

Work-Life Balance in the Modern Workplace

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Founding Editor

The series started in 1970 under the dynamic editorship of Professor Roger Blanpain (Belgium), former President of the International Industrial Relations Association. Professor Blanpain, Professor Emeritus of Labour Law, Universities of Leuven and Tilburg, was also General Editor of the International Encyclopedia of Laws (with more than 1,600 collaborators worldwide) and President of the Association of Educative and Scientific Authors. He passed away in October 2016.

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Introduction

The Bulletins constitute a unique source of information and thought-provoking discussion, laying the groundwork for studies of employment relations in the 21st century, involving among much else the effects of globalization, new technologies, migration, and the greying of the population.

Contents/Subjects

Amongst other subjects the Bulletins frequently include the proceedings of international or regional conferences; reports from comparative projects devoted to salient issues in industrial relations, human resources management, and/or labour law; and specific issues underlying the multicultural aspects of our industrial societies.

Objective

The Bulletins offer a platform of expression and discussion on labour relations to scholars and practitioners worldwide, often featuring special guest editors.

The titles published in this series are listed at the end of this volume.

Work-Life Balance in the Modern Workplace

Interdisciplinary Perspectives from Work-Family
Research, Law and Policy

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Sarah De Groof

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Summary of Contents

Notes on Contributors	v
Foreword	xxiii
CHAPTER 1 Introduction <i>Sarah De Groof</i>	1
CHAPTER 2 Connecting Crowd-Work with Work-Life Balance: Mission Impossible? <i>Alberto Barrio & Nuna Zekić</i>	9
CHAPTER 3 Part-Time Fathers and Mothers? Comparing Part-Time Employment in Germany, Sweden, Ireland and the Netherlands <i>Sonja Bekker, Lena Hipp, Janine Leschke & Friederike Molitor</i>	27
CHAPTER 4 How Can Labour Law Contribute to Work-Life Balance? Recommendations for a Modern Working Time Law <i>Sarah De Groof</i>	51
CHAPTER 5 Making the Business Case for Work-Life Integration in the United States <i>Katherine S. Drake & Amy K. Brown</i>	73
CHAPTER 6 The Third Shift: How Do Professional Women Articulate Working Time and Family Time? <i>Émilie Genin</i>	103

Summary of Contents

CHAPTER 7		
Irregular Work Scheduling and Its Consequences		
<i>Lonnie Golden & Jaeseung Kim</i>		115
CHAPTER 8		
Through Work-Life-Family Reconciliation to Gender Equality? Slovenia and the United Kingdom's Legal Frameworks Compared		
<i>Barbara Kresal & Ania Zbyszewska</i>		155
CHAPTER 9		
"This Is Not an Ideal, Man": Restructuring the Ideal Worker Norm		
<i>Ifat Matzner-Heruti</i>		183
CHAPTER 10		
Teleworking in Iberian Labour Law as a Measure of Reconciling Work and Family Life and Working Time Control as the Key to Avoid the Blurring of the Boundaries Between Work and Family Life		
<i>Lourdes Mella Méndez</i>		209
CHAPTER 11		
Work-Life Balance in the Modern Workplace: A Comparative Analysis of the Turkish and European Multinational Companies Operating in Turkey		
<i>Gürol Özcüre, Nimet Eryiğit & Harun Demirkaya</i>		231
CHAPTER 12		
Exploring the 'Boundary Control Paradox' and How to Cope with It: A Social Theoretical Perspective on Managing Work-Life Boundaries and Work-Life Balance in the Late Modern Workplace		
<i>Pascale Peters, Robert J. Blomme, Anne van Heertum & Daantje Derks</i>		261
CHAPTER 13		
Precarious Work and Work-Family Reconciliation: A Critical Evaluation of New Zealand's Regulatory Framework		
<i>Amanda Reilly & Annick Masselot</i>		285
CHAPTER 14		
Regulating Work-Life Balance: The Contemporary Swedish Experience		
<i>Niklas Selberg</i>		311
CHAPTER 15		
Family Responsibilities Accommodation in Canada: Individual Solutions to a Collective Dilemma		
<i>Mathilde Valentini & Stephanie Bernstein</i>		341

CHAPTER 16

Reconciliation of Work and Private Life as Key Element for Sustainable
Work Throughout the Life Course

Greet Vermeylen, Agnès Parent-Thirion, Mathijn Wilkens & Jorge Cabrita 359

CHAPTER 17

Work-Life Balance, Time and Money: Identifying the Work-Life
Balance Priorities of Working Class Workers

Tracey Warren 373

Table of Contents

Notes on Contributors	v
Foreword	xxiii
CHAPTER 1	
Introduction	
<i>Sarah De Groof</i>	1
§1.01 General Background	1
§1.02 Overview of the Contributions	2
§1.03 What They Have in Common	7
CHAPTER 2	
Connecting Crowd-Work with Work-Life Balance: Mission Impossible?	
<i>Alberto Barrio & Nuna Zekić</i>	9
§2.01 Introduction	9
§2.02 What is Crowd-Work?	10
[A] Definition of Crowd-Work	11
[B] Essential Features of Crowd-Work	11
[1] Platforms	12
[2] Process	12
[3] Providers	13
[4] Consumers	14
[C] Other Features of Crowd-Work	15
§2.03 Legal Challenges Crowd-Work Poses	15
[A] Employment Status	15
[B] Differences Within Employment Status	18
[C] New Forms of Subordination	19
[D] Collective Representation	20
§2.04 Attention Paid to Work-Life Balance	20
[A] Possibility to Perform Work on Distance	21

Table of Contents

[B]	Flexibility on Working Time	21
[C]	Holding Multiple Jobs	22
§2.05	Conclusions	23
CHAPTER 3		
Part-Time Fathers and Mothers? Comparing Part-Time Employment in Germany, Sweden, Ireland and the Netherlands		
<i>Sonja Bekker, Lena Hipp, Janine Leschke & Friederike Molitor</i>		27
§3.01	Introduction	27
§3.02	Welfare State Typologies and SET	28
§3.03	Part-Time Employment: Individual and Household Characteristics	30
§3.04	Part-Time Work and National Institutions	32
§3.05	Descriptive Analysis: Part-Time Employment and Household Context	36
§3.06	Conclusion	43
References		45
CHAPTER 4		
How Can Labour Law Contribute to Work-Life Balance? Recommendations for a Modern Working Time Law		
<i>Sarah De Groof</i>		51
§4.01	Introduction	51
§4.02	Work-Life Balance ‘Criteria’	52
[A]	Number of Working Hours	54
[B]	Non-standard Working Hours	55
[C]	Working Time Regularity and Predictable Working Hours	55
[D]	Little Overtime and Extra Working Hours	56
[E]	Emergency Leave	56
[F]	Control over Start and Finish Times	57
[G]	Intensity of Work	57
[H]	Autonomy over Working Time	58
§4.03	A Work-Life Balance Evaluation	59
[A]	Some Work-Life Balance Criteria Are Positively or Negatively Influenced	59
[1]	Number of Working Hours	59
[2]	Non-standard Working Hours	63
[3]	Emergency Leave	64
[4]	Intensity of Work	64
[5]	Autonomy over Working Time	65
[B]	On Some Work-Life Balance Criteria There is No Influence	67
[C]	Limitations to a Work-Life Balance Evaluation	67
§4.04	Recommendations for a Modern Working Time Law	68

CHAPTER 5

Making the Business Case for Work-Life Integration in the United States

Katherine S. Drake & Amy K. Brown

		73
§5.01	Introduction	73
§5.02	Overview of Work-Life Integration, Workplace Flexibility, Culture, and Redesign	74
	[A] Work-Life Integration	74
	[B] Workplace Flexibility	75
	[C] Workplace Culture	76
	[D] Workplace Redesign	77
	[E] From Workplace Flexibility to Work-Life Integration: The 3A Model	78
§5.03	The Case for Work-Life Integration	79
	[A] The Changing Workforce	79
	[1] Job Market Changes	79
	[2] Shifting Roles of Men and Women at Home and at Work	80
	[3] From Baby Boomers to Millennials	82
	[4] The Growing Gig Economy	83
	[B] Business Benefits of Work-Life Integration	84
	[1] Summary of Research	84
	[2] Case Studies	85
§5.04	The Current State of Paid Family Leave in the US	86
	[A] Private Sector Policies	87
	[B] Government Policies	90
§5.05	Moving Work-Life Integration Forward	94
	[A] Understanding the Barriers to Change	94
	[B] The 3A Model as a Framework for Paradigm Shift	94
	[C] Strategies for Adapting the Workplace to Fit the Workforce	95
	[1] Broad Recommendations	95
	[i] Implement Organizational Culture Assessment	95
	[ii] Resist Overwork and Face Time	95
	[iii] Offer Increased Flexibility	96
	[iv] Resist the Flexibility Stigma	96
	[v] Measure Effectiveness	97
	[2] Workplace Transformation Models	97
	[i] OpenWork	97
	[ii] Results-Only Work Environment (ROWE)	98
§5.06	Conclusions	100

CHAPTER 6

The Third Shift: How Do Professional Women Articulate Working
Time and Family Time?

