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Whose equality? Paid domestic work and EU gender equality law

Introduction

The proclamation of the European Pillar of Social Rights in 2017 marks a renewed commitment to gender equality in the European Union (EU). Principle 2 of the Pillar reaffirms the centrality of equality between men and women which 'must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression'. Work-life balance features prominently as one of the means of achieving greater gender equality. Principle 9, dedicated exclusively to this theme, reflects the EU's aim of moving away from a model of rights related to care that centre on women towards a model which acknowledges that both men and women have caring responsibilities.¹ In line with delivering on the Pillar, the EU institutions have adopted a new directive on work-life balance.² Similar developments in law and policy have been taking place in several European states, signalling a shift in national welfare and labour law systems towards greater recognition of the need for legal intervention to support work-life balance.³

Having access to suitable leave arrangements from work to care for dependants is an important tool towards gender equality for two reasons. First, it allows more women to enter and remain in paid jobs without being penalised for taking up unpaid caring roles. Second, giving caring rights to men nurtures an equalitarian vision of caring, whereby responsibilities are shared between men and women; such a vision can be a first step towards broader societal change concerning gender-based roles.⁴

Yet despite legal and policy developments at both EU and national levels, workers with caring responsibilities, be it in relation to their children or to other dependants, are still confronted with what Nicole Busby refers to as the 'unpaid care/paid work conflict'.⁵ An entrenched culture of long working hours, widespread expectations to be flexible and available to work unconstrained by family obligations, as well as the lack of affordable and good-quality care services, put working people under significant strain.⁶ To manage this conflict, many families and individuals rely on hiring a domestic worker. For many people, especially women, relying one way or another on the services of a domestic worker is not a luxury but a necessary condition for their participation in the labour market. At the same time, the ageing of Europe's population means that demands for paid domestic work are and will continue to be on the rise, as most people now prefer home-based care to living in institutional homes for the elderly.⁷

¹ Bell, M. (2018) 'The principle of equal treatment and the European Pillar of Social Rights', *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 160, 783-810.

² Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers.

³ See generally, Burri S., Senden L. and Timmer A. (2020) *Gender equality law in Europe. How are EU rules transposed into national law in 2019?* (forthcoming).

⁴ Fredman, S. (2014) 'Reversing roles, bringing men into the frame', *International Journal of Law in Context*, 10(4), 442-459; Caracciolo di Torella, E. (2015) 'Men in the work/family reconciliation discourse: the swallows that did not make a summer?', *Journal of Social Welfare and Family Law*, 37(3), 334-344.

⁵ Busby, N. (2011) *A right to care?*, Oxford University Press.

⁶ Fudge J., 'A new gender contract? Work/life balance and working-time flexibility', in Conaghan, J. and Rittich, K. (eds.) (2005), *Labour Law, work, and family: Critical and comparative perspectives*, Oxford University Press, 261-288.

⁷ According to Eurostat, the number of people over 65 in the EU27 was 84.6 million in 2008 and is expected to rise steadily, reaching 151.5 million by 2060. Moreover, the old-age-dependency ratio is projected to double from 25.4 % in 2008 to 53.5 % by 2060. This means that while at the moment there are four people working for every person over 65, by 2060 this share will only be two to one,

Domestic workers therefore play a very important role in the sustainability of families, communities and economies. The nanny who picks up the children after school, the cleaner who comes in once or twice a week to clean the home and do the ironing, the au pair who minds the children in exchange for accommodation and a stipend, the care worker who ensures the elderly or disabled person is clean and safe – these are all paid domestic workers whose work allows so many others to turn up to work every day.⁸

Yet despite this important role, domestic workers are exposed to multiple forms of disadvantage that range from notoriously low wages, long and unregulated working hours and harassment at work, to unfair dismissals and lack of pregnancy and maternity protection.⁹ The global COVID-19 health emergency is exacerbating many of the problems domestic workers face. The working conditions of this largely female workforce sit very uneasily with the vision of gender equality the EU and its Member States seek to achieve. Working in and for a private household brings with it challenges with respect to accessing protection against discrimination, not least because of the very structure of legal provisions on non-discrimination. Finding, for instance, a suitable comparator is a common difficulty for domestic workers, as well as other workers in small establishments, when seeking to substantiate a claim of direct discrimination.¹⁰ Similarly, equal pay laws are heavily restricted in their ability to address low pay in segregated occupations where women predominate. That is why, for the purposes of this article, I will use equality in a broad sense and not as a synonym of non-discrimination.

