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Choice, workplace flexibility and care needs in the digital age: a comparison between the German and Italian legal approaches

Summary

The aim of this paper is twofold: to highlight the potential and limitations of the new right to request flexible working arrangements for caring purposes, as established in Directive no. 2019/1158, and to consider, through an overview of the EU law, whether and to what extent this right can be interpreted in a manner that truly favours the interests of workers with care-related responsibilities over those of employers.
The paper analyses some examples of approaches taken regarding the implementation of the right to request flexible working arrangements in two different jurisdictions, such as Germany and Italy, and compares the transposing choices made in the two different legal contexts. The author argues, also in light of this investigation, that the potential of the duty to provide flexible working arrangements could be, to a certain extent, enhanced through the application of the prohibition of indirect discrimination, from which a sort of duty of accommodation could be inferred. The duty to provide flexible working arrangements could constitute the procedural tool to apply and enhance the proportionality test and reasonable accommodation.

Keywords: Working time, flexible working arrangements, care needs, Italy, Germany

1. Introduction

The topic of reconciling family and professional life, commonly referred to as work-life balance, plays a pivotal role among the emerging challenges of our contemporary society. This longstanding issue, extensively debated in sociological analyses, can appear under various dimensions. One crucial perspective revolves around the organisation of working hours, which significantly influences not only private and family life but also the overall well-being and mental health of employees.

Since mid-1980s, driven by profound changes in the organisation of work, a debate has been going on regarding a new conceptualisation of working time. Many scholars emphasise that the notion of working time can no longer be understood as homogeneous, and the boundary between working and free time has become increasingly blurred[1].

New working patterns are developed with the aim to provide greater schedule flexibility for workers, both by reducing working hours and by (yearly) modulating the working time, so to help them balance their work and non-work commitments.

Similar changes in working organisation are taking place today due to the introduction of new digital technologies in the workplace. The recent ILO report on working time shows the effects on work–life balance of a variety of working-time arrangements that currently exist in the global economy. Shift work, part-time work with predictable work schedules, flextime (flexible schedules), home-based telework (working from home) are only a few prominent examples of these working-time arrangements, whereby workers can be empowered to organise their own work schedules for their personal responsibilities and/or leisure[2], leading to improved work–life balance.

Surveys also offer some evidence that the flexibilisation of working time shall not be addressed solely in line with business needs, but

[1] A. Supiot: *Alla ricerca della concordanza dei tempi (le disavventure europee del "tempo di lavoro")*. "Lavoro e diritto" 1997, p. 15. For an overview on the challenges labour law is facing *vis à vis* to digitalisation with regard also to working time see: M. Weiss: *Challenges for Labour Law and Industrial Relationship*. In: M. Weiss (ed.): *A Legal Scholar Without Borders*. Adapt 2023, p. 69: the distinction between work and private life "more and more may fall apart due to digitalisation of work. De-localised work and work without clear time limits more and more is intruding into private life, thereby eliminating to a bigger and bigger extent the demarcation line between the two spheres of human life". On the different notions of working time see, for instance, R. de Luca Tamajo: *Il tempo di lavoro e (il rapporto individuale di lavoro)*. In: A.a.V.v., *Il tempo di lavoro. Atti delle giornate di studio di diritto del lavoro AIDLaSS*. Giuffré 1987, p. 9; C. Cester: *Lavoro e tempo libero nell'esperienza giuridica*. "Quaderni di diritto del lavoro e delle relazioni industriali" 1995, vol. 17, p. 10; F. Bano: *"Tempo scelto" e diritto del lavoro: definizioni e problemi*. In: B. Veneziani, V. Bavaro (eds): *Le dimensioni giuridiche dei tempi di lavoro*. Cacucci 2009, p. 237 e ss., p. 244.

[2] According to ILO report (*Working Time and Work-Life Balance around the World*. International of Labour Office 2022), perhaps, flextime is the most common form of flexible working-time arrangement. In particular "Basic flextime arrangements (also known as «flexible schedules» or «flexible hours») allow workers to choose when to start and finish work, based on their individual needs and preferences (within specified limits) and in some cases even the number of hours that they work in a particular week".

it also serves other interests, and in particular, the needs and interests of the individual worker. The increasing demands to adapt and flexibilise working hours, particularly through non-standard schedules, can empower women (mothers) in the labour market by enhancing their autonomy and control over their working conditions[3]. Yet, the challenge today is how to guarantee that working-time flexibility can really help to combine paid work, family responsibilities and leisure time[4].

In this regard, legal and cultural traditions (gender cultures) could represent serious obstacles. For example, in Italy, the workplace demands and world are still strongly separated from those of the family, especially concerning the needs of childcare and relational aspects. Consequently, the male-breadwinner/female-carer model persists, with fathers often relieved of responsibilities for childcare, and mothers being underrepresented in the Italian labour market[5].

Furthermore, while part-time work can encourage women's labour force participation, thus allowing some of them to remain in the job market after becoming parents or when caring for relatives, it may not always serve as an effective tool to facilitate work–life balance for parents and caregivers in Italy. The issue in Italy, where the percentage of women currently working part-time remains high, is that, in reality, employees have limited opportunities to autonomously determine reductions in working hours or the distribution of working time, even though, theoretically, part-time work could be a voluntary choice based on individual preferences[6].

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[3] P. Ichino: *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro*."Rivista italiana di diritto del lavoro" 2017, vol. 4, p. 525 (528); M. Tiraboschi: *Il lavoro agile tra legge e contrattazione collettiva: la tortuosa via italiana verso la modernizzazione del diritto del lavoro*. "WP CSDLE "Massimo D'Antona". IT – 335/2017", p. 39.

[4] See e.g. S. Fredman: *Discrimination Law*. Oxford University Press 2012, p. 45: "Flexible working may seem the ideal forum for combining family responsabilities and paid work. However, the reason why employers tend to introduce flexible working is not to achieve 'family friendly' outcomes, but to reduce labour costs by adjusting labour inputs to meet fluctuations in demand". See also S. Fredman: *Women at Work: the Broken Promise of Flexicurity*. "Industrial Law Journal" 2004, p. 299. M. Barbera, S. Borelli: *Principio di uguaglianza e divieti di discriminazione*. "WP CSDLE "Massimo D'Antona". IT – 451/2022".

[5] C. Saraceno: *Ancora 50 anni per l'uguaglianza alle donne solo il 77% dei diritti*. "La stampa" 2023, p. 25; C. Saraceno: *Childcare needs and childcare policies: A multidimensional issue*. "Current Sociology" 2011, pp. 78–96.

[6] See F. Bano, *"Tempo scelto"*, *supra* note 1, p. 246. Anyway, as all research in the field shows, the active participation of women with caregiving responsibilities in the

Similar concerns arise in relation to other forms of flexible working arrangements, such as work-sharing, remote work, and agile work, which have gained specific attention during and after the Covid-19 pandemic. The expansion of the so-called "third generation of telework" has become more evident than ever before, sparking an ongoing debate that also focuses on its implications as for the concept of working time[7] and work–life balance.

It may very well be doubted whether, and to what extent, telework can contribute to achieving a better work–life balance. Agile workers enjoy an increased autonomy to determine when and where they carry out their duties[8] ("time sovereignty")[9] and, hence, they bear the

employment market remains significantly lower compared to other EU countries. According to the latest Inapp plus report, the birth of a child has led to the loss of employment for 18% of mothers. Inapp plus report, *Lavoro e formazione: L'Italia di fronte alle sfide del futuro*. November 2022, p. 128.