Émilie Genin

		103
§6.01	Introduction	103

Table of Contents

§6.02	Methodological Note	104
§6.03	Gender, Work-Family Conflict and Third Shift	106
§6.04	The Third Shift: A Symptom of the Dematerialisation of Work, Disruptive Technologies and Gender Inequity	109
§6.05	Discussion of the Stakes for the Third Shift	111
§6.06	Conclusion	112
CHAPTER 7		
Irregular Work Scheduling and Its Consequences		
<i>Lonnie Golden & Jaeseung Kim</i>		115
§7.01	Introduction and Overview	115
§7.02	Irregular Shift and On-Call Working in the U.S. and Its Potential Adverse Consequences	117
§7.03	Irregular Shift Work: Findings Using the GSS and Its Supplements	118
§7.04	Irregular/On-Call Work Shifts and Work-Family Conflict	121
§7.05	Implications of the Findings for Proposed Legal Reforms: What Can Be Done?	124
References		145
CHAPTER 8		
Through Work-Life-Family Reconciliation to Gender Equality? Slovenia and the United Kingdom's Legal Frameworks Compared		
<i>Barbara Kresal & Ania Zbyszewska</i>		155
§8.01	Introduction	155
§8.02	Social and Economic Background	158
§8.03	Legislative Frameworks	159
[A]	Slovenia	160
[1]	Historic Development	160
[2]	Leaves Associated with Parenthood	161
[i]	Maternity Leave	161
[ii]	Paternity Leave	162
[iii]	Parental Leave	162
[iv]	The Right to Part-Time Work Due to Parenthood	163
[3]	Flexible Working Arrangements and Other Rights for Working Parents	164
[4]	The Role of Collective Agreements	164
[5]	Child-Care Services	165
[B]	United Kingdom	165
[1]	Historic Development	165
[2]	Leaves Associated with Parenthood	167
[i]	Maternity Leave	167
[ii]	Paternity Leave	168
[iii]	Shared Parental Leave	168

[iv] Adoption Leave and Other Entitlements for Adoptive Parents	169
[v] Unpaid Parental Leave	169
[3] Emergency Leave	170
[4] Flexible Working and the Right to Request	170
[5] Childcare	171
§8.04 Comparing the Slovenian and UK Work-Family/Life Balance Regimes	171
[A] How Employee Friendly?	172
[B] How Egalitarian?	174
[C] Impact of the Crisis	175
§8.05 Conclusions	177
References	179
CHAPTER 9	
“This Is Not an Ideal, Man”: Restructuring the Ideal Worker Norm	
<i>Ifat Matzner-Heruti</i>	
§9.01 Introduction	183
§9.02 Masculinities Imperatives as Manifested in the Lives of Israeli and American Fathers	185
[A] Avoid Acting in a Feminine Way	187
[B] Located Within a Hierarchy	188
[C] Being the Family Provider	190
§9.03 The Role of the Israeli and American Governments, Employers, and Courts in the Reinforcement of the Masculine Breadwinner Norm	193
§9.04 Deconstructing the Ideal Worker Norm	201
§9.05 Masculinities Theory Meets Neo-Institutionalism Theory	205
[A] What Influences Fathers to Use Work-Family Policy? The Effect of the Organizational Environment	205
[B] What Influences Organizations to Adopt Work-Family Policy? The Effect of the Organizational Field	206
§9.06 Conclusion	208
CHAPTER 10	
Teleworking in Iberian Labour Law as a Measure of Reconciling Work and Family Life and Working Time Control as the Key to Avoid the Blurring of the Boundaries Between Work and Family Life	
<i>Lourdes Mella Méndez</i>	
§10.01 Teleworking in Iberian Labour Law (Portugal and Spain) as a Measure of Reconciling Work and Personal and Family Life	209
[A] Teleworking as a Way of Helping Victims of Domestic Violence	212
[B] Teleworking as a Way of Helping Working Parents with Young Children	219

Table of Contents

§10.02	Working Time Control as the Key to Avoid the Blurring of the Boundaries Between Work and Family Life	222
[A]	Risks of Working Outside the Workplace	222
[B]	Working Time in Distance Work and Its Control by the Employer	224
CHAPTER 11		
Work-Life Balance in the Modern Workplace: A Comparative Analysis of the Turkish and European Multinational Companies Operating in Turkey		
<i>Gürol Özcüre, Nimet Eryiğit & Harun Demirkaya</i>		
§11.01	Introduction	231
§11.02	General Scope: Work-Life Balance in Turkey	232
[A]	The ILO and the Council of Europe Work-Life Balance Conventions Affecting Turkish Labour Law	235
[B]	The EU Work-Life Balance Policy Affecting Turkish Labour Law	237
[C]	Work-Life Balance Regulations in the 2003 Turkish Labour Act	240
[D]	Part-Time Working Rights for Parents in Turkey	242
[E]	Employees Adopting a Child under Three Years of Age	243
[F]	National Action Plans, Employment Strategies and Development Plans for Gender Equality in Turkey	245
[G]	2016 Progress Report of the EU for Turkey; Latest Data of Women Employment in Turkey	247
§11.03	Comparison of the Sixth European Working Conditions Survey in 2015 and Our Survey in 2016 Results in Turkey	248
§11.04	Concluding Remarks	258
CHAPTER 12		
Exploring the ‘Boundary Control Paradox’ and How to Cope with It: A Social Theoretical Perspective on Managing Work-Life Boundaries and Work-Life Balance in the Late Modern Workplace		
<i>Pascale Peters, Robert J. Blomme, Anne van Heertum & Daantje Derks</i>		
§12.01	Introduction	261
[A]	The Scholarly Debate on the Blurring of Boundaries Between Work and Non-work	261
[B]	The Societal Debate on Blurring of Boundaries Between Work and Non-work	263
[C]	Our Contribution to the Debates on the Blurring of Boundaries Between Work and Non-work	264
§12.02	Historical Background of the Boundary Control Paradox	265
[A]	Control in the Modern Workplace	265
[B]	Control in the Late Modern Workplace	266
§12.03	Boundary Theory and Its Key Concepts	268

[A]	Constructing Boundaries Between the Work and Non-Work Domains	268
[B]	Flexibility and Permeability of Work and Non-Work Boundaries	268
[C]	Managing Work-Life Interruptions	268
[D]	Work-Life Role Identities	269
[E]	Preferred and Enacted Boundary Management Strategies	269
[F]	Boundary Management Incongruence	270
[G]	Boundary Control	270
[H]	Availability Culture: Relevant Others' Norms and Behaviours	271
[I]	The Boundary Control Paradox	271
[J]	Preliminary Insights from an Empirical Case Study	272
§12.04	Conclusion and Discussion	275
[A]	Exploring the Boundary Control Paradox and How to Cope with It	275
[B]	Sustainability Policies and Practices	275
[C]	Active Responses to Paradoxical Pressures	276
[D]	Implications for Scholarly Research and for Policies and Practices	279
	References	280
CHAPTER 13		
	Precarious Work and Work-Family Reconciliation: A Critical Evaluation of New Zealand's Regulatory Framework	
	<i>Amanda Reilly & Annick Masselot</i>	285
§13.01	Work Family Reconciliation and Precarious Work in New Zealand	287
§13.02	Right to Request Flexibility	293
§13.03	Regulation of Time in New Zealand	295
§13.04	Union Initiatives with Regard to Scheduling and Regularity of Hours	300
§13.05	Conclusion	303
	References	304
CHAPTER 14		
	Regulating Work-Life Balance: The Contemporary Swedish Experience	
	<i>Niklas Selberg</i>	311
§14.01	Work-Life Balance: Revitalising a Classical Concern for Labour Law	311
§14.02	Work/Life Balance in Sweden: A Historical Overview	313
§14.03	Work/Family Balance in Sweden: An Empirical Overview	315
§14.04	Swedish Labour Law and Industrial Relations: An Overview	318
§14.05	Regulating Work-Life Balance: EU-Law, International Labour Standards and National Legislation – and Collective Agreements	319

Table of Contents

§14.06	The Interplay Between Legislation and Collective Agreements and the Sanctions for Breach of Working Time Norms	322
§14.07	The Role of Trade Unions	323
§14.08	The Quantity of Work to be Performed	324
	[A] Full Time or Part Time Work? The Role of the Contract of Employment	324
	[B] A Preferential Right to Increased Working Hours	325
	[C] Working Hours: Normal and Overtime – and the Obligation to Work Overtime	325
§14.09	Regulating Work Intensity: A Healthy Workload?	327
§14.10	A Reduction in Working Time? A Failed Legislative Proposal	328
§14.11	A Reduction of Working Time? State Policies and Collective Agreements	329
§14.12	A Right to Full-Time Employment? A Failed Legislative Proposal	330
§14.13	Scheduling and the Allotting of Working Hours	331
	[A] Scheduling: The Right to Direct Work, Trade Union Negotiations and Notification to the Employee	331
	[B] Scheduling as an Aspect of the Working Environment	331
	[C] Scheduling and Pro-active Actions Favouring Non-discrimination and Equal Opportunities	332
	[D] Legislated Periods of Rest	333
	[E] Collective Agreements on the Allocating of Working Hours	334
§14.14	Legislated Rights to Absence from Work	335
	[A] The Protection Against Termination of Employment and Absence from Work	335
	[B] Parental Leave and Care for Ill Relatives	335
	[C] Studies	336
	[D] Job Hunts	337
	[E] Starting a Business	337
	[F] Commissions of Trust in Trade Unions and Political Office	338
	[G] Retirement	338
§14.15	Concluding Discussion: Work/Life Balance from the Perspective of Labour Law	338
CHAPTER 15		
Family Responsibilities Accommodation in Canada: Individual Solutions to a Collective Dilemma		
<i>Mathilde Valentini & Stephanie Bernstein</i>		
§15.01	Introduction	341
§15.02	The Duty to Accommodate in Canadian Employment Discrimination Law	343
§15.03	Accommodating Workers Based on Their Family Responsibilities: The Evolving Legal Test	347
§15.04	Is the Duty to Accommodate an Effective Means to Facilitate Balancing Work and Family Responsibilities?	352

