Doing Things with Time: Flexibility, Adaptability, and Elasticity in UK Equality Cases

Emily Grabham*

> Unfortunately, women's labour is not infinitely elastic.[1]
>
> The achievement, then, lies not in the discovery of new knowledge but in the effort to make what we already know analytically accessible.[2]

Introduction

Flexibility is a key concept within labour law and policy. It epitomizes what is apparently "new" about the "post-industrial" economy—highly adaptive production systems working in harmony with responsive employees. Trends within international financial institutions such as the World Bank and the International Monetary Fund, and within the European Union (through policies emerging from the European Central Bank and the European Employment Strategy), position flexibility as the answer to businesses "inefficiency" and sustained high levels of unemployment.[3] In particular, flexible labour policies are seen to be key to overcoming market rigidities, often equated with minimum labour standards, benefits, and employment security for workers.

This article focuses on another aspect of recent flexibility discourse: the increasing significance of flexibility arguments to UK employment equality law. It makes use of the well-evidenced legal and governmental preoccupation with working time to investigate the production and circulation of concepts of flexibility through equality law case reports from the period 2001–2010. With case reports as my main focus, I trace how flexibility emerges through legal

* Many thanks to the editors and anonymous reviewers of the *Canadian Journal of Law and Society* for their extremely helpful comments. Thank you also to Kate Bedford, Jessica Cadwallader, Davina Cooper, Judy Fudge, and Lucy Williams for their comments and suggestions in relation to earlier drafts. An earlier draft of this article was presented to a symposium organized by the *Connecticut Law Review*: "Redefining Work: Exploring the Four Day Work Week," October 30, 2009. Thank you to co-participants there for their feedback.

1 D. Elson, "Male Bias in the Development Process: An Overview," in *Male Bias in the Development Process*, ed. D. Elson (Manchester: Manchester University Press, 1995): 25.

2 A. Riles, *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2000): 18.

3 See D. Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford: Oxford University Press, 2005) and H. Collins, "The Right to Flexibility," in *Labour Law, Work, and Family*, ed. J. Conaghan and K. Rittich, 99–124 (Oxford: Oxford University Press, 2005).

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2011, Volume 26, no. 3, pp. 485–508. doi: 10.3138/cjls.26.3.485

documental networks, so as to work out the contours of our collectively imagined "efficient" and "well-balanced" working practices.[4] Flexibility, here, covers a wide range of situations: the teacher who requested a daylight shift to help her cope with deteriorating vision;[5] the warehouse assistant refused flexible working to help her look after the grandchild who lived with her;[6] the father who took one day off work to look after his son and was disciplined for absenteeism.[7] Tribunals considered a variety of requests for flexible or part-time work, including claims, respectively, by two police officers, a hairdressing tutor, a legal secretary, two lawyers, a recruitment manager, a pilot, an IT specialist, an administrator, a sales executive, an airport check-in worker, a railway signalling operator, a sales assistant, and a Royal Navy employee.[8]

Apart from looking at constructions of flexibility, however, the article has another, connected aim—that of taking the case reports and policy documents at their word. In this sense, the analysis both intensifies a focus on how flexibility is discursively created through methods of documentation and it also stops with the reports and policy documents themselves, forcing into view the agency and form of these documents-as-things. This is an attempt not at contextualizing work–life balance cases, nor at putting the

---

4 The reports analysed in this paper consist of Employment Tribunal, Employment Appeal Tribunal, Court of Appeal, and House of Lords (now Supreme Court) decisions issued between 2001 and 2010 on issues of equality-related flexibility arguments. Employment-related cases are heard first in a local Employment Tribunal and can be appealed (on a point of law only) to the Employment Appeal Tribunal, the Court of Appeal, and finally the Supreme Court. The case reports all deal with UK-level decisions. I specifically left out decisions from the European Court of Justice and the European Court of Human Rights for reasons of focusing the paper on UK-decided cases. The cases were located by searching on the widely used legal search engine Westlaw, using terms that have become prevalent within substantive equality law. For example, in order to yield cases on disability discrimination and scheduling, I searched, among other things, " 'flexible working' AND 'reasonable adjustment' "; for sex discrimination cases I searched, among others, " 'flexible working' AND 'indirect discrimination' ".

5 *Meikle v. Nottinghamshire County Council* (2005) ICR 1.

6 *Commotion Ltd v. Rutty* (2006) ICR 290.