[7] The worker's greater "autonomy" to decide how and when work is to be performed makes it necessary to ask whether traditional working time regulations are still suitable to face with the world of digitalised work. For instance, the problem arises of how the employer should provide adequate instruments to record working time and overtime work, especially in the case of agile work. In fact, according to CJEU the Member States must require employers to set up an "objective, reliable and accessible system" enabling the duration of time worked each day by each worker to be measured. This obligation aims at ensuring better protection of the safety and health of workers. For details see: V. Leccese: *La misurazione dell'orario di lavoro e le sue sfide*. "Labour & Law Issues" 2022; V. Leccese: *Lavoro agile e misurazione della durata dell'orario per finalità di tutela della salute,* nota a Cge 14 maggio 2019 – C-55/18, "Rivista giuridica del lavoro" 2020, p. 42; regarding the obligation to record working time in the German system: F. Bayreuther: *Arbeitszeiterfassung auf richterrechtlicher Basis*. "Neue Zeitschrift für Arbeitsrecht" 2023, pp. 6–7; D. Benkert: *Pflicht zur Arbeitszeiterfassung – was bedeutet dies für Arbeitgeber?* "Neue Juristische Wochenschrift-Spezial" 2023, pp. 50–51.

[8] In the era of digitalisation it has become very clear that the degree of autonomy in performing work makes it more and more problematic to identify the status (employment or self-employment) of the persons involved in such a work. On the erosion of subordinate contract of employment and main reform approaches that have emerged in recent years see, for instance, A. Perulli, T. Treu: *"In tutte le sue forme ed applicazioni". Per un nuovo Statuto del lavoro*. Giappichelli 2022; N. Contouris: *Defining and Regulating Work Relations for the Future of Work*. International Labour Organisation 2019; T. Treu: *Introduzione*. In: A. Occhino (ed.): *Il lavoro e i suoi luoghi*. Vita e Pensiero 2018, XIII; A. Zoppoli: *Prospettiva rimediale, fattispecie e sistema nel diritto del lavoro*. Editoriale Scientifica 2022, p. 39; L. Zoppoli: *I riders tra fattispecie e disciplina: dopo la sentenza della Cassazione n. 1663/2020*. "Massimario della Giurisprudenza del lavoro", n. straordinario 2020, p. 265.

[9] According to *Collins English Dictionary* "time sovereignty" is the "control by an employee of the use of his or her time, involving flexibility of working hours".

responsibility of organising their own time as long as they produce results. Thus, while time flexibility can improve workers' health and well-being, facilitate a better work–life balance and promote gender equality by encouraging women's participation in the labour market, it can also lead to a blurring of paid work and leisure and private life ('time porosity')[10].

Generally speaking, Alan Supiot has long been arguing that "Gender equality implies equal conditions for individual choice of time for paid work, unpaid work (family duties and training for oneself) and leisure time. That is to say, that such equality must not be separated from the right to respect private and family life, reflected in the European Convention on Safeguarding Human Rights and Fundamental Freedoms (art. 8–1)"[11]. The idea was to rethink working time regulation in a broader perspective, so to make the various aspects of each worker's life (primarily paid work, unpaid work, and leisure or rest) mutually compatible. This relates to a transformative dimension of substantive equality: the aim should be to grant women an access to the paid labour force on equal terms, so to find a better balance between work and private life on the one hand, and a more flexible organisation of working time on the other.

As is well known, in the past, the European Parliament has exerted significant pressure to strengthen the protections on the issue of the organisation of working hours and their modification by taking into

[10] See European Economic and Social Committee, *Teleworking and gender equality – conditions so that teleworking does not exacerbate the unequal distribution of unpaid care and domestic work between women and men and for it to be an engine for promoting gender equality*, 2021, and EIGE, *Gender equality and the socio-economic impact of the COVID-19 pandemic*, 2021. See for example: E. Genin: *Proposal for a theoretical framework for the analysis of time porosity*. "Int. Journal Comp. Lab. Law and Industrial Relations" 2016, vol. 32, no. 3, p. 280; F. Malzani: *Il lavoro agile tra opportunità e nuovi rischi per il lavoratore*. "Diritti Lavori Mercati" 2018, p. 21; M. Peruzzi: *Sicurezza e agilità: quale tutela per lo smart worker?* "Diritto della sicurezza sul lavoro" 2017, p. 26; M. Weiss: *Challenges for Labour Law and Industrial Relationship*, *supra* note 1, p. 73: "in the digital economy there is the danger that working time never ends. Workers may be supposed to remain on line, to answer e-mails and phone calls also after normal working time as well as on holidays and on vacations. And even if the workers are not asked by the employer to do so, they might do it voluntarily".

[11] A. Supiot: *Transformation of labour and future of labour law in Europe*. Final Report 1998. European Union, p. 72.

account the specific question of work–life balance[12]. However, the review process of the Working Time Directive has long been stalled.

The 2019 Work–Life Balance Directive EU marks a turning point on this topic[13]. Even from its preamble it is evident that the EU legislator is aware that working-time flexibility is linked to gender equality, as it helps women in combining childcare with work[14].

For this reason the 2019 Work–Life Balance Directive introduces a new right for parents[15] and carers[16] to request flexible working arrangements for caring purposes (art. 9, co. 1). The employer is obliged to "consider" and respond to such requests within a reasonable time. If a request is declined, the employee is entitled to receive an explanation of the refusal or postponement of such arrangements (art. 9, co. 2). Additionally, the Directive grants workers the right to return to their original working pattern at the end of the agreed period (reversibility), even before the agreed period ends, whenever a "change in circumstances" justifies it (art. 9, co. 3).

[12] See Resolution of 17 December 2008 on the Council common position for adopting a directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time (10597/2/2008 – C6-0324/2008 – 2004/0209(COD)).

[13] See L. Waddington, M. Bell: *The right to request flexible working arrangements under the Work-Life Balance Directive – A comparative perspective*. "European Labour Law Journal" 2021; M. Militello: *Conciliare vita e lavoro. Strategie e tecniche di regolazione*. Giappichelli 2021; E. Caracciolo di Torella: *An emerging right to care in the EU: a "New Start to Support Work–Life Balance for Parents and Carers"*. ERA Forum 2017; S. Scarponi: *'Work life balance' fra diritto Ue e diritto interno. "*WP C.S.D.L.E. "Massimo D'Antona". INT – 156/2021".

[14] See Preamble no. 10: "a major factor contributing to the underrepresentation of women in the labour market is the difficulty of balancing work and family obligations. When they have children, women are likely to work fewer hours in paid employment and to spend more time fulfilling unpaid caring responsibilities. Having a sick or dependent relative has also been shown to have a negative impact on women's employment and results in some women dropping out of the labour market entirely".

[15] The right is conferred on parents of children of a specific age, which shall be at least eight years.

[16] Directive defines "carers" as a "worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason". On the definition of carers in the Directive: E. Caracciolo di Torella, M. Masselot: *Caring Responsibilities in European Law and Policy – Who Cares?* Abingdon 2020; C. Chieregato: *A Work–Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158*. "International Journal of Comparative Labour Law and Industrial Relations" 2020, p. 59, 75; G. James: *The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?* "Industrial Law Journal" 2006, vol. 35, no. 3, pp. 272–278.