§15.05	Maintaining the Burden on the Individual Worker: Some of the Limits of the Duty to Accommodate	354
§15.06	Conclusion: The Need for a Paradigm Shift	357
CHAPTER 16		
Reconciliation of Work and Private Life as Key Element for Sustainable Work Throughout the Life Course		
<i>Greet Vermeylen, Agnès Parent-Thirion, Mathijn Wilkens & Jorge Cabrita</i>		
§16.01	Introduction	359
§16.02	Results from the 6th EWCS: Working Time and Reconciliation Between Work and Private Life	360
§16.03	Working Time Duration	361
§16.04	Paid and Unpaid Working Time	362
§16.05	Working Time Organisation	364
§16.06	Blurring Frontiers Between Working and Not Working (for Pay)	364
§16.07	ICT and Working Time	364
§16.08	Work-Family Conflicts	365
§16.09	Reconciliation Issues	366
§16.10	Working Time Options and Working Time Preferences	366
§16.11	Family Leaves	367
§16.12	Maternity Leave and Paternity Leave	367
§16.13	Parental Leave	368
§16.14	Carers' Leave	369
§16.15	Social Infrastructure	370
§16.16	Different Needs at Different Times Throughout the Life Course	371
	Bibliography	371
CHAPTER 17		
Work-Life Balance, Time and Money: Identifying the Work-Life Balance Priorities of Working Class Workers		
<i>Tracey Warren</i>		
§17.01	Introduction	373
§17.02	The Centrality of Time: Long Hours, Work-life Balance and Middle Class Workers	375
§17.03	Other Temporal Dimensions of Work-life Im/Balance	378
§17.04	Work-Life Balance and Money	380
§17.05	Work-Life Balance, Time and Money	381
§17.06	Work-Life Balance Policies: Time and Money	382
§17.07	Conclusion: Holistic Work-Life Balance Academic and Policy Agendas	384
	References	385

CHAPTER 13

Precarious Work and Work-Family Reconciliation: A Critical Evaluation of New Zealand's Regulatory Framework

Amanda Reilly & Annick Masselot

A new class of workers, referred to as the 'precariat',¹ is emerging both internationally² and within New Zealand.³ Precarious work is often understood as work that 'departs from the normative model of the standard employment relationship ... [which] is poorly paid and incapable of sustaining a household'⁴ but it is also more broadly identified by its characteristics. The New Zealand Council of Trade Unions, has identified uncertainty of job duration, irregular hours, fluctuating pay, limited access to paid leave, poor representation and input at work on wages and conditions, limited access to training and inferior rights and conditions at work as characteristics of precarious work.⁵

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1. Standing, Guy. *The Precariat: The New Dangerous Class* (London and New York: Bloomsbury Publishing, 2011).
 2. Kalleberg, Arne, *Good Jobs, bad jobs: The rise of polarized and precarious employment systems in the United States, 1970s-2000s* (Russell Sage Foundation, 2011); Keune, Maarten, *Trade union responses to precarious work in seven European countries*, 5(1) *International Journal of Labour Research* 59–78 (2013); Fudge, Judy, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers*, 34(1) *Comparative Labor Law and Policy Journal* 95–132 (2012).
 3. Wilson, Margaret, *Precarious Work – New Zealand Experience*, 39(2) *New Zealand Journal of Employment Relations* 22–33 (2014).
 4. Fudge, Judy & Owens Rosemary (eds.), *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms* (Hart Publishing, 2006), p. 3.
 5. New Zealand Council of Trade Unions, *Under Pressure: A Detailed Report into Insecure Work in New Zealand* (NZCTU, 2013) <http://www.union.org.nz/wp-content/uploads/2016/12/CTU-Under-Pressure-Detailed-Report-2.pdf> (accessed 19 December 2016), p. 6. See also Tucker, Deborah, *Precarious' Non-Standard Employment – A Review of the Literature* (Labour Market Policy Group, Department of Labour, 2003).

Neoliberal reform, focused on Gross Domestic Product, de-unionisation and de-regulation of labour standards have contributed to growth in this phenomenon.⁶ Legal protections, rooted in industrial modes of production and based on an out-dated male bread winner/female caregiver social norm,⁷ are inadequate in this new environment.⁸ Employment law protections are often tied to the legal status of employee while increasing numbers of workers do not fit into this category. Even when relevant, such protections are under-enforced.⁹ Unions and collective bargaining as a cornerstone of workers' protection have also been undermined by the decline of the Union movement.

Productivity improvements and the need to reduce costs for business dominate the discourse around work regulation¹⁰ and work-family regulation largely targets elite women's needs rather than those at the margins of the workforce.¹¹ Yet, precarious workers, whose work is characterised by poor pay, low levels of legal protection, job insecurity and limited ability to support a household,¹² are those most in need of work

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6. Quinlan, Michael, *The 'pre-invention' of precarious employment: the changing world of work in context*, 23(4) *The Economic and Labour Relations Review* 3–24 (2012).
 7. Fudge & Owens, *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms*; Bornstein, Stephanie, *Work, Family, and Discrimination at the Bottom of the Ladder* 19(1) *Georgetown Journal on Poverty Law & Policy*, 1–42 (2012); Crompton, Rosemary, *Employment and the Family: The reconfiguration of Work and family Life in Contemporary Societies* (Cambridge University Press, 2006).
 8. Vosko, Lea, *Managing the Margins Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press, 2010); Forstater, Mathew, *Working for a better world Cataloging arguments for the right to employment* 41(1) *Philosophy & Social Criticism*, 61–67 (2015); Ministry of Business Innovation and Employment, *Playing by the Rules: Strengthening Enforcement of Employment Standards Discussion Document* (May 2014) [CAB Min (14) 19/7 refers]; Caracciolo di Torella, Eugenia & Annick Masselot, *Work and Family Life Balance in the EU law and policy 40 years on: still balancing, still struggling*, 2 *European Gender Equality Law Review*, 6–14 (2013); Masselot, Annick, *The Right and Reality of Flexible Working Arrangements in New Zealand*, in *Families, Care-Giving and Paid Work*, Grace James & Nicole Busby (eds.) (Edward Elgard Publishing, 2011) 69–85; Handy, Jocelyn, *Maintaining Family Life Under Shiftwork Schedules: A Case Study of a New Zealand Petrochemical Plant*, 39(1) *New Zealand Journal of Psychology*, 7–14 (2010).
 9. Vosko, Lea, Martha MacDonald & Ian Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge, 2009); Kalleberg, Arne L., *Nonstandard Employment Relations: Part-Time, Temporary and Contract Work*, 26 *Annual Review of Sociology*, 341–365 (2000); Kalleberg, Arne L., *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74(1) *American Sociological Review*, 1–22 (2009).
 10. Houseman, Susan, *Why Employers Use Flexible Staffing Arrangements: From and Establishment Survey*, 55(1) *Industrial and Labor Relations Review* 155–162 (2001); Pennycook, Matthew, Giselle Cory & Vidhya Alakeson, *A Matter of Time: The Rise of Zero-Hour Contracts* (Resolution Foundation, 2013), http://www.resolutionfoundation.org/wp-content/uploads/2014/08/A_Matter_of_Time_-_The_rise_of_zero-hours_contracts_final_1.pdf (accessed 7 December 2016).
 11. Williams, Joan C. & Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle* (Center for American Progress and Work Life Law, 2010), <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf> (accessed 7 December 2016); Caracciolo di Torella, Eugenia & Annick Masselot, *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan, 2010).
 12. Fudge & Owens, *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms*; New Zealand Council of Trade Unions, *Under Pressure: A Detailed Report into Insecure Work in New Zealand.*; National Women's Law Center, *The Schedules That Work Act: Giving Workers the Tools They Need to Succeed* (2014) http://www.nwlc.org/sites/default/files/pdfs/schedules_that_work_act_fact_sheet_7.22.14.pdf (accessed 7 December 2016); PEPSON, *It's More Than*

family reconciliation support. Such workers frequently have greater family responsibilities than others, and are forced to take jobs that permit them to fulfil these responsibilities.¹³ These workers are thus in need of work family reconciliation measures. Work family reconciliation is concerned with the *need* workers may have to manage their time in order to take care of their families.¹⁴ The concept of work family reconciliation is distinguishable from the concept of work-life balance which is to do with the *desire* to limit the involvement in paid activities in order to pursue other interests (e.g., further education) with the overall aim of contributing to individuals' wellbeing.¹⁵

This paper considers the problem of precarious workers and work family reconciliation within the context of New Zealand. New Zealand has many of the same features as other Western post industrial countries but it also has some of its own peculiarities linked to colonisation and its relationship with the indigenous people as well as a heavy reliance of agriculture and tourism for its wealth. Although New Zealand has followed the same trends towards deregulation as other countries, New Zealand legislators and unions have made some attempts at addressing work family reconciliation needs which are here discussed. The central research question this contribution explores is whether New Zealand's legal framework is fit for the purpose of supporting precarious workers in work-family reconciliation. Three areas are considered: the right to request flexibility, regulation of working time and the role and efficacy of unions in facilitating work family reconciliation. This analysis is located within a consideration of work family reconciliation needs and the demographics of the precarious workforce.