The aim of this article is twofold. First, to draw attention to the legal and practical obstacles domestic workers face when it comes to equality at work. Second, to propose steps that the EU and its institutions could take to address those obstacles. The discussion is structured in three main sections. In the first section, I sketch the profile of domestic workers in Europe with reference to those characteristics that are important from an equality point of view. The second section discusses obstacles to equality with a focus on selected areas, namely: freedom from harassment at the workplace, the combination of paid work with unpaid care and protection from discriminatory dismissals. This is by no means a comprehensive analysis of all issues, but it provides a snapshot of the situation in Europe, drawing on the law and practice of a limited number of European states. Other important aspects of domestic workers' working conditions, such as working time and equal pay, are not covered here.¹¹ In the second section, I also discuss some of the ramifications of the COVID-19 pandemic on paid domestic work. Finally, the third section discusses the role of the EU and its institutions in promoting a vision of gender equality that includes domestic workers.

thus elderly care needs will increase. Eurostat (2008) Ageing characterizes the demographic perspectives of the European societies, *Statistics in Focus*, 72/2008.

⁸ I follow the ILO definition of domestic work under Article 1(a), ILO Convention 189: 'the term domestic work means work performed in or for a household or households'. I therefore use the term 'domestic work' in a broad sense as encompassing both care as well as other household work such as cleaning and cooking. In favour of using 'care work' and 'domestic work' interchangeably, see Adelle Blackett, 'Introduction: Regulating decent work for domestic workers' (2011) 23 *Canadian Journal of Women and the Law*, 1-46.

⁹ ILO (2010) Decent work for domestic workers, Report IV(1) to the International Labour Conference, 99th Session, Geneva: International Labour Office.

¹⁰ Albin, E. (2012) 'From 'domestic servant' to 'domestic worker' in Fudge, J., McCrystal, S. and Sankaran, K. (eds.), *Challenging the legal boundaries of work regulation*, Hart: Oñati International Series in Law and Society, 231-251.

¹¹ For a preliminary discussion, see Pavlou V. (2016) 'Domestic work in EU law: the relevance of EU employment law in challenging domestic workers' vulnerability', *European Law Review* 41(3) 379-398.

The profile of paid domestic workers in Europe and its implications for equality

Paid domestic work is hardly an obsolete occupation. The International Labour Organisation (ILO) estimates that there are 67.1 million domestic workers globally. Women are, as one would expect, overrepresented, as they make up 83 % of the sector.¹² Domestic workers are also very often migrants. Based on official employment statistics, the ILO calculates that there are at least 2.5 million migrants in domestic work in Europe.¹³ These statistics reflect only part of the reality, because they do not include irregular migrants and other informal workers. As informality is widespread in domestic work, the actual numbers of those making a living in this sector and the share of migrants should be expected to be much higher.¹⁴

Domestic workers may be directly recruited by individuals and families or hired through a variety of intermediaries, including increasingly through digital platforms.¹⁵ The expansion of the so-called 'gig economy' during the last few years has renewed old debates concerning the legal characterisation of employment relationships – are Uber drivers employees, independent contractors or somewhere in between? The burgeoning labour law scholarship on this topic has showed little interest in types of work where women tend to be overrepresented, such as care and domestic services, even though there is evidence that digital platforms have expanded in those fields as well.¹⁶ The platform Nannuka, for instance, offers child care, elderly care, domestic work and tutoring services in the UK and Greece, while the company Care.com, established in 2006 in the USA, has expanded to 13 European countries since its inception. Both websites have thousands of registered domestic workers' profiles in each country. This finding is important, not only because it indicates the extent of paid domestic work in Europe, but also because it shows another dimension of the legal characterisation of these employment relationships. While it is highly unlikely that these digital platforms will be considered to constitute the employers of those who register their profiles in search for work, their expansion in care and other domestic work services increases direct recruitment and as a result, informality and casualisation.

The profile of the domestic worker in Europe – predominantly a woman, very often a migrant, who tends to work informally – is highly relevant for the potential of experiencing discrimination at work and the likelihood of accessing effective redress. Thus, researching paid domestic workers' working conditions in Europe has both a quantitative and qualitative dimension; quantitative because of the large numbers of affected workers and qualitative because domestic workers are predominantly women who experience specific obstacles when it comes to enjoying equality at work. I turn to examine some of these obstacles in the next section.

¹² ILO (2016), *Formalizing domestic work*, International Labour Office.

¹³ ILO (2015) *ILO global estimates on migrant workers. Special focus on migrant domestic workers*, International Labour Office.

¹⁴ The ILO highlights some regional differences worth pointing out. Northern, Southern and Western European countries are quantitatively much more important destinations for migrant domestic workers than countries in Eastern Europe. Migrants make up more than half of the domestic workforce in Northern, Southern and Western Europe (54.6 %), while in Eastern Europe their share is 25 %. The share of female migrants in domestic work is even higher in Northern, Southern and Western Europe, making up 65.8 % of the sector. ILO (2015) *ILO global estimates on migrant workers. Special focus on migrant domestic workers*, International Labour Office.