The aim of this paper is both to point out the potential and limits of the new right to request flexible working arrangements for caring purposes, as established in Directive no. 2019/1158, and to consider, through an overview of the EU law, whether and to what extent this right can be interpreted in a one-sided manner that really favours the interests of workers who have care-related tasks, over those of employers. Concerning the employer's response, it is important to identify the relevant factors leading to the decision, whether to grant the request or not and to clarify the requirements to which employers are subject and whether it is possible to scrutinise the employer's reason for declining a request.

The second section of this article shows some examples of routes followed in respect of the implementation of the right to request flexible working arrangements in two different jurisdictions, Germany and Italy[17]. Regarding the Italian system, attention is also focused on agile work, as the legal system and, especially, social partners have particularly emphasised this tool to promote work–life balance. The aim of this section is to provide an overview to better understand the relationship between the right to request flexible working and anti-discrimination legislation. The question arises whether and how the EU law might support an interpretation of Italian legislation that recognises a positive duty upon employers, requiring proactive efforts to accommodate parents or carers who wish to work flexibly to combine care and work.

2. Flexible working arrangements, carers and EU law

To fully grasp the potential of the right to request flexible working arrangements as outlined in the Work–Life Balance Directive, it is essential to contextualise it within the framework of other provisions of the existing EU law that, either directly or indirectly, facilitate flexi-

[17] The situations in which the employee can exercise such a right are many and the changes which can be requested are very broad; for instance, an employee is entitled to request to reduce or increase the number of hours worked, to request a change to their place of work, including requesting to work from home, or to request a change to their working times. According to Art. 3 "'Flexible working arrangements' means the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced working hours".

ble working arrangements. This helps to clarify the role it may play, considering its relationship with non-discrimination law.

The key question is the extent to which EU law restricts the employer's power in the cases where the request is denied. There is no doubt that the employer's decision to reject a request must be objectively justifiable, and the employer is bound by various procedural requirements. According to the Work–Life Balance Directive, the employer has an obligation to provide an explanation for any refusal. Managerial decision-making appears to be subject to significant constraints regarding the acceptable reasons for declining such a request. The Directive specifies that "employers shall consider and respond to requests for flexible working arrangements…, *taking into account the needs of both the employer and the worker*"[18].

However, this cryptic and ambiguous phrasing fails to offer precise criteria for assessing the extent of the employer's discretion concerning the duty to accommodate the employee's individual requirements. Therefore, the question arises: is it possible, and if yes, to what extent is it possible to subject the employer's refusal of the request to the judicial scrutiny and establish a justiciable standard to ensure compliance with the EU law requirements?

Some labour law scholars have underscored the limitations of the new right to request flexible working arrangements as outlined in the Directive. The argument is straightforward. They have observed that, unlike other forms of leave also addressed in the Directive – such as paternity leave, parental leave, and carers' leave – employers are not obliged to grant the request. The Directive merely provides for a right to "request" such arrangements, and the employer is required to seriously consider that request[19].

[18] Art 9(2).

[19] L. Waddington, M. Bell: *The right to request flexible working arrangements under the Work–Life Balance Directive, supra* note 13; M. Militello: *Conciliare vita e lavoro. supra* note 13; C. Chieregato: *A Work–Life Balance for All? Assessing the Inclusiveness of EU Directive 2019/1158*, *supra* note 16. See also M. Weldon-Johns: *EU work-family policies revisited: Finally challenging caring roles?* "European Labour Law Journal" 2021, p. 310 (317): "The greatest limitation here is that this is only a right to request such a change and does not guarantee that working carers will be able to change their working arrangements". For a dissimilar opinion see B. Graue: *Auswirkungen der Richtlinie 2019/1158/EU zur Vereinbarkeit von Beruf und Privatleben für Eltern und pflegende Angehörige auf das deutsche Arbeitsrecht*. "ZESAR" 2020, pp. 62–71.

This implies that there is no absolute right to receive flexible working arrangements for care-related reasons. As revealed in the Impact Assessment accompanying the Commission's legislative proposal, the idea of an absolute right was discarded "as it would create serious restrictions on employers to determine how work is organised in a firm"[20].

While this argument is supported by many scholars, it is not entirely convincing. It must be acknowledged that an absolute right to receive flexible working arrangements could indeed impose serious restrictions on the freedom to conduct a business, as recognised in Article 16 of the Charter. However, in my opinion, this perspective has underestimated the importance of procedural obligations that employers shall fulfil, including the obligation to discuss the request with the employee and provide him/her with an explanation for any refusal.

Under the Work–Life Balance Directive, the employer is not entitled to decline the request without justification. A refusal to grant a request to change an employee's working arrangements that is not based on "reasonable grounds" cannot be challenged in court. The requirement for justification plays a crucial role, particularly when compared with similar obligations provided in existing Directives. For instance, the Directive on part-time work does not grant an absolute right to part-time work; instead, it obliges Member States to ensure that employers, "as far as possible", consider the requests from workers to transfer from full-time to part-time work when this becomes feasible in the company.

This means that, according to the rule, it is up to the employer to decide whether or not the employee can reduce his/her working time. Some scholars have pointed out that "the CJEU has paid little attention to the duty employers are under to justify decisions to refuse to allow a worker to continue to work part-time, where this is needed for care reasons" [21].

In the Work–Life Balance Directive, employers are not obliged to grant the request, but the employer's justification when refusing

[20] COMMISSION STAFF WORKING DOCUMENT, 'Executive Summary of the Impact Assessment, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU' SWD (2017) 203 final, 4.

[21] C. Hiessl: *Caring for Balance? Legal Approaches to those who Struggle to Juggle Work and Adult Care*. "International Journal of Comparative Labour Law and Industrial Relations" 2020, p. 107 (111).

a request for flexible working arrangements shall meet more stringent requirements (it must be objectively justifiable). Two main policy goals served by Directive 2019/1158/EU (art. 9.2) can be identified: transparency and the balancing of (fundamental) interests of both workers and employers (as required in response to a request).

The first goal is reflected in the requirement for the employer to communicate a response to the worker's request for "flexible working arrangements" within a reasonable timeframe. The duty to respond to the request aims to inform the worker about the decision on the adjustment of the work schedule and the business interest involved. Although the Directive does not explicitly impose such an obligation, the employer is required to discuss the request with the employee, so to make the scheduling decision at least in a manner that is respectful of the worker's interest and aimed at achieving a better balance between work and personal life (the so-called "obbligo a trattare").

The second goal is to give a more careful attention towards the effects of the scheduling choices that the employer has to make concerning parents and workers with caregiving responsibilities. The Directive makes it clear that a balancing of interests is required, "taking into account the needs of both the employer and worker" [22].

The obligation to justify the reasons for refusing requests is a crucial tool to ensure a fair balance between the care-related needs of the employee and the business interests of the employer. Generally, the employer has the discretion to reject employee requests, while combining the freedom of contract and the freedom to conduct a business recognised in Article 16 of the Charter.

However, under the EU law, this freedom is not unlimited. The freedom to conduct a business can come into conflict with fundamental social rights recognised at the EU level in certain provisions of the EU Charter of Fundamental Rights. These include Article 33 on family and professional life, Article 23 CFR on equality between women and men (referenced in the Preamble of the Work–Life Balance Directive), and Article 21(1) CFR, which prohibits discrimination on various grounds, including sex[23].