§13.01 WORK FAMILY RECONCILIATION AND PRECARIOUS WORK IN NEW ZEALAND

Precarious work is characterised by job insecurity and irregular and unpredictable hours. Overwork is also a potential characteristic of precarious work as precarious workers are susceptible to work overload due to economic pressure. The lack of voice inherent in the precarious workers' position contributes to reinforcing worker's lack of control over their working time.¹⁶ Non-standard hours, long hours, intensified work and shift work reduce opportunities for workers to socialise and enjoy personal and

Poverty: Employment Precarity and Household Well-being (February 2013) <http://pepsouwt.files.wordpress.com/2013/02/its-more-than-poverty-feb-2013.pdf> (accessed 7 December 2016).

13. Hofäcker, Dirk & Stefanie König, *Flexibility and Work-life conflict in time of crisis: a gender Perspective*, 33(9) *International Journal of Sociology and Social Policy*, 613–635 (2013); Fursman, Lindy & Nita Zodgekar, *Making It Work: The Impacts of Flexible Working Arrangements on New Zealand Families*, 35 *Social Policy Journal of New Zealand* 43–54 (2009).

14. Caracciolo di Torella & Masselot, *Reconciling Work and Family Life in EU Law and Policy*.

15. *Ibid.*

16. Underhill, Elsa, and Michael Quinlan, *How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers*, 66(3) *Relations Industrielles/Industrial Relations*, 397–421 (2011), p. 405.

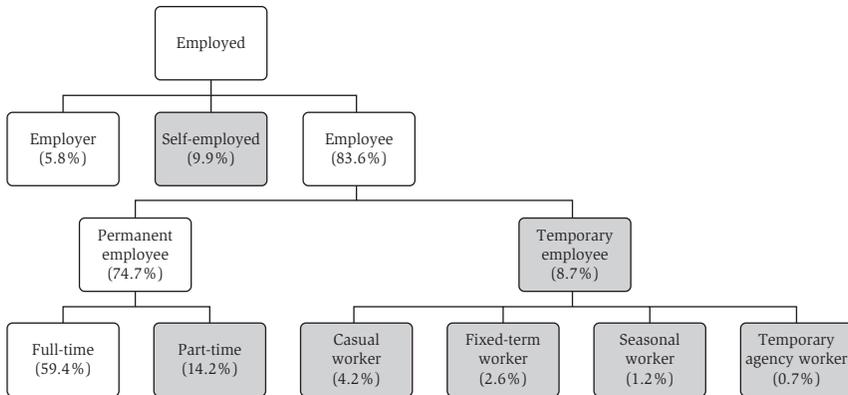
family leisure time.¹⁷ They also have a depressing effect on workers' physical and mental health which can affect the quality of time away from work.

Irregular and unpredictable hours also raise challenges in terms of work-family reconciliation. Inadequate notice of work schedules makes arranging childcare and transportation difficult.¹⁸ Irregular hours result in irregular pay making it difficult to meet basic expenses and workers experience stress from not knowing the amount of income they will receive each week. For many precarious workers, working hours are at the discretion of their employer and, whilst many experience a shortfall of hours, a sizeable proportion of temporary workers work forty hours or more.¹⁹ The volume of working hours impacts directly on employees' ability to resolve work family conflict.²⁰ This is relevant because New Zealanders work typically long hours,²¹ and this workplace culture impacts negatively on work family reconciliation.²² Too many hours of work leave little time for family life and working overtime impacts negatively on individuals' perception of their work family balance.²³ Over time work is particularly negative on work family reconciliation when it is imposed by employers as opposed to being the results of a personal choice by the employee.²⁴

Identifying precarious workers is challenging as such workers are not identified as a discrete category in national statistical surveys. In New Zealand, as elsewhere, a range of contractual forms of work arrangement have evolved with many workers not fitting into a standard employer employee contractual relationship (with the associated rights which attach to standard contract of employment.) These include part-time work, fixed-term contracts, temporary agency work, work with flexible hours, teleworking and home working, and 'zero-hour work'. Although not all forms of non-standard work are precarious with all associated problems, many are.

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17. International Labour Organisation, *From Precarious Work to Decent Work: Outcome Document to the Workers' Symposium on Policies and Regulations to combat Precarious Employment* (ILO, 2012) p. 38, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_179787.pdf (accessed 11 December 2016).
 18. National Women's Law Center, *The Schedules That Work Act: Giving Workers the Tools They Need to Succeed*.
 19. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life* (2013), http://www.stats.govt.nz/browse_for_stats/income-and_work/employment_and_unemployment/flexibility-security-employment.aspx (accessed 7 December 2016).
 20. Jacobs, Jerry and Kathleen Gerson, *The Time Divide: Work, Family and Gender Inequalities* (Harvard University Press, Cambridge, 2004).
 21. Fursman, Lindy, *Working Long Hours in New Zealand: A Profile of Long Hours Workers Using Data from the 2006 Census* (Department of Labour, March 2008), <http://thehub.superu.govt.nz/sites/default/files/Working%20Long%20Hours%20in%20New%20Zealand%2C%20A%20Profile%20of%20Long%20Hours%20Workers%20Using%20Data%20From%20The%202006%20Census.pdf> (accessed 22 December 2016).
 22. Fursman, Lindy & Nita Zodgekar, *Making It Work: The Impacts of Flexible Working Arrangements on New Zealand Families*.
 23. Eurofound, *Fifth European Working Conditions Survey* (Publications Office of the European Union, 2012) http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1182en.pdf (accessed 22 December 2016); Van der Hulst, Monique and Sabine Geurts, *Associations between overtime and psychological health in high and low reward jobs* 15(3) *Work & Stress* 227–240 (2001).
 24. Porter, Gayle, *Work, work ethic and work excess*, 17(5) *Journal of Organizational Change and Management*, 424–439 (2004).

The diagram below indicates the approximate distribution across different forms of non-standard work in New Zealand.²⁵



Temporary worker is an umbrella terms encompassing a number of different legal arrangements which may raise different work-family issues as well as making one size fits all regulation inappropriate.

Casual workers, i.e., ‘employees hired on a periodic basis as need arises’²⁶ are typically in a short-term employment relationship with no expectation of on-going work or mutuality of obligations between the parties. By contrast, zero hour contract workers are in an on-going employment relationship characterised by a contract which contains no guaranteed hours for the employee.²⁷ The use of zero-hour contracts in New Zealand was growing until recently,²⁸ however, as will be discussed in the section on regulation of working hours, such arrangements are now illegal. Seasonal workers, i.e., workers whose jobs are only available at certain times of the year are also temporary workers. Such workers are most likely to work in agriculture, fisheries and forestry.²⁹

25. Distribution of non-standard work in New Zealand New Zealand Workforce Structure. Source: Statistics New Zealand, *Survey of Working Life* (December 2012), http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/SurveyofWorkingLife_HOTPDdec12qtr.aspx (accessed 20 December 2016); Note: Shaded cells are categories of non-standard work. Percentages do not add to totals due to the exclusion of residual categories from the diagram.

26. Brosnan, Peter & Pat Walsh, *Employment Security in Australia and New Zealand*, 8(3) *Labour & Industry: a journal of the social and economic relations of work*, 23–41 (1998).

27. Pennycook et al., 2013), *A Matter of Time: The Rise of Zero-Hour Contracts*.

28. O’Meara, Patrick, *Flexibility and Employment Laws: Labour law not working for those in insecure work*. Radio New Zealand Insight Programme (16 November 2014), <http://www.radionz.co.nz/national/programmes/insight/audio/20157262/insight-for-16-november-2014-flexibility-and-employment-laws> (accessed 7 December 2016).

29. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*.

Most seasonal workers are male³⁰ and Māori and Pacific ethnicities have a higher likelihood of being in seasonal employment.³¹

Not all temporary workers are precarious workers, and some choose this form of work for personal reasons. However, Dixon's 2009 study³² indicated that temporary workers are exposed to higher levels of insecurity and workers experience greater variability in hours and an increased likelihood of working nonstandard hours.³³ She also found that more than half of all workers' hours of work changed from week to week to suit the employer's needs. This was especially the case for casual workers (62%), but less common among fixed-term workers (32%). Nearly a fifth of both casual and temporary agency workers had limited advanced notice of work schedules, with 18% and 19% respectively being told their work schedule only one day or less in advance. Work outside of standard working hours was also common; 43% of casuals and 45% of seasonal workers did at least some of their work in non-standard hours. Seasonal work appears to be more stable than other forms of temporary work; nearly half of all seasonal workers always knew their work schedules.³⁴ However, Dixon's study³⁵ indicated that seasonal workers had the highest incidence of all temporary workers for non-standard working hours. They also have a high (23%) incidence of working long hours (forty-five hours or longer per week) and high incidence of experiencing physical symptoms as a result of their work, with 15% saying that they often or always experienced physical problems or pain.

There is no available data on workers who are ostensibly self-employed but who are essentially dependent contractors (which does not exist as a separate legal category in New Zealand). Nonetheless, it seems likely that such workers may also be adversely affected by unreliable work and irregular schedules.

While the above discussion has focused on non-standard work, non-standard work does not necessarily equate to precarious work although it is generally viewed as one indicator of precariousness. It is possible to be ostensibly employed in a permanent position but in real terms to feel that employment is insecure or to lack security or control over working hours. The New Zealand Council of Trade Unions estimates that at least 30% of New Zealand's workforce is in insecure work (including the ostensibly permanently employed) using the criteria identified above. Conversely not every person in non-standard employment is a precarious worker. Many highly paid IT workers are not and some workers express a preference for remaining in non-standard work.