¹⁵ Judy, F. Hobden, C. (2018) *Conceptualizing the role of intermediaries in formalizing domestic work*, International Labour Office.

¹⁶ Drawing on the USA experience, Julia Ticona and Alexandra Mateescu document a vast difference in the numbers of people offering their work through Uber – 160 000 drivers registered in 2014 – in contrast to the 5.3 million registered profiles on a platform offering care and domestic services, Care.com. See, Ticona, J. and Mateescu, A. (2018) 'Trusted strangers: Carework platforms' cultural entrepreneurship in the on-demand economy', *New Media and Society* 20(11) 4384-4404.

Obstacles to gender equality at work: focus on specific issues

Freedom from harassment at the workplace

Studies show that certain forms of violence at work, including sexual violence and victimisation, disproportionately affect women.¹⁷ Domestic workers are at heightened risk of experiencing violence and harassment at work, not only because they are women, but also due to the specificities of their work.¹⁸ While imbalance of power between a worker and her employer is an intrinsic feature of all employment relationships, in the case of domestic workers, that imbalance tends to be more pronounced, making them vulnerable to abuse. Domestic workers work, and sometimes even live, in their employer's private household. Their work, especially if it involves adult care, requires close proximity with the human body, which might expose them to unwanted sexual advances. Working in a private household, where labour inspection is often barred in view of protecting privacy, as well as being isolated without contact with colleagues, makes it difficult to uncover abuse.

Migrant domestic workers are in a particularly vulnerable situation if they experience any form of abuse, because they may lack a supportive social network to turn to. Non-EU migrant domestic workers are subject to immigration rules which often make them dependent on their employer for both work and residence permits;¹⁹ therefore, they might be wary of losing both the right to work and to stay in the country if they complain against abuse and harassment. In 2019, the Cypriot Equality Body published a report documenting the extent of the phenomenon of harassment against migrant, mostly third-country national, domestic workers in Cyprus.²⁰ Drawing on complaints filed during the last decade, the Equality Body reports that violence in all its forms against migrant domestic workers is very common in Cyprus. Worryingly, there have been cases of detrimental treatment, including expulsion, of domestic workers who complained to the local authorities against abuse at work.²¹

Because of the stigma associated with being a victim, especially of sexual harassment,²² coming forward is never easy, let alone bringing a claim to court and receiving redress. Fear of repercussions including dismissal, difficulties in gathering evidence and substantiating a claim, and lack of funds and knowledge of how redress mechanisms work, are all factors contributing to underreporting; as a result, few victims pursue claims judicially.²³

EU equality law considers sexual harassment, harassment on the grounds of sex and harassment motivated by the person's racial or ethnic origin as forms of prohibited discrimination. While such behaviours could be addressed through Member States' criminal laws, the Recast and Race Equality Directives introduce three innovative

¹⁷ Lippel, K. (2016) *Addressing occupational violence: an overview of conceptual and policy considerations viewed through a gender lens*, International Labour Office: Geneva.

¹⁸ That domestic workers are a group at risk of experiencing harassment at work is reflected in Article 5 of ILO Convention 189 on decent work for domestic workers which requires ratifying States to ensure effective protection against all forms of abuse, harassment and violence.

¹⁹ Pavlou, V. (2016) 'Migrant domestic workers, vulnerability and the law: immigration and employment laws in Cyprus and Spain', *Investigaciones Feministas* 7(1) 149-168.

²⁰ Office of the Commissioner for Administration and the Protection of Human Rights (2019) *Report in relation to the regulatory framework on domestic work in Cyprus* (Report N. 15/2019).

²¹ Office of the Commissioner for Administration and the Protection of Human Rights (2019) *Report in relation to the regulatory framework on domestic work in Cyprus* (Report N. 15/2019).

²² Latcheva R. (2017) 'Sexual harassment in the European Union: A pervasive but still hidden form of gender-based violence', *Journal of Interpersonal Violence*, 32(12) pp. 1821-1852.

²³ Burri, S., Senden, L. and Timmer, A. (2020) *Gender equality law in Europe. How are EU rules transposed into national law in 2019?* (forthcoming).

provisions that seek to curb the structural problems victims face: the reversal of the burden of proof, protection against victimisation and the creation of equality bodies.²⁴

Importantly, because of their equality dimension and purpose to safeguard a person's dignity, the measures protecting against different forms of harassment at work apply to all without exceptions; any domestic worker irrespective of migration or employment law status should thus be able to benefit from these provisions.²⁵

Combining paid work with unpaid care

Labour law intervenes in the regulation of employment relationships in different ways to allow the combination of paid work with unpaid care. Traditionally, labour law systems focused on granting rights to women, acknowledging their specific role in relation to childrearing and childbirth;²⁶ the most important of these are the right to a period of maternity leave and protection against pregnancy-related dismissal. These rights have an undisputable equality dimension because they seek to protect women from suffering disadvantages in their labour market participation when they give birth. At EU level, maternity leave and protection against dismissal are guaranteed under the Pregnant Workers Directive.²⁷ Because in their vast majority domestic workers are women, the area of maternity protection rights is very important for them.