[22] Art 9(2).

[23] The second paragraph states: "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with mater-

Even though Article 33 does not explicitly mention flexible working arrangements, the principle in this provision could be interpreted broadly. A key legal source for this provision is Article 27 of the Revised European Social Charter, stating that member States should take appropriate measures "to enable workers with family responsibilities to enter and remain in employment" and "to take account of their needs in terms of conditions of employment".

Hence, the scope of protection under Article 33 can be interpreted as encompassing employees' entitlement to paid maternity leave, parental leave, and the right to flexible working arrangements. This perspective is reinforced by the European Pillar on Social Rights, although its provisions are not legally binding. Principle 9 on "work–life balance" asserts that "parents and people with caring responsibilities have the right to suitable leave, *flexible working arrangements*, and access to care services". Consequently, an unjustified refusal to provide flexible working arrangements (with insufficient justification under the Directive) would directly be in breach of the aforementioned EU fundamental rights provisions. These include the prohibition of discrimination on grounds of sex: a mandatory general principle of the EU law articulated in Article 21 CFR.

The inherent conflict in fundamental rights between the freedom to conduct a business and freedom of contract on one side and the fundamental right to equality, non-discrimination, and the right to work–life balance on the other is to be solved through a balance of all circumstances, that is by employing a method known as *praktische Konkordanz* or practical concordance. This approach ensures that constitutionally protected legal values are harmonised when conflicting[24].

The *praktische Konkordanz* necessitates that none of the conflicting constitutional values shall be realised at the expense of a competing constitutional value; instead, all legal positions are to be balanced as

nity and the right to paid maternity leave and to parental leave following the birth or adoption of a child".

[24] See for example in Germany Federal Constitutional Court's Order of 9 May 2016, 2 BvR 2202/13. See also G. Zagrebelsky: *Il diritto mite. Legge, diritti, giustizia.* Einaudi 1997, pp. 170–171. The author argues that "l'unica regola formale di cui si può parlare è quella della 'ottimizzazione' possibile di tutti i principi, ma come ottenere questo risultato è questione eminentemente pratica e 'materiale'".

fairly as possible[25]. This method optimises the values or principles in conflict, akin to *Pareto* optimality. In other words, the interference of the freedom to conduct a business (and thus the freedom to refuse employee requests) with the right to work–life balance (and therefore the right to flexible working arrangements) should be minimised as much as possible without entirely disregarding the rights of either party.

3. The fine line between the duty to consider the request for flexible working arrangements and the duty to provide a reasonable accommodation

As some scholars have clearly stated, a more thorough understanding of the potential of the Work–Life Balance Directive "can be found through a combined analysis of protections found in other instruments, especially EU equality law"[26].

Although European anti-discrimination law neither recognises carers as a protected characteristic nor introduces a duty of reasonable adjustment for carers[27], the Work–Life Balance Directive may be interpreted in the light of its close relationship with anti-discrimination law to ensure adequate account of individual needs, when regulating working hours.

In case law, national courts, when applying anti-discrimination law, have provided carers with various possibilities to challenge the managerial prerogative to determine working arrangements, thus making it difficult for them to combine care and work, and, in some circumstances, to claim the right to work in a way that allows them to combine the two.

For instance, in a recent case[28], the employer's decision to replace a single "central" working shift with two alternating shifts for all em-

[25] Alexy, R.: *Constitutional Rights, Balancing, and Rationality*, "Ratio Juris" 2003, vol. 16, no. 2 (pp. 131–40).

[26] L. Waddington, M. Bell: *The right to request flexible working arrangements, supra* note 13, p. 513.

[27] See G. Mitchell: *A Right to Care: Putting Care Ethics at the Heart of UK Reconciliation Legislation*. "Ind. Law Journal" 2020, vol. 49, no. 2, p. 199.

[28] December 31, 2021 in *Riv. it. Dir. lav*. 2022, II, 247. See G. de Simone: *Discriminazione*. In: M. Novella, P. Tullini (eds): *Lavoro digitale*. Giappichelli 2022, p. 127; also T. Firenze n. 1414/2019 in *RGL* 2020, II, p. 309 noted by L. Santos Fernandez; G. Calvellini: *Work-life balance e diritto antidiscriminatorio, oggi*. In: G. Calvellini, A. Loffredo (eds): *Il tempo di lavoro tra scelta e imposizione*. Editoriale scientifica 2023, p. 73.

ployees made it more difficult for working parents to manage their child care arrangements. Having concluded that this adverse effect on parents disproportionately affected women, the Bologna Court upheld the appeal of the equality councillor. The court held that it would have been possible for the employer to implement less harmful measures regarding caregiving needs, and as such, the rule could not pass a strict test of justification. Indeed, having a single central shift only for working mothers of young children or another schedule compatible with childcare would not have undermined "the overall functional needs of the new warehouse organisation based on the double shift".

According to established case law of some national courts[29], an obligation of the employer to justify a refusal to allow flexible working arrangements regarding working hours can stem from prohibitions of direct or indirect discrimination under Anti-discrimination Law. In making these observations, the courts appear to come close to a crossing the line between prohibiting unlawful discrimination and imposing *positive duties* on employers to act towards specific groups. Prohibition of indirect discrimination[30] can play the same role as a reasonable accommodation duty. As in all other cases of measures that could represent a disadvantage for a group of individuals who have a protected characteristic, enjoying of some protections, the obligation not to indirectly discriminate – if interpreted dynamically – can also provide for a *de facto* accommodation duty[31].

This implies that the employer must have sufficiently weighty reasons if the request is to be refused or only partially granted. Directive No. 1158/2009 endorses the approach developed in national anti-discrimination law: essentially, due to its close link with anti-discrimination law, the duty to consider the request for flexible working arrange-

[29] See the case-law cited from G. Calvellini: *Work-life balance*, *supra* note 28, pp. 75–77.

[30] On the uncertainty about the meaning of the crucial aspect of indirect discrimination see H. Collins: *Justices for Foxes: Fundamental Rights and Justification of Indirect Discrimination*. In: H. Collins, T. Khaitan (eds): *Foundations of Indirect Discrimination Law*. Hart Publishing 2018, p. 249.

[31] See London Underground Ltd v Edwards (No. 2) [1999] ICR 494 (CA). See also L. Waddington: *Reasonable Accommodation – Time to Extend the Duty to Accommodate Beyond Disability?* "NJCM-Bulletin" 2011, p. 186, 192–193; J. Conaghan: *The Family-friendly Workplace in Labour Law Discourse: Some Reflections on London Underground Ltd v Edwards*. In: H. Collins, P. Davies, R. Rideout (eds): *Legal Regulation of the Employment Relation*. Oxford University Press 2001, pp. 161–185.

ments does not seem to differ from the duty to provide a reasonable accommodation. EU law imposes a positive duty on the employer to accommodate (make changes) by offering working parents flexible working arrangements that would enable them to combine their work and childcare responsibilities. The employer is required to conduct adequate investigative activities aimed at *considering* the adoption of appropriate (operational) measures to accommodate (or not excessively sacrifice) the care-related needs of the employee. My claim is that the employer is not completely free to reject a request for flexible working arrangements without serious grounds and must, in principle, adapt the workplace (premises and equipment), so to make the appropriate adjustments (patterns of working time) and to avoid imposing a disproportionate or undue burden, where needed in a particular case, to ensure that carers can more easily combine care and work.