In conclusion, while it is difficult to be precise about the exact number of precarious workers who may be experiencing work family reconciliation issues in New

30. Dixon, *A profile of temporary workers and their employment outcomes*, p. 6.

31. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*, p. 13.

32. Dixon, Sylvia, *A profile of temporary workers and their employment outcomes* (New Zealand Department of Labour, 2009), <http://www.mbie.govt.nz/publications-research/research/labour-market-and-skills/temporary-workers.pdf> (accessed 19 December 2016).

33. Standard working hours are 7am to 7pm, Monday to Friday.

34. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*, p. 21.

35. Dixon, *A profile of temporary workers and their employment outcomes*.

Zealand, it is clear that precarious work exists as a phenomenon. It is also apparent that regulating work-family reconciliation is challenging in that precarious work is not concentrated under a single legal form of legal form. Precarious work is also found across different sectors with different scheduling needs. Industries with the highest usage of temporary workers are education and training, and retail, accommodation and food services, where nearly 1 in 5 (both 17%) of their workforce are temporary.³⁶ Employers in these sectors have different needs than those employing seasonal workers. A casual retail assistant may only be required for a few hours every now and again but long intense hours may be required to harvest fruit.

So far the discussion has focused on precarious workers in general, however, New Zealand precarious workers are not a homogenous group and their work-family reconciliation needs vary. The Council of Trade Union (CTU) has, amongst others identified Māori and Pacific workers as well as migrants as particularly at risk. The challenges faced by men and women may vary too and vary across the life cycle.

Precarious employment has a disproportionate ethnic divide with Māori and Pacific workers being disproportionately over-represented in insecure work.³⁷ In absolute terms, the majority of the temporary workforce is New Zealand-born European but when viewed proportionately, Māori workers have the highest incidence of working in temporary jobs at 13%, followed by Pacific workers at 10.7%.³⁸ In addition, Māori and Pacific ethnic groups combine high fertility rates with much lower female employment rates and may have different cultural pressures³⁹ with regard to gender and family and community responsibility norms.⁴⁰

Immigrants are susceptible to exploitation and often find themselves in precarious work.⁴¹ Anderson and Tipples argue that migrant workers commonly end up in insecure work as they try to find an entry point into the labour market. Immigrant workers are susceptible to accepting precarious employment due to language and cultural barriers or unfamiliarity with their employment rights.⁴² This also exposes them to exploitation by employers. There is evidence that migrant workers are being

36. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life* (2014), http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/flexibility-security-employment.aspx (accessed 11 December 2016).

37. New Zealand Council of Trade Unions, *Under Pressure: A Detailed Report into Insecure Work in New Zealand*, p. 26.

38. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*, p. 6.

39. Mikaere, Ani, *Colonising myths-Maori realities: He rukuruku whakaaro* (Huia Publishers, 2011).

40. The Māori and Pacific culture are not grounded in the betterment of the individual. These cultures place greater emphasis on family and community obligations. Therefore, cultural traditions might add expectations on Māori and Pacific individuals which can cause conflict with working time obligations.

41. McLaren, Eva, Patrick Firkin, Paul Spoonley, Ann Dupuis, Anne de Bruin, and Kerr Inkson, *At the margins: contingency, precariousness and non-standard work*, 1 Labour Market Dynamics Research Programme, Research Report Series (2004), as cited by New Zealand Council of Trade Unions, *Under Pressure: A Detailed Report into Insecure Work in New Zealand*, p. 26.

42. Anderson, Danaë, *Are vulnerable workers really protected in New Zealand?* 39(1) *New Zealand Journal of Employment Relations*, 52–67 (2014), p. 52.

overworked, underpaid and have no written employment agreements.⁴³ Anderson and Tipples argue that the exploitation of migrant workers is made worse by the weak monitoring and enforcement of labour law.⁴⁴ Migrant workers may also have unique work family reconciliation challenges relating to responsibilities to extended family members in other countries amongst other things.

The challenges of precarious work transcend gender boundaries, but there are gendered implications. Nearly six in ten temporary workers in New Zealand are women⁴⁵ at least in part due to work family conflict.⁴⁶ Women are still largely responsible for unpaid household work and frequently assume the role of primary caregiver. Thus women with childcare responsibilities may choose to participate in temporary work for the flexibility it purports to offer as a method of resolving the conflict.⁴⁷ Unfortunately, temporary work, especially temporary work with uncertain continuity and/or irregular work schedules, is no panacea for work-family conflict. A worker may accept work which conflicts with their care responsibilities because they fear not being offered future work opportunities if they refuse. Precarious work also impacts on working fathers. An EEO Trust survey⁴⁸ found that 80% of fathers wanted to spend more time with their families. Eighty-two per cent of working fathers said their paid work negatively affected the amount of time they spent with their children. Fifty-two per cent said that their paid work affected the quality of time spent with their children. Fathers in the survey cited several workplace situations which negatively impact on their ability to balance work and family commitments, including lack of flexibility of hours and unpredictable hours, unsupportive work cultures, travel to and location of work, and low uptake of work-life provisions.

Childcare is not the sole care responsibility workers can experience. Eldercare is the unpaid care of an elderly relative by providing 'personal care, household assistance, administrative support, social and emotional support.'⁴⁹ As the population ages, many workers, particularly older workers, find themselves balancing paid work with care for elderly relatives. Caring for the elderly is less predictable than childcare responsibilities and the strategies for meeting these needs often rely on traditional methods of using leave entitlements.⁵⁰ This is problematic for precarious workers who

43. *Ibid.* p. 54.

44. *Ibid.* p. 56.

45. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*.

46. Owens, Rosemary, *Engendering Flexibility in a World of Precarious Work*, in Fudge, Judy & Owens Rosemary (eds.), *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms* (Hart Publishing, 2006) 329–352, p. 329.

47. Connelly, Catherine & Daniel Gallagher, *Emerging Trends in Contingent Work Research*, 30(6) *Journal of Management*, 959–983 (2004), p. 968.

48. EEO Trust, *Fathers in Paid Work Toolkit* (2003), <http://eetrust.org/content/docs/toolkits/Father%20and%20paid%20work%20toolkit.pdf> (accessed 11 December 2016).

49. Davey, Judith & Sally Keeling, *Combining work and Eldercare: a study of employees in two City Councils who provide informal care for older people* (2004), <http://thehub.superu.govt.nz/sites/default/files/Combining%20Work%20and%20Eldercare%2C%20a%20study%20of%20employees%20in%20two%20City%20Councils.pdf> (accessed 11 December 2016), p. 14.

50. Herring, Jonathan, *Caring and the Law* (Hart Publishing, 2013).

cannot plan with certainty because of uncertain hours and work schedules and limited access to leave entitlements.⁵¹

In conclusion, given the varied work-family reconciliations needs of both precarious workers, and the varied needs of employers in different sectors, designing any 'one size fits all' legislative solution is challenging and possibly counterproductive. A more individualised tailored approach seems called for.

§13.02 RIGHT TO REQUEST FLEXIBILITY

The concept of flexible work came to the forefront of New Zealand employment law not primarily to solve work-family conflict but as a tool for employers to adapt quickly and more adequately to globalised market competition.⁵² Employer-defined flexibility can lead to less predictability and discretion for employees, as well as an increase in irregularity of work hours, which in turn leads to lower income and higher insecurity for workers.⁵³ Thus, the flip side of flexibility for employers is precariousness and increased work-life conflict for employees.

However, flexibility does not have to the benefit employers exclusively. It was discussed above how the work family reconciliation needs of precarious workers may vary across a life time and depend upon a range of factors including gender and ethnicity. It was also mentioned that different sectors legitimately have different requirements. The ability to tailor individualised solutions which are flexible to the individual and to the employer has advantages over statutorily dictated standard working conditions.

New Zealand has taken some positive steps towards achieving this ideal. Employees (including temporary and other non-standard workers) have a statutory right to request flexibility. This is covered by Part 6AA of the Employment Relations Act 2000 (as amended successively by the Employment Relations Amendment (Flexible Working Agreements) Act 2007 and by the Employment Relations Amendment 2014), which provides the right to request flexible working arrangements.

Originally modelled on a similar UK provision,⁵⁴ which exclusively addressed the need of parents of young and disabled children, the 2007 New Zealand law was designed to facilitate more broadly the needs of employees with their more general care obligations. It represented a significant development for the right to care⁵⁵ and

51. James, Grace and Emma Spruce, *Workers with Elderly Dependants: Employment Law's Response to the Latest Care-Giving Conundrum*, 35(3) *Legal Studies* 463–479 (2015).

52. Masselot, Annick, *Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand*, 39(9) *New Zealand Journal of Employment Relations*, 59–71 (2015).

53. Hofäcker & König, *Flexibility and Work-life conflict in time of crisis: a gender Perspective*.

54. Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000. See also Levin-Epstein, Jodie, *How to Exercise Flexible Work: Take Steps with a 'Soft Touch' Law*, Work Life Balance Brief No 3. (Centre for Law and Social Policy, 2005); Hegewisch, Ariane, *Flexible working policies: a comparative review* (Equality and Human Rights Commission, 2009).