The Court of Justice of the EU (CJEU) has consistently held that the Pregnant Workers Directive has a broad personal scope with an autonomous EU law meaning.²⁸ Essentially, any woman who provides services for a certain period of time, under the direction or supervision of another and receives remuneration for the services should be able to access maternity leave and protection against pregnancy-related dismissal.²⁹ From this follows that Member States cannot apply narrower national definitions with the effect of excluding categories of female workers. The European Commission has also been clear that the Pregnant Workers Directive includes all women workers; where Member States excluded categories of workers, the European Commission requested amendments to national legislation. In its first implementing report, the Commission firmly stated that:

'The Directive applies to workers who are pregnant, have recently given birth or are breastfeeding in all fields and occupations, with no exceptions. The exclusion of certain groups of women from the Directive's scope is contrary to Community law and infringement proceedings will be commenced.'³⁰

Domestic workers in the EU are therefore covered by legal provisions on maternity leave and protected against dismissal in case they become pregnant. However, domestic workers are a group that often suffers from what we call the gap between

²⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

²⁵ Pavlou, V. (2016) 'Domestic work in EU law: the relevance of EU employment law in challenging domestic workers' vulnerability', *European Law Review*, 41(3) 379-398.

²⁶ This approach is reflected in the work of the ILO which in 1919 adopted one of its very first instruments, the Maternity Protection Convention No 3.

²⁷ Council Directive (EC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work for pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1.

²⁸ *Kiiski v Tampereen Kaupunki* (C-116/06) [2007]; *Danosa v LKB Lizings SIA* (C-232/09) [2010].

²⁹ This is the definition of 'worker' the CJEU developed initially in free movement law and subsequently applied in some – but not all – areas of social law, notably in the areas of equal pay, working time and pregnant workers' rights.

³⁰ *Report of the Commission on the implementation of Council Directive 92/85, COM(1999) 100 final*, p. 7.

the law in the books and law in practice – having these rights on paper does not mean that they are able to enjoy them in practice. This is of course true for many women who experience pregnancy-related discrimination, including dismissal, despite the existence of legal protection. Such phenomena are often exacerbated in times of economic turmoil and austerity.³¹ In the case of domestic workers, it is not uncommon for employers to terminate their employment when the worker becomes pregnant.³²

Challenging her dismissal as discriminatory on the basis of gender might be particularly difficult for any woman if such a challenge entails bringing legal proceedings against the employer. In *Porrás Guisado* the CJEU held that the protection against pregnancy-related dismissal under Article 10 of the Pregnant Workers Directive should be implemented in a way that is not only reparative (i.e. providing remedies to dismissed workers) but also preventive;³³ this is what the Court refers to as the “double protection” the Directive requires.³⁴ In a particularly incisive point of analysis, the CJEU acknowledges the:

‘harmful effects which the risk of dismissal may have on the physical and mental state of workers who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy.’³⁵

Therefore, according to the Court, Article 10 of the Pregnant Workers Directive precludes the very “taking of a decision to dismiss”.³⁶ From this follows that that even handing a dismissal notice to a pregnant worker can have the kind of serious detrimental effects the Pregnant Workers Directive seeks to prevent.

It is not clear how Member States are complying with the Directive’s preventive aspect. Stating somewhere in their labour legislation that the dismissal of a pregnant woman is prohibited does not seem preventive enough.³⁷ Employers can still proceed with dismissal relying on the fact that many, especially the most vulnerable workers, will be deterred from challenging such a decision and initiating litigation.

For the prohibition to be truly preventive, alternatives need to be found. The correct implementation of the prohibition implies restricting the employer’s managerial prerogative to dismiss a worker who falls under the personal scope of the Pregnant Workers Directive. One approach could be to have in place a system whereby employers must obtain prior authorisation from a labour authority or equivalent body to dismiss a pregnant worker.³⁸ The employer would need to provide evidence that

³¹ Busby, N. and James, G. (2016) ‘Regulating work/care relationships in a time of austerity: a legal perspective’, in Lewis, S., Anderson, D., Lyonette, C., Payne, N. and Wood, S. (eds.) *Work-life balance in times of recession, austerity and beyond* (Routledge) pp. 78-92.