Although EU law confines the duty to accommodate only to people with disabilities, the Work–Life Balance Directive embraces a substantive concept of equality and an asymmetric and redistributive approach to equality, aiming to redress the disadvantage (even if this entails preferential treatment for carers). With its obligation to consider the request for flexible working arrangements, EU law draws on the well-known theoretical framework developed by Amartya Sen and Martha Nussbaum[32]. The so-called "capabilities" theory highlights the importance of valuing individual diversities, considering the extent to which each individual is actually able to exercise the freedom to choose for himself or herself and achieve the goals of his or her life aspirations.

4. A comparison between German and Italian cases

Shifting the focus towards the regulations transposing the directive on work–life balance in Germany and Italy, some substantial di-

[32] See A. Sen: *Development as Freedom*. Oxford University Press 1999, p. 5: "what people can achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives". See also: A. Perulli, V. Speziale: *Dieci tesi sul diritto del lavoro*. Il Mulino 2022, p. 67; R. Del Punta: *Leggendo "The Idea of Justice", di Amartya Sen*. "Giornale di diritto del lavoro e di relazioni industriali" 138/2013, p. 197; R. Del Punta: *Labour Law and the Capability Approach*. "*Int. Journal Comp. Lab. Law and Industrial Relations*" 2016, p. 383.

vergences can be highlighted regarding the regulatory choices made in the two countries under analysis as for the content and methods of exercising the right to request flexible working for caregiving needs of employees.

In Italy, the recent legislative implementation of Directive 2019/1158 clearly opts for a minimalist approach, as it essentially leaves the existing framework unchanged and does not reinforce the tools available to implement time flexibility to facilitate work–life balance (see § 4.2 below). On the contrary, the German legislation for transposition dated 22 November 2022 partially reproduces the wording and content of the directive[33], showing greater openness to the opportunities offered by EU law and the aim pursued by Directive 2019/1158 in Article 9[34]. Nevertheless, even in Germany, gaps, doubts, or ambiguities are left unsolved by the law.

4.1. Flexible working for care-related needs under German Law. A half-hearted implementation of the Work–Life Balance Directive

Starting from the German model, it should be highlighted that in Germany any employee living together with a child and having custody of that child is explicitly entitled to request changes to his/her working arrangements to facilitate care-related tasks. German law specifically allows workers to request a reduction in the number of hours worked (*Verringerung*) or a change in their working times (*Verteilung*). According to the Act on Parental Benefit and Parental Time (*Bundeselterngeld- und Elternzeitgesetz* "BEEG"), sec. 15 para. 5, new version, there are two types of flexible working arrangements. Similarly to the Work–Life Balance Directive, there is no obligation on the employer to grant such a request.

[33] The Act that transposes the Directive into domestic law passed the German Bundestag on 22 December 2022. The new Act only makes marginal adjustments to the Federal Parental Allowance Act (*Bundeselterngeld- und Elternzeitgesetz 'BEEG'*), the Caregiver Leave Act (*Pflegezeitgesetz 'PflegeZG'*), the Family Care Leave Act (*Familienpflegezeitgesetz 'FPfZG'*), and the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz 'AGG'*).

[34] W. Brose: *Die Reform des PflegeZG. Eine halbherzige Umsetzung der Vereinbarkeitsrichtlinie 2019/1158/EU*. "ZESAR" 2023, p. 313.

As far as certain aspects related to flexible working arrangements are concerned, Germany has chosen to go beyond the minimum standards set by the Directive. While the Directive does not require employers to justify a refusal in writing or specify the deadline for employers to respond, the latest German provision clarifies that, if the employee's request is declined, the employer must provide a written response within four weeks, detailing the reasons for that refusal (sec. 15, para. 5, s. 4, *BEEG*). These new provisions are applicable irrespective of the size of the company.

However, certain aspects remain contentious. For instance, in the circumstance where the changes that can be requested are narrower than those foreseen under the Directive, it is questionable whether the German system recognises the right to request flexible working arrangements in a way that meets the minimum requirements set out in the Work–Life Balance Directive. Firstly, sec. 15, para. 5, s. 4 *BEEG* makes no reference to the request to change the place of work, including requesting to work from home. This choice could be considered consistent with the German system, which lacks any comprehensive legislation on telework and is characterised by the fact that some work agreements expressly state that the employer can refuse to accept telework without providing any reasons for that[35].

However, this gap can, to a certain extent, be addressed within specific legal provisions already implemented in the past. Special legislative rules have established the right to request telework, in an aim to promote equal opportunities and fair employment practices for both men and women. An example of this is the Act of April 24, 2015 concerning gender equality in the federal administration and federal courts (§ 16 (1) f. 2 *BgleiG*). According to this act, employees – such as

[35] Furthermore, the labour courts are rather sceptical as to whether an employee has a general right to request to perform his or her job remotely, because they argue that this right could interefere with the employer's freedom to conduct a business in case the employer should be obliged to set up additional home office workstations. No right to request for flexibility regarding the workplace can be derived from general regulations. § 106 GewO is likely not sufficiently specific in this regard as to reliably guarantee such a right. In order to enable a caregiving family member to work from home *via* § 106 GewO, in each individual case, the employer's discretion would need to be reduced to zero, and furthermore, the employment contract should not be a hindrance. See Lag Rheinland Pflaz 18 December 2014, 5 Sa 378/14; ArbG Augsburg 7 May 2020 – 3 Ga 9/20; Lag Berlino-Brandenburgo 24 March 2021, 4 Sa 1243/20.

parents with young children or those caring for severely disabled individuals – have the entitlement to apply for a remote work arrangement to fulfil caregiving responsibilities[36].

The employer has to grant the request in accordance with the employee's wishes, unless there are compelling service-related reasons (*dienstlichen Möglichkeiten*) justifying a refusal. Administrative entities have considerable discretion in determining what reasons can be considered as service-related under § 16 and whether the job can be performed remotely. However, the employer's decision to deny a request must be objectively justifiable and may be subject to judicial review. Employers cannot freely reject such a request without a substantial reason[37].

The other critical point concerns an amendment to the Caregiving Leave Act (*Pflegezeitgesetz "PflegeZG"*), which now grants employees in small businesses the right to request full or partial caregivers' leave for close relatives (sec. 3 *PflegeZG*). It is surprising that under this Act, workers are *only* allowed to request an adjustment to their work schedule (including changing the time of work) as far as this concerns a reduction in working hours. As mentioned earlier, it may well be doubted whether this provision complies with the EU law, as Article 9 of Directive 2019/1158 introduces the possibility for workers to utilise both a reduction in working hours and flexible work schedules. Failure to allow carers to request flexible working schedules may limit the ability of some carers to balance work and caregiving responsibilities. German scholars argue that the gap at the national level cannot be bridged by § 7 para. 2 *TzBfG*; according to this provision, the employer must discuss the request with the employee who wishes to change the number of working hours or the place of work, but the employer is not required to provide any reasons for his/her decision. Neither a mandatory review of the request within a certain period nor a gener-

[36] Similar provisions for employees with family obligations can be found in two Acts regulating equal opportunities in employment relationships in the public sector: the Act for the Federal Administration and the Federal Courts (*Gleichstellungsdurchsetzungsgesetz*) of 2001 and the Act for the Public Service of the State of Baden-Württemberg (*Gesetz zur Verwirklichung der Chancengleichheit von Frauen und Männern im öffentlichen Dienst des Landes Baden-Württemberg*) of 2005.