55. See Busby, Nicole, *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011).

constituted a world premiere in relation to valuing unpaid care work. In 2014, however, an amendment (which entered into force on 6 March 2015) removed the criteria of care and thus, moved away significantly from the original intention to facilitate a better reconciliation between family and work commitments. Section 69AA(a)⁵⁶ of the 2007 Act was replaced by a new section which extended the statutory right to all employees, not just those with care responsibilities. Moreover, originally the right to request was limited to employees who had been employed by the same employer for a period of six months, but this limitation was also removed in 2014. Technically, this right is now available to all employees including those in non-standard work from the beginning of employment, whether they have care obligations, or they simply want to enjoy a better work-life balance.

Prima facie this development is positive. However, in the context of work family reconciliation there are some problematic aspects. The legislation now lacks clear underpinning principles which value the reconciliation of work and family or recognise the reality of unpaid care. The removal of the care criteria from the right to request flexible working arrangements arguably makes the care-giving provided by men and women invisible. Care is no longer valued (not even symbolically) and this entrenches the idea that production and reproduction are disconnected in New Zealand society.

An employer, faced with multiple requests by employees for flexibility is not provided with any justification for prioritising work-family reconciliation motivated requests. The desire of one employee to take time off to train for a marathon is exactly on a par with the need of another employee to take an aging parent to the doctor. Moreover, highly valued employees with bargaining power are much more likely to benefit from this right than precarious workers.

The right to request flexible working arrangement can arguably be classified as symbolic. Indeed, while it pays lip service to the idea of work family reconciliation, the dominant focus remains on work productivity. Another point to note is that the statutory right only confers a right to request; employees have always had the right to negotiate and renegotiate the terms of their contract of employment. Although, under the legislation, the employer has the obligation to consider seriously the request for flexible working arrangement, such a request could easily be refused as this obligation is weak. All the law provides for is a right to a process for a fair and timely consideration of a request, rather than a right to flexibility. An employer may refuse the request by providing explanations as to the (business related) reasons for the refusal.⁵⁷ The fact that employers are able to decline on business grounds demonstrates the continuing paramountcy of the employer's needs as opposed to employees' need for work family reconciliation. This theme continues in the next section where it is shown that although symbolic steps have been taken towards regulation to mitigate the worst of employer scheduling practices, the employer's needs are still treated as superior to that of employees.

56. Under the 2007 Act, Section 69AA(a) states that the object of this Part is to provide '...certain employees with a statutory right to request a variation of their working arrangements if they have the care of any person'.

57. S69AAF of the employment relations Act 2000.

It is also difficult for employees to challenge the refusal of an employer based on business related grounds. Employees, especially those in precarious work often lack the business organisation knowledge (and/or financial and/or emotional ability) to be able to challenge the employer's decision. In addition, the law does not empower employees to challenge the reasons put forward by the employer, as it only allows employees to challenge employers who do not deal with the request in accordance with the specified process. In this case, the matter can be referred to a Labour Inspector, then to mediation, and then only to the court system (the Employment Relations Authority). Even if an employee finds the courage and the energy to contest their employer's refusal, the penalty is paltry. According to S 69AAJ, an employer who does not comply with the process of considering seriously a request for flexible working arrangement is liable to a penalty not exceeding NZD2,000. Such an amount is so insignificant and token, that it cannot be considered as a viable deterrent to employers. In addition, the remedy is ill-adapted to the aim of the provision, as the need for flexibility cannot be met with monetary penalty.

As a result, this statutory right is seldom exercised. Although many employees have requested flexible work arrangements, few have used the formal procedure. The 2011 review of the 2007 amendment shows that among current employees, 43% reported that they have made a request for flexible working arrangement to their employer and a large majority of these requests were approved.⁵⁸ However, the request for flexible working arrangement was often not based on the statutory rights.⁵⁹ There is, to date, no reported case law around this provision.

Highly qualified, skilled workers, which New Zealand is short of, inherently have the bargaining power to request changes in their terms and conditions of employment. Precarious workers lack bargaining power altogether. The law, as it currently stands is insufficient to change this.

§13.03 REGULATION OF TIME IN NEW ZEALAND

Some key scheduling issues were identified above as problematic for precarious workers leading to work family reconciliation issues, including the problem of over-work due to income insecurity, irregular working hours, changes to rosters at short notice, and insufficient or no guaranteed hours. Following a successful campaign by the unions and in particular UNITE,⁶⁰ the New Zealand legislature has recently turned its mind to improving worker's control of their working hours. Consequently, New Zealand law was changed on 1 April 2016 as six new sections (67C–67H) were inserted

58. Department of Labour, *Review of Flexible Working Arrangements in New Zealand Workplaces* (Department of Labour, 2011).

59. *Ibid.*

60. Treen, Mike, *How UNITE took on the Fast Food Companies over Zero Hour contracts and won* (UNITE, 2015) http://www.unite.org.nz/how_unite_took_on_the_fast_food_companies_over_zero_hour_contracts_and_won?recruiter_id=26272 (accessed 19 December 2016); see further next section.

into the Employment Relations Act 2000.⁶¹ These reforms represent a step in the right direction to improve work family reconciliation. Nevertheless, it remains questionable whether such reforms go far enough.

New Zealand workers, in real terms, have little protection against overwork. The legal system lacks the comprehensive working time regulations that exist in the European Union countries. Although, there is a maximum working hours provision which establishes a forty-hour, five-day working days per week, the protection it provides is weak. Section 11B of the Minimum Wage Act 1983 prevents an employer from fixing working hours above forty hours per week, *unless this is agreed to* by both parties.⁶² These hours can be varied from week to week with agreement between the parties. Subsection (3) of that section also requires that where working hours are fixed at under forty hours per week, both parties must endeavour to fix daily hours so that work hours are not worked on more than five days per week.⁶³ There is no entitlement to an overtime premium for working above the forty hour maximum, but this can be achieved by agreement between the parties.⁶⁴

The fact that maximum hours may be varied by agreement between the parties makes it doubtful that precarious workers would be able to access any protection against overwork through this provision. Given the weak bargaining power of precarious workers, it would be difficult to refuse an employer's request to alter working hours above the maximum. This is especially true where the employee has no guarantee of on-going work (casuals and temporary agency workers), or the worker is not directly employed within the organisation who has day-to-day control over them (temp agency workers).

In any case, many workers might worry that, refusing to agree to the employer's request to work above the forty hours week, might lead to their hours being drastically reduced in retaliation. It should be noted, however, that a recent amendment to the

61. The focus here is on regulation of working hours however it is worth noting that New Zealand law also provides workers with other leave entitlements which may address work-life balance issues. *I.e.*, Parental leave is provided by the Parental Leave and Employment Protection Act 1987. Paid parental leave is conditional to continuous period of employment and eligibility of the mother. Paid annual as well as sick and bereavement leaves are protected by the Holidays Act 2003. These rights are conditional to continuous employment criteria. Employees are entitled to four weeks' paid annual holiday after twelve months of continuous employment under section 16 of the Holidays Act 2003. The Holidays Act also sets out entitlements to time-and-a-half pay for workers working on public holidays and alternative holiday if the public holiday falls on an ordinary working day for the employee. However, these provisions are available are largely only for those in standard employment and are frequently tied to continuity of service which it may be difficult for precarious workers to establish.

62. Section 11B(2) Minimum Wage Act 1983: 'The maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.'

63. Section 11B(3) Minimum Wage Act 1983: 'Where the maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week is not more than 40, the parties to the agreement must endeavour to fix the daily working hours so that those hours are worked on not more than 5 days of the week.'

64. This section is an obscure requirement of New Zealand law which has had a limited effect in workplaces.

Employment Relations Act 2000 S67F⁶⁵ provides protection against such victimisation, provided that the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision. Therefore, New Zealand employers may not adversely treat employees who refuse additional hours where there is no availability agreement, which is positive but questions remain as to whether in real terms precarious workers will be able to access this protection given the unbalanced bargaining power between the parties. Also the law contains no prohibition against treating employees who *have agreed* to an availability provision adversely.

In addition to the issue of long working hours, precarious workers are exposed to a lack of certainty with regards to working hours as well as to irregular schedules. Irregular hours, uncertain and unpredictable work schedules deprive precarious workers of the ability to plan and balance their work commitments with their family commitments.⁶⁶ Irregular hours result in uncertain and variable pay, contributing to financial pressures which in turn makes it harder for precarious workers to decline work when it is offered.

Providing advance notice of work schedules allows workers to plan work and personal commitments as well as to determine their income in advance, allowing for financial planning and certainty. For this reason, laws providing for the advance notice of work schedules are in effect in several jurisdictions⁶⁷ as well as compensation for cancelled shifts.⁶⁸ In a recent change to New Zealand law S67C of the Employment Relations Act requires hours of work to be agreed upon between employee and employer as well as to be written into an employees' individual or collective agreement.⁶⁹ Hours of work includes the 'number of guaranteed hours' of work, 'the days of the week on which work is to be performed' and 'the start and finish times of work' as well as any flexibility around days and hours of work. This requirement for specificity must be seen as a minor positive development in that it does give employees some indication of the employer's expectation at the outset but employers retain the ability to require flexibility.

65. Section 67F was inserted into the Employment Relations Amendment Act 2000, on 1 April 2016, by section 9 of the Employment Relations Amendment Act 2016 (2016 No 9).

66. Shagvaliyeva, Sussanna, and Rashad Yazdanifard, *Impact of flexible working hours on work-life balance*, 4 *American Journal of Industrial and Business Management* 20–23 (2014); Hofäcker & König, *Flexibility and Work-life conflict in time of crisis: a gender Perspective*; Masselot, *Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand*.