7 *New Southern Railway Ltd (formerly South Central Trains Ltd) v. Rodway* (2005) ICR 1162.

8 See, respectively, *Chief Constable of Avon & Somerset Constabulary v. Ms A. Chew* (2001, unreported, case no: EAT/503/00) and *Mrs Suzanne Finnigan v. Ministry of Defence Police* (2005, unreported, case no: EATS/0019/05); *Carshalton College v. Mrs H. Morris* (2002, unreported, case no: EAT/0673/01); *Sinclair Roche & Temperley & others v. Sian Heard and Sian Fellows* (2004, unreported, case no: UKEAT/0738/03/MH); *Mrs D. Fox v. Betesh Fox & Co Solicitors* (2002, unreported, case no: EAT/0363/01); *Hardy & Hansons plc v. Lax* (2005) ICR 1565; *British Airways plc v. Mrs Jessica Starmer* (2005, unreported, case no: EAT/0306/05/SM); *Herbert Smith & others v. Michelle Langton* (2005, unreported, case no: UKEAT/0242/05/DM and UKEAT/0437/05/DM); *Ms J. Mitchell v. David Evans Agricultural Ltd* (2006, unreported, case no: UKEAT/0083/06/SM); *Mrs H. Shaw v. CCL Ltd* (2007, unreported, case no: UKEAT/0512/06/DM); *Aviance UK Ltd v. Mrs M.L. Garcia-Bello* (2007, unreported, case no: UKEAT/0044/07/DA); *Network Rail Infrastructures Ltd v Ms Patricia Gammie* (2009, unreported, case no: UKEATS/0044/08/BI); *Miss L.A. Rollinson v. P & B Baldwin t/a United Colours of Benetton* (2005, unreported, case no: UKEAT/0873/04/CK); *Ministry of Defence (Royal Navy) v. Mrs Adele MacMillan* (2004, unreported, case no: EATS/0003/04). For analogous cases in Australian equality law, see R. Owens, "Engendering Flexibility in a World of Precarious Work," in *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, ed. J. Fudge and R. Owens, 329–52 (Oxford: Hart Publishing, 2006).

reports within their wider networks.[9] Instead, the purposefully foreshortened analysis in this article, which often does not step beyond the case reports and policy documents themselves, forces us (I hope) to look more literally at "work–life balance" and "flexible working" debates as practices of legal documentation. Using this approach, it becomes much clearer why certain sequenced, and progress-oriented understandings of flexibility (such as the idea of adaptation) are likely to retain discursive power over other interpretations (such as elasticity).

The first section introduces the legal background to UK "flexible equality" measures. Equality legislation is seen as one of the few limits on the "managerial prerogative," that is, the employer's power generally to determine the terms and conditions, and day-to-day operation, of work. As such, it is often understood as a means of limiting an employer's own exercise of flexibility in changing shift rotas or working patterns, for example, through insisting on certain minimum standards of treatment.[10] However, equality law also operates on the basis that by making people and timetables more flexible, equality in the workplace and therefore "social inclusion" can be achieved.[11] It works ostensibly to improve employees' flexibility, thereby easing the conflict between work and care obligations, or between work and religious practice. In the second and third sections, I suggest that these apparently temporal concepts of flexibility within UK law are being overtaken, or at least matched, by understandings of "elastic" or "adaptive" labour, which prioritize capabilities and properties of matter: stretchiness, pliability, changes in form. The fourth section considers the concept of "balance," its temporal assumptions, and its positioning as a potential means of forging policy solutions to dilemmas of care and inclusion. Finally, the fifth section deals with the question of how legal form influences our understandings of labour flexibility. I conclude that dominant, and fairly conservative, understandings of flexibility as adaptation make sense if we consider the forward-looking temporal orientation of the legal networks in which flexibility decisions are made.

Flexibility and Equality in UK Labour Law

The Equality Act 2010, the majority of which came into force on October 1, 2010, consolidates, expands, and streamlines the United Kingdom's notoriously complex equalities legislation. Prior to the enactment of this legislation, UK employment equality law conceived of equality as a flexibility issue in a variety of ways. Although it is still very early to predict how the Equality Act will impact on previous law and policy, it is likely that previously

---

9 See, e.g., E. Cloatre, "Trips and Pharmaceutical Patents in Djibouti: An ANT Analysis of Socio-Legal Objects," *Social & Legal Studies* 17 (2008): 263–81.