[37] VG Koblenz, 18 February 2015 - 2 K 719/14.KO Rn. 27; cfr. anche VG Trier, 1 March 2011 - 1 K 1202/10.TR Rn. 18. See C. Picker: *Rechtsanspruch auf Homeoffice?* "Zeitschrift für Arbeitsrecht" 2019, p. 269, 276.

al obligation to provide reasons in case of rejection are provided for [38].

As already mentioned with regard to *BEEG*, § 3 *PflegeZG* makes no reference to the request to change the workplace either, and thus does not meet the requirements established by the Directive, according to which flexible working arrangements include "the use of remote working arrangements". This is quite surprising. Of course, it is true that in Germany telework is voluntary, and the employee (or a caregiver), as a rule, does not have a right to telework. However, a number of exceptions apply, and some of them could also concern carers.

Under German law, severely disabled employees are entitled to be accommodated into an employment in such a way that they are able to fully develop and use their knowledge and skills. Sec. 164, para. 4, no. 1 and 4 of *SGB* IX obliges the employer to tailor work to the needs of the individual and provide necessary and appropriate modifications and adjustments which do not imply a disproportionate or undue burden, where needed in a specific case, in order to ensure a workplace suitable for the persons with disabilities. This section is the legal basis of an important ruling by the Lower Saxony Regional Labour Court[39], which takes the view that this provision aims to enable severely disabled persons to find an employment where their (residual) capabilities are optimally exploited. According to *Lag*, this provision would not reach its purpose if the employer is completely free to reject a request to change the place of work to be submitted. The obligation to grant a change in working arrangements, as well as in the place of work, including the request to work from home, can be relieved (only) when such a measure is considered unreasonable (for example, a job cannot be performed flexibly and remotely; the employee's Internet connection in the home office is inadequate) or leads to a disproportionate burden.

The ruling is an attempt to interpret the provision in a manner compatible with the European directives, in particular, with the Employment Equality Directive of 2000, which established the obligation to provide "reasonable accommodation" to disabled individuals (art. 5). There cannot be any doubt that remote working arrangements,

[38] T. Klein: *Flexible Arbeitsregelungen zur Förderung der Vereinbarkeit von Familien- und Berufsleben und die Grenzen des Arbeitszeitrechts*. "Neue Zeitschrift für Arbeitsrecht" 2021, p. 474, 476. See also the statements by the Scientific Services of the Bundestag unter WD 9–3000–063/22, S. 11, 13.

[39] Lag Niedersachsen, 6 December 2010 – 12 Sa 860/10 – BeckRS 2011, 68917.

along with other flexible working arrangements, can be considered *appropriate* measures to adapt the workplace to the disability, and thus to meet the obligation to provide reasonable accommodations. According to the Preamble to the Framework Directive, the appropriateness of the employer's measures has to be assessed based on their effectiveness: even though remote working is not mentioned, recital 20 states that "appropriate measures" are "effective and practical measures to adapt the workplace to the disability, for example, modifying premises and equipment, patterns of working time, the distribution of tasks, or the provision of training".

In the *HK Danmark* judgment, the CJEU develops the concept of "reasonable accommodation", established by the UN Convention on the Rights of Persons with Disabilities, in a wider sense. The Court clarifies that "a reduction in working hours could be regarded as an accommodation measure, in a case in which reduced working hours make it possible for the worker to continue employment"[40].

The crucial question is whether the duty to provide a reasonable accommodation, expressly established by Art. 5 in favour of persons with disabilities, can also be extended to workers who are carers[41]. This interpretation could be based on the wording and the purpose of principles and rules set forth under the EU equality law and the case law of the *CJEU*.

The *CJEU* holds in the *Coleman* judgment that the Employment Equality Directive, which prohibits employment-related discrimination on the grounds, *inter alia*, of disability, should be considered as applicable not "only to people who are themselves disabled" but also to a person who is associated with an individual with a disability. The prohibition of discrimination on the ground of disability, therefore, can be extended to the detrimental treatment of a mother on the

[40] CJEU 11.4.2013, C-335/11 and C-337/1, HK Danmark, §§ 56. See M. Aimo, D. Izzi: *Disability and workers' well-being in collective agreements: practices and potential*. In: T. Treu, G. Casale (eds): *Transformations of Work: Challenges for the National Systems of Labour Law and Social Security*. XXII World Congress of the International Society for Labour and Social Security Law, Wolters Kluwer 2019, p. 41; C. Spinelli: *Disability, Reasonable Accommodation and Smart Working: a virtuous matching?* ibidem, p. 1309.

[41] Regarding the concept of reasonable accommodation with regard to disability see L. Waddington: *Reasonable Accommodation – Time to Extend the Duty to Accommodate Beyond Disability?* "NJCM-Bulletin" 2011, p. 186.

ground of her son's disability. The *CHEZ* judgment is also particularly important insofar as the Court confirms that discrimination by association is prohibited by the EU equality law also in the context of indirect discrimination. According to some scholars "this might mean that a carer who wishes to work flexibly to combine care and work and who is hampered in this by standard employment policies or working arrangements could argue that they are subject to indirect discrimination by reason of the disability or age of the person they care for" [42].

The Work–Life Balance Directive requires member States to take the necessary measures to prohibit less favourable treatment of workers on the ground, *inter alia*, that they have applied for, or that they have exercised the right to request flexible working arrangements (art. 11). The critical point is that the German Act that transposes the Work–Life Balance Directive into domestic law does not offer carers any possibilities to challenge work schedules and other arrangements, making it more difficult for them to combine care and work. Thus, it is very hard to argue that a duty to provide reasonable accommodation in favour of carers can be found in such provisions.

There seems to be an inconsistency within German Law. It is indeed rather curious that, while the German legislator extends the competence of the Equality body designated for the promotion, analysis, monitoring, and support of equal treatment of all persons without discrimination on grounds of sex, with regard to issues concerning discrimination and falling within the scope of the Work–Life Balance Directive it does not explicitly prohibit discrimination on the ground of being a carer[43]. As it has also been pointed out, it surprises that in the accompanying memorandum to the bill (the so-called *Gesetzesbegründung*), it is stated that the Act expands the list of grounds on which EU provides for a prohibition of discrimination, because parents and carers are now entitled to appeal to the Federal anti-discrimination agency to enforce the prohibition of discrimination. The German Act, as the Directive transposed by it, is not revolutionary, as it fails

[42] L. Waddington, M. Bell: *The right to request*, *supra* note 13, p. 515. On the so-called discrimination by association see, for instance, L. Waddington: *Reasonable Accommodation*, cit. *supra* note 41; C. Janda, H. Hermann: *Die assoziierte Benachteiligung im Arbeitsrecht*. "ZESAR" 2023, vol. 11–12, p. 455. Case C-83/14 CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia EU: C:2015:480.

[43] W. Brose: *Die Reform des PflegeZG*, *supra* note 34, p. 316.

to recognise the status of caring as a protected characteristic within the anti-discrimination laws. The implication of this choice is simply that a right to care remains still reliant on pre-existing anti-sex discrimination legislation. While it is commendable that the German legislator focuses on the right to request flexible working, more would be needed to protect carers from discrimination and to promote carers' ability to perform in a paid workplace.