67. See for instance the new regulation adoption in San Francisco, US. Jamieson, Dave, *A Landmark Workers 'Bill of Rights' Passes Unanimously in San Francisco*, Huffington Post (25 November 2014), http://www.huffingtonpost.com/2014/11/25/retail-worker-bill-of-rights-san-francisco_n_6221642.html (accessed 22 December 2016).

68. See for example the US Congress proposal for regulation of part-time Schedules, also known as the 'Schedules that Work Act': Kasperkevic, Jana, *Elizabeth Warren to help propose Senate bill to tackle part-time schedules*, The Guardian (23 July 2014), <http://www.theguardian.com/money/us-money-blog/2014/jul/23/elizabeth-warren-senate-bill-part-time-schedules> (accessed 22 December 2016).

69. Section 67C was inserted into the Employment Relations Amendment Act 2000, on 1 April 2016, by section 9 of the Employment Relations Amendment Act 2016 (2016 No 9).

More significantly the newly introduced section 67G of the Employment Relations Act⁷⁰ relates to cancellation of shifts. Under this section the employer cannot cancel a shift unless a reasonable period of notice is given beforehand and reasonable compensation is paid to the employee, if the employer cancels a shift without giving reasonable notice (section 67G(2)). The notice period must be specified in the employee's employment agreement. If it is not specified, then the employer must pay the employee reasonable compensation for the notice specified in the employment agreement (section 67G(3)(b)). If neither reasonable notice nor reasonable compensation is specified in the employee's employment agreement, then the employee is entitled to receive the full amount they would have normally earned working the cancelled shift.

This provision must be welcomed in that it forces employers to plan ahead and compensate employees for shift cancellation. However, the repeated use of the word 'reasonable' in the provision introduces a problematic and subjective element, which might need to be clarified through litigation. Indeed, what is 'reasonable' for the business might not be 'reasonable' for the worker's family life.

In addition to long working hours and irregular and uncertain hours, insufficient hours are also an issue for precarious workers. There has been another recent positive development in New Zealand law around the regulation of 'zero hour' contracts.⁷¹ 'Zero hour' contracts are distinct from casual contracts. Under casual contracts, while the employer has no obligation to offer work, the employee has no obligation to accept work when it is offered. With 'zero hour' contracts, workers not only have no guarantee of work, they are obliged to accept work if and when it is offered. Most pernicious of all is that sometimes employers will make 'zero hour' workers sign exclusivity clauses which mean that employees cannot seek work from other employers. 'Zero hour' contracts thus add to the complexity of managing work family reconciliation for precarious workers. Not only is work not on a regular schedule, when it is offered it cannot be refused, potentially leading to both underemployment as well as intense overwork in times of high employer demand.

Since 2016, New Zealand law effectively prohibits the use of 'zero hour' contracts. S67D of the Employment Relations Act⁷² introduces the concept of 'availability'. This provision allows employers to require availability from employees but only if agreed hours of work are specified, and those agreed hours include guaranteed hours of work among those agreed hours. Furthermore, the availability provision has to be based on reasonable grounds and the employee has to be provided with reasonable compensation for making him/herself available for work (s67D3(a) and (b)). This means that employers cannot demand availability from employees without

70. Section 67G was inserted into the Employment Relations Amendment Act 2000, on 1 April 2016, by section 9 of the Employment Relations Amendment Act 2016 (2016 No 9).

71. Brinkley, Ian, *Flexibility or insecurity? Exploring the rise in zero hours contracts* (The Work Foundation, 2013) <http://mbsportal.bl.uk/taster/subjareas/hrmemployrelat/twf/164297flexibilityinsecurity13.pdf> (accessed 22 December 2016).

72. Section 67D was inserted into the Employment Relations Amendment Act 2000, on 1 April 2016, by section 9 of the Employment Relations Amendment Act 2016 (2016 No 9).

reason and employees required to be available must have at least two guaranteed hours. Thus, effectively ‘zero hour’ contracts are now prohibited.

While the intention of this provision is to prevent egregious abuse of ‘zero hour’ contracts, much discretion is given to the employer to determine what is ‘reasonable’. S67(d)(5) provides that in considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:

whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision; as well (b) the number of hours for which the employee would be required to be available; and (c) the proportion of the hours referred to in paragraph (b) to the agreed hours of work. It is thus clear that, as with the right to request flexibility, primacy is to be given to the employer’s business needs.

Furthermore employees who have agreed to an availability provision cannot refuse to be available during the agreed hours unless reasonable compensation for availability is not written into the contract. ‘Reasonable’ is not explicitly defined, however, S67(d)(6) provides that compensation payable under an availability provision must be determined having regard to all relevant matters.⁷³

Finally, S67H prohibits unreasonable restrictions on ‘secondary employment’. Employers cannot restrict secondary employment for employees, unless the employer has reasonable grounds and the reasons behind these grounds are stated in the employee’s employment agreement. Here again the employer is only required to act ‘reasonably’ but reasonableness is not defined and presumably once again the employer’s business requirements are likely to take precedence over the employees’ work family reconciliation needs.

In conclusion, while the 2016 amendments ostensibly address some of the worst of the scheduling issues, there is a high degree of flexibility to agree on arrangements which may be very un-family friendly in real terms. While workers with real bargaining power may now have additional leverage in bargaining terms and employers have been given some direction as to how specific they must be in reaching agreements, the fact remains that precarious workers may have little choice but to agree to less than optimal work arrangements. Having agreed, the law offers little in the way of redress. Indeed, a worker who has agreed to an availability provision may explicitly be subjected to detriment, if they refuse hours. Furthermore, the requirements that employers should be reasonable are vague although implicitly it does give primacy to the employer’s business needs. Further clarification may be needed through a process of litigation. It

73. Section 67(d)(6) Compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:

- (a) the number of hours for which the employee is required to be available;
- (b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work;
- (c) the nature of any restrictions resulting from the availability provision;
- (d) the rate of payment under the employment agreement for the work for which the employee is available;
- (e) if the employee is remunerated by way of salary, the amount of the salary.

remains to be seen whether precarious workers will have the time or the means to bring litigation forward.

§13.04 UNION INITIATIVES WITH REGARD TO SCHEDULING AND REGULARITY OF HOURS

Statutory regulation of working hours can be beneficial, however, as noted above the requirements of individual sectors vary as do the work family reconciliation needs of individuals and families. In this context, unions can potentially play an important role in negotiating specific solutions tailored to the needs of industry as well as those of the family.

The weak bargaining power of precarious workers has been identified as a key limitation on the efficacy of rights to request flexibility and enforcement of legislative protections.⁷⁴ The purpose of labour law classically has been seen as redressing the inherent imbalance of power between workers and employers by empowering unions to act for workers.⁷⁵ This principle is explicitly acknowledged in New Zealand's Employment Relations Act which states at section 3 that the object of this Act is – (a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship... (ii) by acknowledging and addressing the inherent inequality of power in employment relationships [and by] (iii) promoting collective bargaining.

Unfortunately however, since the 1990s the power and coverage of New Zealand unions was significantly and intentionally undermined by the Employment Contracts Act.⁷⁶ This was replaced in 2000 by the more union friendly Employment Relations Act but the damage had been done and union membership is not high, particularly in the private sector, and it seems to be in a process of gradual decline. As of 2016 it sat at roughly under 20% of the employed workforce.⁷⁷

74. Conaghan, Joanne, *Time to dream? Flexibility, families and the regulation of working time*, in Fudge, Judy & Owens Rosemary (eds.), *Precarious Work, Women, and the New Economy: the Challenge to Legal Norms* (Hart Publishing, 2006), 101–130.

75. Kahn-Freund, Otto, *Labour and the Law* (2nd ed., Stevens, 1977) (1977), p. 6; Anderson, Gordon and John Hughes, *Employment Law in New Zealand*, 6–11 (LexisNexis NZ, 2014); Collins, Hugh, *Labour Law as a vocation*, 105(3) *Law Quarterly Review*, 468–484 (1989).

76. Anderson, Gordon, *Labour Law in New Zealand* (2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2015).

77. 'In the June 2016 quarter, around 1 in 5 employees belonged to a union, with most union members in full-time employment (86.9 percent) and in a permanent job (92.1 percent). Although the sex split for employees was similar (50.9 percent male, 49.1 percent female), women were more likely to be union members than men (6 in 10 or 58.7 percent).' *Statistic New Zealand, Union membership and employment agreements – June 2016 quarter* (2016), http://www.stats.govt.nz/browse_for_stats/income-and-work/employment_and_unemployment/improving-labour-market-statistics/union-membership-employment-agmt.aspx (accessed 19 December 2016).