³² Andall, J. (2000) *Gender, migration and domestic service: The politics of Black women in Italy*, Ashgate; Addati, L., Cheong Lindsay, T. (2013) ‘Meeting the needs of my family too’: Maternity protection and work-family measures for domestic workers, ILO.

³³ *Jessica Porrás Guisado v Bankia SA and others* (C-103/2016) [2018].

³⁴ *Jessica Porrás Guisado v Bankia SA and others* (C-103/2016) [2018] para 59.

³⁵ *Jessica Porrás Guisado v Bankia SA and others* (C-103/2016) [2018] para 62.

³⁶ *Jessica Porrás Guisado v Bankia SA and others* (C-103/2016) [2018] para 63. According to Article 10(1) of Directive 92/85, Member States shall take the necessary measures to prohibit the dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave, “save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent”.

³⁷ This seems to be the approach in most Member States. See, Burri, S., Senden, L. and Timmer, A. (2020) *Gender equality law in Europe. How are EU rules transposed into national law in 2019?* (forthcoming).

³⁸ See Article 10(1) of Directive 92/85, which foresees the consent of a competent authority, but only as an option for Member States. According to Article 10(1) of Directive 92/85, Member States shall take the necessary measures to prohibit the dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave, “save in exceptional cases not connected with their

the dismissal is for reasons unrelated to the worker's pregnancy.³⁹ Another way could be for Member States to introduce a system of precautionary penalties that employers would need to pay before dismissing a pregnant worker; if the dismissal is deemed fair, employers can recover any sums paid. Preventive measures are important for all working women but for some they are essential in bridging the gap between the law in the books and the law in action. For women in precarious and non-unionised jobs, such as domestic workers, preventive measures might be the only way to guarantee effective protection against pregnancy-related dismissal.

Beyond maternity-related protections and rights, the law can intervene to create entitlements for both women and men that allow the combination of paid work with unpaid caring roles. The most recent EU law instrument in this area is the newly adopted Directive on Work-Life Balance.⁴⁰ The Directive provides individual rights to different types of leave from work – paternity, parental, carer's leave and time off work on force majeure grounds – as well as the right to request flexible working arrangements.

To what extent do these entitlements apply to those working in or for a private household? The Directive's personal scope is broad and inclusive, but not unambiguously so. The first indication of inclusiveness is Recital 17 in the Preamble, which explicitly states that the Directive applies to part-time, fixed-term and temporary agency workers. Article 2 defines the personal scope with a formulation that is almost identical to the provision on personal scope previously found in the, now repealed, Parental Leave Directive. It stipulates that:

'This Directive applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, taking into account the case-law of the Court of Justice.'

Tying the personal scope to national law definitions of the concept of worker is a standard technique which we see in other EU directives in the field of social law, notably in the so-called atypical work directives. What is new here is the reference to CJEU jurisprudence on the notion of worker. While there is no single, autonomous EU definition of worker, the Court has shown willingness to apply the broad definition, initially developed in the free movement of workers' case law, to other areas such as equal pay⁴¹ and working time.⁴² Even when Member States have discretion in defining the personal scope of an EU directive, such discretion is not unfettered; Member States must have due regard to the directive's objectives and ensure its effectiveness.⁴³

There are therefore strong indications that the CJEU will interpret the personal scope broadly to include all those who, for a certain period of time, provide services under the direction or supervision of another in exchange for remuneration. However, to

condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent".

³⁹ At the same time, however, we would need broader supportive mechanisms for affected workers to enforce their rights, such as free and simplified extra-judicial procedures to deal with complaints, coupled with administrative fines for unscrupulous employers.

⁴⁰ EU Directive 2019/1158 of 20 June 2019 on work-life balance for parents and carers. For a detailed analysis of this Directive, see Oliveira Á., De La Corte-Rodríguez, M, and Lütz, F. (2020), *The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?* European Law Review 45(3), 295-323.

⁴¹ *Debra Allonby v Accrington & Rossendale College* (C-256/01) [2004].

⁴² *Union Syndicale Solidaires Isère v Premier Ministre* (C-428/09) [2010]; *Fenoll v Centre d'aide par le travail 'La Jouvène'* (C-316/13) [2016].

⁴³ *O'Brien v Ministry of Justice* (C-393/10) [2012]; *Betriebsrat der Ruhrländklinik gGmbH v Ruhrländklinik gGmbH* (C-216/15) [2017].

avoid any doubt, especially in the process of transposition, the Directive's drafters could have spared the reference to Member States' national laws and constructed personal scope in unambiguously broad terms, affirming the CJEU's recent jurisprudence in this area. Making it clear that the Directive includes domestic workers would have pre-empted their exclusion in national implementing measures.⁴⁴ Besides, the Directive on transparent and predictable working conditions in the EU, adopted on the same day as the Directive on Work-Life Balance, makes an explicit reference – albeit only in the Preamble – to domestic workers being potentially included.⁴⁵ One cannot but wonder why domestic workers were not explicitly included in a legislative measure that focuses on equality between men and women.