4.2. The right to request flexible working for care-related needs under Italian law. The example of agile work

As far as the topic of flexible working hours tailored to care needs is concerned, the Italian regulatory framework resulting from the reforms that have been introduced over the years, appears quite heterogeneous. While recent and significant innovations can be identified in anti-discrimination law, particularly referring to Law No. 162/2021, which includes "changes in the organisation of working conditions and hours" within the notion of discrimination, other domestic regulations intersecting with this topic suffer from some delays. For example, in the field of working time, as already anticipated above, the regulatory framework has been focusing more extensively on the company's interest in flexibility, without providing adequate space for the worker's self-determination in order to suit his or her lifestyle and to reconcile work and family life.

The implementation of European legislation provides a valuable opportunity to reconsider the standard approach, by placing greater importance on the individual choices of workers, parents, or caregivers as for the organisation of a schedule that allows for the combination of work and caregiving. However, the implementation of the directive through Legislative Decree No. 105/2022 falls short in this regard. In contrast to the German system, the Italian legislator entirely neglects instruments designed to facilitate a more adaptable work organisation and the structuring of working hours for the purpose of reconciliation. Additionally, the transposition decree does not address, at least explicitly, the flexible working methods mentioned in Directive 1158, as discussed earlier[44].

[44] O. Bonardi: *Il diritto di assistere. L'implementazione nazionale delle previsioni a favore*

According to what can be inferred from European regulations, one of the types of contract where the worker's interest in "choosing" (controlling) working time – and, in general, flexibility aimed at satisfying the needs and interests of the worker – is fully met seems to be that of remote work, which, unlike part-time[45], is explicitly mentioned in Directive 1158, Art. 9.

Our Italian legislator, at least based on what intentionally declared, heads towards this direction when, in 2017, it chooses to promote agile work through its legislative recognition: this instrument, qualified as "a mode of execution of the subordinate employment relationship" (Article 18, paragraph 1, Law No. 81/2017), is indeed conceived with the double purpose of "increasing the competitiveness of companies and facilitating employees' work-life balance". In this way, the legislator shows awareness towards the evolution of working methods and the production induced by the advent of new digital technologies: in brief, by signing an agreement, the employee is granted greater "organisational" freedom, that is, broader freedom to decide – albeit within certain limits – when and where to perform the work ("time sovereignty")[46].

The agile work performance is characterised by flexibility in time and space of its execution, which means that an agile worker is entitled to carry it out "without strict time and place constraints". An important feature of the agile work provisions is that part of the work is performed outside the company premises, without a fixed location. The duration of work time, the timing of work time, and space flexibility are crucial factors in employees' ability to balance their work and personal

dei caregivers della direttiva 2019/1158 in materia di conciliazione, and C. Alessi: *La flessibilità del lavoro per la conciliazione nella direttiva 2019/1158/UE e nel d.lgs. 30 giugno 2022 n. 105*, both in "*Quaderno di DLM n. 14 dal titolo" "Diritto di conciliazione. Prospettive e limiti della trasposizione della dir. 2019/1158/UE"*. Editoriale scientifica 2023.

[45] In this regard see V. Ferrante: *Lavoro a tempo parziale*. "Enciclopedia giuridica Treccani" 2008, p. 1, 69; C. Alessi, O. Bonardi, L. Calafà, M. D'Onghia: *Per una trasposizione responsabile della dir. 2019/1158/UE relativa all'equilibrio tra attività professionale e vita familiare per i genitori e i prestatori di assistenza*. "Rivista giuridica del lavoro" 2022, p. 111.

[46] See, for example: M. Tufo: *Il lavoro digitale a distanza*. Editoriale scientifica 2021; S. Cairoli: *Tempi e luoghi di lavoro nell'era del capitalismo cognitivo e dell'impresa digitale*. Jovene 2020; G. Calvellini: *La funzione del part-time: tempi della persona e vincoli di sistema*. Esi 2020 (spec. cap. I e II); E. Dagnino: *Dalla fisica all'algoritmo: una prospettiva di analisi giuslavoristica*. Adapt, University Press 2019; C. Spinelli: *Tecnologie digitali e lavoro agile*. Cacucci 2018; see also A. Occhino (ed.): *Il lavoro e i suoi luoghi*. Giuffré 2018.

lives. Thus, it is not surprising that agile work is generally considered a work–life balance tool, enabling parents to share the care of their children. This point of view was also upheld by the 2019 budget law (Law No. 145/2018), which required "the employer to give *priority* to requests for performing agile work from women within three years after the end of maternity leave, as well as from workers who are parents of disabled children (Art. 1, par. 3-bis Law No. 81/2017)[47].

However, "all that glitters is not gold" in this respect. Law No. 81/2017 and subsequent legislative interventions can be criticised for at least two reasons. First, considering the legislator's intention to pursue the goal of work-life balance, it is highly questionable whether it is appropriate to leave the power to regulate a wide range of working conditions within the contractual autonomy of the parties to the employment contract. Under the employment contract (and also in case of agile work), the individual position of the worker *vis-à-vis* the employer is too weak to counteract the dominant position and reach an agreement that can balance the paid work and caring responsibilities. The legislator adopted a formalistic approach: the freedom of contract of the contracting parties was not significantly restricted, notwithstanding the unequal bargaining powers they enjoy[48]. The Italian Act only requires that parties comply with the rules on maximum weekly and daily working time established by statutory law and collective bargaining. The matter is governed by collective agreements, which are empowered to set the maximum weekly working hours. Secondly, criticism is also directed at the legislative intervention of 2018, where the Italian legislator discards the idea of introducing a statutory right to agile work for caring purposes and – contrary to what is found in other more advanced foreign experiences – it only requires employers to recognise a "priority" to requests for performing agile work coming from the above-mentioned persons (art. 1, par. 3-bis)[49].

[47] I. Senatori, C. Spinelli: *(Re-)Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience*. "Italian Labour Law e-Journal" 2021, vol. 14, issue 1.

[48] According to I. Senatori, C. Spinelli: *(Re-)Regulating Remote Work*, *supra* note 13: "The overestimated role recognised to the individual agreements implies some risks, concerning first of all how ascertain that the worker's consent is true, but also how to avoid discrimination when defining working conditions".

[49] See for example V. Maio: *Il lavoro da remoto tra diritti di connessione e disconnessione*. In: M. Martone (ed.): *Il lavoro da remoto. Per una riforma dello smart working oltre*

4.3. Final remarks

The legal framework is now, in general terms[50], confirmed by Legislative Decree No. 105 of 2022, which, instead of bringing national legislation in line with Dir. 1158, merely extends this right to parents with children up to 12 years old, as well as to disabled workers and caregivers (see the modifications made to Article 18, paragraph 3-bis, Law No. 81/17).

One would expect the national legislator to be particularly careful in establishing employment rules aimed at accommodating the needs of employees with broader caregiving responsibilities, thus seizing the opportunity to clarify and strengthen measures that may assist those opting for remote work and outlining limitations regarding the employer's acceptable reasons for refusing such a request. However, this is not the case. A clear distinction can be made between the right to request flexible working arrangements under the EU law and the "priority right" that parents and caregivers are entitled to exercise under Italian law to perform their jobs remotely (art. 4, Legislative Decree No. 105/2022)[51].