Despite the stated commitment to unions, in real terms, legislative support is limited and consequently there is insufficient support for bargaining for the improvement of work family reconciliation. Unlike many other European countries,⁷⁸ New Zealand does not have extension bargaining. Collective contracts do not extend beyond the members of the union. In addition, although there is a guiding principle that all parties are required to act in good faith, unlike in other countries (such as France and Spain),⁷⁹ there is no legislative requirement for employers to bargain on particular terms and conditions. Consequently, New Zealand employers are increasingly trying to exclude from collective bargaining fundamental terms such as pay rates.⁸⁰

Furthermore, while New Zealand unions certainly aim to better the working conditions of precarious workers, precarious workers are often not union members. Unions therefore do not have a mandate to act on behalf of such workers. While it is difficult to be precise with regards to numbers of precarious workers due to aforementioned categorisation issues, it is clear that temporary/non-standard workers have lower trade union participation, with only 22.4% of temporary workers being union members; casual workers had the lowest membership at 14.8%.⁸¹

New Zealand unions also do not have extensive resources to command and have to tread a difficult line in terms allocating those resources *vis-à-vis* their responsibilities to dues paying members. The weakening of the union movement has moreover indirect flow on effects; the NZCTU argues that the increase in insecure work and lower union participation has eroded workers' knowledge of their employment entitlements.⁸² This in turns weakens the ability of the regulatory system to assist precarious workers. Even where laws exist, workers may not have the knowledge to access and/or the financial ability enforce them; casual workers have been found to have the lowest level of knowledge of their legal entitlements.⁸³

Despite these limitations, New Zealand unions have had some success in improving workers' control over working hours, including workers in sectors where precarious work is prevalent. In order to do so, unions have been using a variety of means, which we discuss below.

78. Traxler, Franz, *Collective bargaining in the OECD: developments, preconditions and effects*, 4(2) *European Journal of Industrial Relations*, 207–226 (1998); Traxler, Franz, and Martin Behrens, *Collective bargaining coverage and extension procedures* (2002) <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/collective-bargaining-coverage-and-extension-procedures> (accessed on 19 December 2016).

79. Artilles, Antonio Martín, *Work-life balance in collective bargaining examined* (2005), <http://www.eurofound.europa.eu/observatories/eurwork/articles/work-life-balance-in-collective-bargaining-examined> (accessed 19 December 2016); Gregory, Abigail, and Susan Milner, *Trade Unions and Work-life Balance: Changing Times in France and the UK?* 47(1) *British Journal of Industrial Relations*, 122–146 (2009).

80. *First Union Inc v Jacks Hardware and Timber Limited* [2015] NZ EmpC 230.

81. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*, p. 6.

82. Statistics New Zealand, *Flexibility and security in employment: Findings from the 2012 Survey of Working Life*, p. 45.

83. Dixon, *A profile of temporary workers and their employment outcomes*, p. 34; Whatman, Richard, Craig Armitage & Richard Dunbar, *Labour Market Adjustment under the Employment Contracts Act*, 19(1) *New Zealand Journal of Industrial Relations* (1994).

Unions have, to an extent, been able to influence public policy through their campaigns and participation in policy forums. New Zealand unions have, in particular, been at the forefront of advocating for better control over working time. In 2013, the New Zealand Council of Trade Unions published a comprehensive report entitled: *Under Pressure: Insecure Work in New Zealand*⁸⁴ to investigate the prevalence and spread of insecure work in New Zealand, and the impact it has had on New Zealand workers. This report also encouraged unions to lead campaigns against insecure work and a number of unions have run campaigns to focus on specific issues faced by precarious workers.⁸⁵

Most encouragingly, UNITE, a small union, has been unexpectedly successful in challenging and ending zero hour contracts in the fast food sector through a savvy combination of a media campaigning and collective bargaining.⁸⁶ Not only did UNITE convince all of the fast food chains to agree to terms in collective agreements banning zero hour contracts, but the media campaign was picked up by mainstream media leading ultimately to law change around zero hour contracts discussed above.

Unions have also had some success in achieving favourable judgments for workers through the process of strategic litigation. For example, *Idea Services Limited v. Dickson*⁸⁷ dealt with workers required to sleep over in residential care settings. The Supreme Court ultimately held that a person required to be on-site or available for work is entitled to compensation, even if that person is not performing work duties. As a result, John Ryall, Secretary of the Service and Foodworkers Union (now e Tu) expressed the view that litigation to secure workers' rights was now preferable to collective bargaining.⁸⁸ 'We decided there's got to be a better way than (collective bargaining)[...]I think these cases will continue, until such time as there is a collective bargaining system in place.'

However, collective bargaining, litigation and campaigning through public forums are not necessarily discrete strategies as the long running Ports of Auckland industrial dispute demonstrates. In late 2011, Ports of Auckland became engaged in a dispute with workers represented by the Maritime Union of New Zealand. This began as a rostering dispute; the Maritime Union opposed the Port's proposals to change the rostering system.⁸⁹ The Port argued that more flexible rostering was necessary to match workers with port traffic, but the union opposed this arguing that the current rostering

84. New Zealand Council of Trade Unions, *Under Pressure: A Detailed Report into Insecure Work in New Zealand*.

85. For example the FIRST union which represents workers in Finance, Industrial (Textile and Wood) Retail, Stores & Transport successfully campaigned against a New Zealand bank who wanted to increase flexibility in its employment contracts and reduce advance notice of schedules: McNicol, Hamish, John Anthony and Narelle Henson, ANZ workers walk off the job (10 October 2014), <http://www.stuff.co.nz/business/industries/10601614/ANZ-workers-walk-off-the-job> (accessed 17 January 2017).

86. Treen, *How UNITE took on the Fast Food Companies over Zero Hour contracts and won*.

87. *Idea Services Limited v Dickson* [2011] NZSC 55 SC 25/2011.

88. <https://unitenews.wordpress.com/2015/03/11/nz-labour-letter-march-2015/> (accessed 19 December 2016).

89. NZCTU & MUNZ, *Port of Auckland Dispute Fact Sheet* (2012), <http://www.munz.org.nz/wp-content/uploads/2012/01/Port-of-Auckland-Dispute-Fact-Sheet-3-Feb-2012.pdf> (accessed 17 January 2017).

system provided a balance between the flexibility required by the Port and the certainty of stable and reliable hours for the workers. The union argued that the proposal removed protections for workers against long hours, reduced their entitlements to breaks and sick leave and provided no guarantees of work and hours. Furthermore, the compensatory pay increase offered no real compensation because the hours become unstable. At its heart this was a work family reconciliation issue. Workers were concerned about the impact the proposed roster changes would have on their family lives by reducing their ability to plan and make commitments.

This dispute ran for four years, until a new collective settlement was finally reached in February 2015. Over the years of the dispute, the union utilised a number of techniques to achieve its ultimate bargaining aim including strikes, the involvement of the International Transport Workers Federation and International Longshore and Warehouse Union, street protests, and litigation over breaches of good faith by the employer in bargaining.

It is clear that unions can play an integral role in addressing the challenges experienced by precarious workers. Successful union campaigns can increase awareness of work family challenges and can encourage either legal change or change in standard human resources practice as well as raise awareness of existing legal rights where such exist.

Unions also contribute to clarifying the law. Overall, while New Zealand has adopted new legislation provisions around zero hour contracts and regulating shift work, there is considerable vagueness and scope for interpretation around the concept of ‘reasonableness’.⁹⁰ Thus, it is likely that there will be a need for further union funded litigation.

However, amidst a context of declining union participation, unions are presented with a quandary of whether to focus on achieving solutions for their members or campaigning to improve the working lives for all. While New Zealand unions have taken up the challenge of campaigning for all workers as noted by the late Helen Kelly:

One of the challenges we haven’t cracked is the resourcing model for all this new work. While we rely on those that can access the rights to bargaining and union membership to fund these campaigns we will always be running them on a shoe string.⁹¹

§13.05 CONCLUSION

The central research question this contribution explored is whether New Zealand’s legal framework is fit for the purpose of supporting precarious workers in work-family reconciliation.

Precarious workers encounter a number of work family reconciliation challenges including lack of control of scheduling, overwork or insufficient work all of which flow

90. See our previous discussions on flexible working arrangement.

91. Kelly, Helen, *Speech to the CTU conference* (14 October 2015), <https://thestandard.org.nz/helen-kellys-speech-to-the-ctu-conference/> (accessed 17 January 2017).

from employer requirements for flexibility. The precarity of their working arrangements makes it difficult for precarious workers to gain control of their working hours since there is an inherent inequality of bargaining power in their position giving them limited ability either to negotiate better terms for themselves or to exercise rights they may technically be entitled to in law. Limited knowledge of existing rights compounds these problems.

Regulation to improve the ability of precarious workers to reconcile their work family needs is complex as precarious workers are not concentrated in any one sector or contractual arrangement. Precarious workers are also not a homogenous group and have their own individual needs.

There have been some positive developments in New Zealand law including the extension of the right to request flexibility to all workers and the outlawing of zero hour contracts. However enforcement mechanisms are weak and the penalties for non-compliance by employers are token. The law changes are also underpinned by an emphasis on the employer's needs and what is reasonable from the employer's perspective.

Unions remain the best hope for precarious workers and it would seem that as commented by the late Helen Kelly:

New Zealand working people more than ever need the institutional strength they build through unions to organise themselves, to give them a say in this society and to win justice and fairness for them and their families.⁹²

Unions are well placed contribute to equalising the bargaining power of precarious workers while at the same time working with employers to craft sector specific work family reconciliation terms and conditions in collective contracts. Union can also enforce existing rights and raise awareness of these rights. Given resource constraints, New Zealand unions have achieved some notable wins including successfully lobbying for law change. However, New Zealand unions have limited coverage and resources and the legal framework does not do enough to support unions in this important work. Extension bargaining and explicitly requiring employers to bargain on work-family reconciliation and scheduling issues could considerably strengthen unions' ability to benefit precarious workers. If this were coupled with stronger penalties for employer non-compliance, gains would be possible. However, the fundamental emphasis on the employer's needs as opposed to worker's rights to care for their families would likely remain an obstacle to significant improvements.

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