Discriminatory dismissals

Having legal protection against their employer's arbitrary decision to terminate the employment relationship is very important for workers. This is because dismissal protection can be a vehicle to ascertain other fundamental rights at work, such as the right to join a trade union, the right to privacy or the right to be free from discrimination. The fear of dismissal makes workers vulnerable to accepting violations of their fundamental rights and having no effective legal protection exacerbates such situations.

Domestic workers face various obstacles when it comes to ascertaining their fundamental rights through measures for protection from dismissal. Some of these obstacles are common to most atypical and precarious workers across workplaces, while others are unique to domestic workers. In some jurisdictions, such as the UK, being legally characterised as an employee is a prerequisite for accessing protection against dismissal;⁴⁶ workers⁴⁷ and the self-employed are not protected. Many atypical workers, who are also in the most precarious position, are excluded from the legislation's protective scope. Such exclusion has knock-on effects on the exercise of fundamental rights at work.⁴⁸ Domestic workers often provide their work under arrangements that put their status as employees in question – think for instance of au pairs, platform workers, agency workers or those on zero-hour contracts.⁴⁹ Thus, for atypical workers, seeking redress against unfair dismissal entails overcoming this first significant legal hurdle.

Lydia Hayes' socio-legal study of homecare workers in the UK shows how the fear of being dismissed on the spot and facing unemployment instigates a 'profound sense of insecurity'.⁵⁰ For migrant workers, especially those who have incurred large debts to finance their relocation as well as those without legal residence, the fear of dismissal is coupled with the fear of expulsion. Such a combination can function as a coercive tool in the hands of abusive employers.

Even in jurisdictions that grant protection to atypical workers, it is not uncommon for legal rules on dismissal to treat the employment relationship between a domestic

⁴⁴ Domestic workers are prone to such exclusions. See, for instance, several Member States' exclusion of domestic workers from the Working Time Directive in European Commission (2017) *Report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time*, COM(2017) 254 final.

⁴⁵ See recital 8 of Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

⁴⁶ Section 94(1), Employment Rights Act 1996.

⁴⁷ The status of 'worker' is a legal construction in the UK which gives rise to a limited number of employment rights, such as entitlement to the national minimum wage and protection against discrimination.

⁴⁸ Collins, P. (2018) 'The inadequate protection of human rights in unfair dismissal law', *Industrial Law Journal*, 47(4) 504-530.

⁴⁹ Lydia Hayes' study reveals that zero-hour contracts are rife in the UK's market for homecare services for the elderly. Hayes, L. J. B. (2017) *Stories of care: a labour of law*, Palgrave.

⁵⁰ Hayes, L. J. B. (2017) *Stories of care: a labour of law*, Palgrave, p. 86.

worker and her employer differently from that of other employment relationships. Such differential treatment reflects the societal expectation for a higher level of trust and intimacy in the relationship between a domestic worker and her employer. This expectation is, however, one-sided, as it translates to greater flexibility and discretion for the employer only. In Spain, for instance, the specific piece of labour legislation applicable exclusively to domestic workers introduces divergences from generally applicable rules on the termination of employment.⁵¹ In case of wrongful dismissal,⁵² domestic workers are entitled to less compensation than other categories of workers. The employer may also dismiss the domestic worker with a written declaration of withdrawal (*desistimiento*) and without just cause, which is a requirement for the termination of other employment relationships. This form of dismissal is unique to domestic work.

When it comes to remedies against unlawful dismissal⁵³ – this is the case of discriminatory dismissals such as that of a pregnant woman – Spanish courts have held that domestic workers are not entitled to readmission, which is the standard remedy for other unfairly dismissed workers. This is because courts consider that readmission would constitute an interference with the employer’s private sphere. Courts have opted instead to treat domestic workers’ discriminatory dismissal as wrongful and grant compensation.⁵⁴ The fact that the normal remedy against unlawful dismissal is readmission to work instead of compensation reflects the idea that workers’ fundamental rights – such as the right to be free from discrimination – cannot be monetarised; instead of compensation, fundamental rights must be safeguarded with effectively dissuasive remedies.⁵⁵ The levelling down of domestic worker’s protection against wrongful and unlawful dismissal conveys a message that their fundamental rights are of lesser importance for the legal system.

