

The employment contract can still be considered a formalisation of a market transaction, but its conditions have shifted along with the changes in the parties' relationships in terms of the harmonisation of work and care. Those parties must now acknowledge that employees have care duties in addition to their work duties. In practice, there are major differences between sectors: in the construction industry, facilities to make time available for care duties are still predominantly unaccepted, but in more feminised sectors like the care sector such facilities are all the more accepted. Part-time work has been raised as an argument for performing care duties on an unpaid basis during the worker's free time. However, as more women attain higher-level positions, which are often considered incompatible with part-time work, the problems involved in harmonising work and care once again become pressing.

With respect to day-to-day care duties, facilities to make time available for such duties within the agreed working hours and flexibility are the most obvious choices; for exceptional care outside the scope of common day-to-day care duties there is care leave and urgent leave. In this way, room is created for care duties within the formal framework of the employment relationship, while at the same time a form of osmosis can be ascertained between work and care because the line between them has become less explicit.
Care is an individual choice, as well as a benefit to society at large. The ability to combine work and care represents a public interest that the government feels cannot merely be left to the social partners to resolve. Although concrete agreements will always be a question of consulting and arriving at settlements with the employer, the general interest of harmonising work and care has now justified general regulations. In addition, policy in the EU and in the Netherlands is aimed at increasing participation in the labour market and including as many potential employees as possible. The short history of work and care to date is thus first and foremost a history of inclusion in which the employment contract has been a valuable instrument.