The EU law provides the worker with an entitlement to request certain arrangements, thus triggering a statutory obligation for the employer to consider that request – a sort of duty to negotiate – and

l'emergenza. La Tribuna 2020, pp. 85–100. On the topic see also M. Brollo, M. Del Conte, M. Martone, C. Spinelli, M. Tiraboschi: *Lavoro agile e smart working nella società post-pandemica*. Adapt 2022.

[50] A statutory "right" to agile work has been introduced in response to the Covid-19 pandemic, referred to as "Pandemic agile work". This special form of agile work is limited to specific groups of workers, such as those facing heightened health risks or increased caregiving responsibilities, including disabled workers and parents of children under the age of 14 affected by school closures. However, according to I. Senatori, C. Spinelli: *Regulating Remote Work*, *supra* note 13, p. 240, "This special form has been qualified as a 'right', insofar as the employer is obliged to accept every request coming from an eligible worker. However, the employer's position is mitigated by the condition that the remotisation needs to be compatible with the inherent characteristics of the job and with the needs of the organisation: which brings to doubt about the possibility to qualify the worker's position as a 'right' in a strict sense".

[51] See O. Bonardi: *Il diritto di assistere*, and C. Alessi: *La flessibilità del lavoro*, cit., both in *Quaderno di DLM*, *supra* note 45; E. Dagnino: *Priorità per l'accesso al lavoro agile e ad altre forme di lavoro flessibile*, and R. Casillo: *Permessi e agevolazioni per i lavoratori caregivers familiari (art. 3, comma 1, lett. B, d.lgs. n. 105/2022)*. In: D. Garofalo, M. Tiraboschi, A. Filì, A. Trojsi (eds): *Trasparenza e attività di cura nei contratti di lavoro. Commentario ai decreti legislativi n. 104 e n. 105 del 2022*, p. 602, 568.

to make every effort to reach an agreement on flexible working arrangements with the worker. Under the EU law, the employer is required to discuss and assess the adoption of the most suitable measures to balance two conflicting interests, thus being compelled to investigate and implement an accommodation.

Conversely, under domestic regulation the employer has no obligation to discuss flexible work arrangements with the worker, as the provision only refers to a "priority right", which appears to be triggered at a later stage of the decision-making process when requests for comparable job positions are available. This implies that the procedural obligations an employer must comply with, upon receiving such a request, are less stringent than those found in the Directive.

Nevertheless, in Italian jurisdiction, the right to request flexible working arrangements can fully realise its potential through the aforementioned case law of some national courts, especially through the protections found in the EU and national equality law. Numerous decisions show that workers exercising the right to request flexible working arrangements can also fall within the scope of anti-discrimination law, which grants them an enhanced protection. It was worthless that in 2021 the Italian legislator indirectly codified this case law under the new Article 25 (2 bis) of the Code for Equal Opportunities (Act No. 162 of 5 November 2021), which came into effect on 3 December 2021.

While the wording may not be entirely clear, the legislator appears to include the status of caregivers among one of the grounds for protection against discrimination under Equality Law[52]. On the one hand, it modifies the concept of discrimination by adding a reference to all "changes at the organisational level and in working arrangements and working schedules at the workplace" which may disadvantage individuals with protected characteristics such as age, *care duties*, pregnancy or motherhood/fatherhood (including adoption), or taking up related rights. On the other hand, this provision aims to prevent such disadvantages that could hinder their participation in life or career.

The concept of gender equality is closely linked to work–life balance, and this could allow for the interpretation of national legislation in the light of the objectives enshrined in the EU law, thus highlighting

[52] See, for instance, R. Santagata de Castro: *Discriminazione diretta e indiretta. Una distinzione da ripensare?* "Lavoro e diritto" 2022, p. 509.

the employees' right and the concept of working-time flexibility in this context[53]. Act No. 162 of 2021 could help address gaps left open by the legislator in 2022. The new Article 25 (2 bis) represents a crucial step towards protecting the right to care. It is evident that the protection and promotion of Work–Life Balance involve various tools and legal instruments, especially non-discrimination law, which can play a decisive role. The legislator's intention is to restrict the managerial prerogative of the employer concerning the organisation of working time[54].

This amendment to the law on discrimination introduces certain constraints to the exercise of managerial powers, specifically limiting the employer's freedom to change or reject a request for flexible working arrangements. The employer is now obliged to justify a refusal to provide flexible working arrangements. Consequently, the employee is required to demonstrate the disadvantage resulting from changes in working arrangements and schedules, particularly affecting those with caregiving roles. The challenge is to establish that the rule or practice interferes with the employee's rights, such as the right to work. The burden then falls on the employer to demonstrate that the purpose of the rule or practice was to achieve a legitimate goal, and the employer's right to change or reject working arrangements and schedules outweighs any unavoidable interference with the employee's right. Therefore, the employer's defence should prevail, if the change is genuinely relevant to business needs.

The protection against discrimination based on being a parent or caregiver, explicitly set forth under Italian law, plays a similar role as that of a reasonable accommodation duty and already provides for a *de facto* accommodation duty. Moreover, as the principle of non-discrimination based on being a carer is linked to the principle of non-discrimination based on sex – considered a general principle of the EU law – and it is considered that the national rules set forth under Leg. Decree No. 105/2022 fall under the EU law, a national court hearing a dispute concerning the principle of non-discrimination related to care is entitled to ensure the full effectiveness of the EU law, setting

[53] For the idea that a right to care a right to care requires that the status of carer is recognised as a protected characteristic see N. Busby: *A Right to Care? Unpaid Care Work in European Employment Law*. Oxford University Press 2011, p. 182.

[54] G. Calvellini: *Work-life balance*, *supra* note 28.

aside any provision of national law that may conflict with it, specifically the one regarding the priority right, to be interpreted as the right to submit a request.

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Wybór, elastyczność organizacji pracy i konieczność zapewnienia opieki w erze cyfrowej: porównanie niemieckiego i włoskiego podejścia prawnego

Streszczenie

Niniejszy artykuł ma dwojaki cel: podkreślenie potencjału i ograniczeń nowego prawa do żądania elastycznej organizacji pracy w celach opiekuńczych, ustanowionego w dyrektywie nr 2019/1158, oraz rozważenie, poprzez przegląd prawa UE, czy i w jakim stopniu prawo to można interpretować w sposób, który rzeczywiście faworyzuje interesy pracowników mających obowiązki opiekuńcze nad interesami pracodawców.

W artykule przeanalizowano niektóre przykłady podejść przyjętych w odniesieniu do wdrażania prawa do żądania elastycznej organizacji pracy w dwóch różnych jurysdykcjach, takich jak Niemcy i Włochy, oraz porównano decyzje transponujące dokonane w dwóch różnych kontekstach prawnych. Autor argumentuje, również w świetle tego badania, że potencjał obowiązku zapewnienia elastycznej organizacji pracy można w pewnym stopniu zwiększyć poprzez zastosowanie zakazu dyskryminacji pośredniej, z którego można wywnioskować rodzaj obowiązku dostosowania. Obowiązek zapewnienia elastycznej organizacji pracy może stanowić narzędzie proceduralne do stosowania i wzmacniania testu proporcjonalności i racjonalnego usprawnienia.

Słowa kluczowe: czas pracy, elastyczna organizacja pracy, potrzeby opiekuńcze, Włochy, Niemcy