COVID-19 and domestic work

The unprecedented global health emergency is having a multifaceted impact on domestic workers. Many domestic workers are at the frontline of the COVID-19 crisis, providing essential care for children, the elderly and other people in need. With schools closed, imposed lockdowns and people teleworking in most European countries, there are increased needs for home-based childcare and other types of care and domestic services. As domestic workers have no possibility to telework, those who continue to work during the pandemic do so while exposing themselves and their families to health risks. A survey on the impact of COVID-19 on platform workers reports cases of domestic workers who have had to turn up to work with their children.⁵⁶ As private households are often exempted from the application of occupational health and safety legislation,⁵⁷ there has been little guidance by governments on what kind of measures employers should take to protect their domestic workers. In a recent policy brief, the International Domestic Workers Federation highlights that many domestic workers have suffered pay cuts or had their

⁵¹ Royal Decree 1620/2011 of 14 November, regulating the special relationship that characterizes service within the family household.

⁵² With this term I refer to termination against procedural rules stipulated in the contract or legislation, or without just cause in those jurisdictions that require it.

⁵³ I use unlawful and unfair dismissal interchangeably; broadly speaking, this is dismissal against the law.

⁵⁴ For example, TSJ Cataluña, Sala de lo Social, *Sentencia* 286/2013 of 15 January 2013.

⁵⁵ Baylos, A., Pérez Rey, J. (2009) *El despido o la violencia del poder privado* [Dismissal or the violence of private power], Trotta.

⁵⁶ Fairwork (2020) *The gig economy and Covid-19: Fairwork report on platform policies*, Oxford, United Kingdom.

⁵⁷ For instance, Article 3 of Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work excludes domestic workers from its personal scope. Similar exemptions can be found in a number of national health and safety legislations. See for instance, Section 51 of the UK 1974 Health and Safety Act or Article 3(4) of the Spanish Law 31/1995 on the prevention of risks at work.

employment relationships terminated or suspended without pay.⁵⁸ While significant loss of income due to the pandemic is not unique to domestic workers, it is unclear to what extent domestic workers could benefit from the different relief measures European governments have adopted to mitigate the impacts of the health crisis on the working population.

There are, however, some notable examples of European countries that have taken measures specifically directed at domestic workers. For instance, Spain has introduced a special subsidy applicable to domestic workers who have lost their income fully or partially due to the virus; this subsidy provides very much needed income support to domestic workers who are not entitled to unemployment benefits.⁵⁹ Belgium and France have adopted similar measures.⁶⁰ While these are certainly positive steps forward, it is important to state that migrants without legal migration status and those working informally – i.e. without appropriate social security registration and contributions – are not included; thus these groups of domestic workers are exposed to significant hardship.

Towards an inclusive vision of sex equality at work: the role of the EU and its institutions

At the EU level, the concern with the problems paid domestic workers face is not new. In 2000, the European Parliament adopted the Resolution 'Regulating domestic help in the informal sector'.⁶¹ Despite the rather infelicitous title, the Resolution made several valuable recommendations directed both at the Member States and at other EU institutions. The Resolution went beyond measures to fight undeclared work and proposed, inter alia, regular work permits for migrants to work as domestic workers, the promotion of sectoral social dialogue, the consideration of domestic workers' specificities when designing EU social legislation and for national equality bodies to conduct research on domestic workers' conditions.⁶² Even though there was no follow-up as to whether the Parliament's recommendations were taken on, the Resolution shows that there was a broad EU political consensus to understand and address domestic workers' problems at work. While the Resolution made no explicit reference to paid domestic work as an issue of gender equality, the idea that domestic workers are predominantly women runs throughout the text.

It was the adoption of ILO Convention 189 on decent work for domestic workers⁶³ in 2011 that created a much-needed global impetus to put domestic workers' treatment in law and practice under scrutiny. In 2014, the Council adopted Decision 2014/51/EU authorising Member States to ratify ILO Convention 189;⁶⁴ to date, seven EU Member States have ratified the Convention.⁶⁵ Importantly, the Decision recognises that EU law already offers several of the rights and protections contained in this Convention. In 2016, the European Parliament adopted a new Resolution on domestic workers and carers, this time with a wide-ranging focus and much more pertinent language

⁵⁸ International Domestic Workers Federation (2020) *The impacts of COVID-19 on domestic workers and policy responses*, 1 May 2020.

⁵⁹ Royal Decree 11/2020 of 31 March.

⁶⁰ International Domestic Workers Federation (2020) *The impacts of COVID-19 on domestic workers and policy responses*, 1 May 2020.

⁶¹ European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)) 30 November 2000.

⁶² European Parliament, Resolution on regulating domestic help in the informal sector (2000/2021(INI)) 30 November 2000.

⁶³ ILO, Decent work for domestic workers Convention No. 189 (16 June 2011).

⁶⁴ Council Decision 2014/51/EU of 28 January 2014 authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189), OJ L 32 of 01.02.2014.

⁶⁵ The list of States that have ratified is available here:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:25_51460.

than 16 years earlier. In this Resolution, domestic workers are not referred to as 'domestic help', while the focus is clearly on improving their working and living conditions across the EU instead of combatting undeclared work.⁶⁶ The Resolution recommends several policy and legislative interventions for the EU and its Member States. There is significant emphasis on the professionalisation of the care and domestic work sector, the lifting of any exclusions of domestic workers from EU and national labour and social security legislation and the enforcement of appropriate health and safety measures, including on maternity protection. The Report explicitly calls on the Commission and other European agencies to conduct comparative work on Member States' law and practice in relation to domestic work, with a view to exchanging good practices and fighting exploitation.⁶⁷

The EU Fundamental Rights Agency (FRA) has done extensive research on domestic workers' challenges in accessing rights and protections. FRA has published three relevant reports to date: one in 2011 on migrant domestic workers in an irregular situation,⁶⁸ followed by a second report in 2015 on severe labour exploitation which identified domestic work as an at-risk sector,⁶⁹ and a third in 2018 focusing on female migrant domestic workers.⁷⁰ The reports yielded valuable insights on the impact of law and policy in a number of Member States. Importantly, there is evidence that national equality bodies are using findings from FRA's research to put the analysis of national problems in a broader European context and to urge national authorities to review domestic law and practice.⁷¹ While FRA's work in this area is undoubtedly important, the research is conducted in selected Member States and only focuses on specific issues – mainly human rights abuses and severe labour exploitation.

Without denying the utility of FRA's work, I believe that a more holistic vision is urgently needed. It is important to broaden the perspective and conduct a comprehensive analysis of domestic workers' working conditions, including in key equality areas, that goes beyond protections against severe labour exploitation.⁷² There is an urgent need for updated, specific information on how paid domestic work is regulated in the different Member States, as well as empirical data on how the law is applied in practice.

Having this information available and easily accessible is important for several reasons. First, it will allow knowledge exchange on Member States' innovative practices; such information can be a valuable resource for a variety of national actors, including equality bodies, trade unions and domestic workers' associations. Second, it would be an opportunity for EU institutions to clarify which EU social law sources apply to those working in or for private households. Third, a comparative study that includes an EU law dimension can serve to uncover mismatches between national laws and the protection provided by EU law in areas of importance for domestic

⁶⁶ European Parliament, Resolution of 28 April 2016 on women domestic workers and carers in the EU.

⁶⁷ Point 37, European Parliament, Resolution of 28 April 2016 on women domestic workers and carers in the EU.

⁶⁸ EU Fundamental Rights Agency (2011) *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Publications Office of the European Union.

⁶⁹ EU Fundamental Rights Agency (2015) *Severe labour exploitation: workers moving within or into the European Union*, Publications Office of the European Union.

⁷⁰ EU Fundamental Rights Agency (2018) *Out of sight: migrant women exploited in domestic work*, Publications Office of the European Union.

⁷¹ Office of the Commissioner for Administration and the Protection of Human Rights (2019) *Αυτεπάγγελη Τοποθέτηση της Επιτρόπου Διοικήσεως και Προστασίας Ανθρωπίνων Δικαιωμάτων, ως Εθνικής Ανεξάρτητης Αρχής Ανθρωπίνων Δικαιωμάτων, αναφορικά με το θεσμικό πλαίσιο που ρυθμίζει την οικιακή εργασία στην Κύπρο* [Ex officio report of the Office of the Commissioner for Administration and the Protection of Human Rights in relation to the regulatory framework on domestic work in Cyprus] (Report N. 15/2019).

⁷² Pavlou, V. (2018) 'Where to look for change? A critique of the use of modern slavery and trafficking frameworks in the fight against migrant domestic workers' vulnerability' *European Journal of Migration and the Law* 20(1) pp. 83-107.

workers. Fourth, identifying any mismatches would allow advocates for domestic workers' rights at the national level to frame claims for reform more compellingly with the purpose of complying with EU law. Finally, a study on a wide range of issues might also be the first step in identifying areas apt for future regulation, including by the EU.

Conclusion

Paid domestic work, in all its variations, is a large and growing sector in Europe. It is an undeniably feminised type of work that attracts a significant share of migrant women. Domestic workers play a fundamental role in facilitating others' work-life balance and, consequently, in the promotion of gender equality in Europe. Yet their equality, including their own needs for work-life balance, is rarely considered. This article has offered some examples of how European states' laws and practices in relation to domestic workers can be problematic from an equality point of view. The unprecedented COVID-19 pandemic exposes both the centrality of care work for our societies and the vulnerability of those who make a living providing it. I have therefore argued that for an inclusive gender equality vision, it is imperative to take the issue of paid domestic work seriously. The first step in that direction would be to conduct a comparative analysis that looks closely at a range of work and gender equality issues. The findings of this future research could hopefully become seeds of transformative change.