10 Collins, "The Right to Flexibility": 105.

11 See D. Ashiagbor, "Promoting Precariousness? The Response of EU Employment Policies to Precarious Work," in *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*, ed. J. Fudge and R. Owens, 77–97 (Oxford: Hart Publishing, 2006), and *Labour Law, Work, and Family*, ed. J. Conaghan and K. Rittich (Oxford: Oxford University Press, 2005).

dominant ideas about flexibility will dominate UK legal attitudes to equality at least for some time. This is because the new legislation incorporates many of the core concepts from previously separate pieces of legislation in the areas of sex, race, religion, sexual orientation, and disabilities legislation, and some of the most important legal provisions are contained outside of the new equalities legislation, in amendments to the Employment Rights Act 1996, in the case of flexible working, for example.

Within and outside of the Equalities Act 2010, UK law has made available to women, people with disabilities, and people who practise a religion, a small number of routes for working flexibly or changing their work schedule. The right to request flexible working allows certain employees (both female and male) with responsibility for a child's upbringing, or with other care responsibilities, to request a permanent contractual variation to alter their working schedule.[12] Under sections 80F-I of the Employment Rights Act 1996 (ERA 1996),[13] employees have the right to request, but not receive as such, a change in their terms and conditions such as a change in working hours, time of work, or place of work. This is, in effect, the right to enter a formal procedure under which an employer must consider a request for flexible working and only refuse a properly made request if, for example, it would be too costly or have a detrimental effect on customer demand.[14]

As a form of "smart regulation,"[15] even the type of legal mechanism chosen here, encouraging negotiated compromise, embodies the aims of labour market reflexivity. These measures combine what Joanne Conaghan would term "deregulation flexibility" (policies that aim to overcome unemployment through labour market flexibility) with a centre-left preoccupation

---

12 See L. Anderson, "Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents," *Industrial Law Journal* 32 (2003): 37–42; G. James, "The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?" *Industrial Law Journal* 35 (2006): 272–78.

13 As introduced by the Employment Act 2002.

14 Section 80G Employment Rights Act 1996: Employer's duties in relation to application under section 80F are as follows:

1. An employer to whom an application under section 80F is made—
   (a) shall deal with the application in accordance with regulations made by the Secretary of State, and
   (b) shall only refuse the application because he considers that one or more of the following grounds applies—
      (i) the burden of additional costs,
      (ii) detrimental effect on ability to meet customer demand,
      (iii) inability to re-organize work among existing staff,
      (iv) inability to recruit additional staff,
      (v) detrimental impact on quality,
      (vi) detrimental impact on performance,
      (vii) insufficiency of work during the periods the employee proposes to work,
      (viii) planned structural changes, and
      (ix) such other grounds as the Secretary of State may specify by regulations.

15 Fudge and Owens, *Precarious Work, Women, and the New Economy*: 19.

https://doi.org/10.3138/cjls.26.3.485 Published online by Cambridge University Press

with "fairness."[16] Indeed, flexibility was positioned by the previous Labour government as a means of achieving fairness at work, as a core part of its commitment to "third way" social justice measures.[17] At the time of writing this article, the new coalition Conservative/Liberal Democrat government had not made any significant policy announcements in this area, other than to confirm that the right to request flexible working would be "extended" in consultation with business, with no information on how or why this extension might take place.[18] Although there is some uncertainty about the importance of flexibility within the new UK political landscape, the right to request flexible working carries with it a negligible demand on public resources, instead privatizing the responsibility of managing care and work onto the (often female) carer involved. It would therefore be surprising if flexibility did not retain a central role in the coalition's ongoing labour policies.

The right to request flexible working purports to enhance the by now well-acknowledged policy connection between gender equality and working time in the employment sphere.[19] However, gender equality is also seen to be achieved through access to adequate maternity and paternity leave and a woman's ability to change her hours from full-time to part-time after maternity leave.[20] In particular, as is the case with other grounds of equality, the Equality Act 2010 allows a woman to claim indirect discrimination if an employer's time-related provision, criterion or practice (such as a shift pattern, timetable or other time-related policy) disadvantages women due to caring responsibilities, for example.[21]

However, importantly, flexibility discourse does not limit itself to gender equality laws and rhetoric. In the United Kingdom over the past two decades, flexibility has become central to the way in which other equality issues have been framed in UK employment law. It has travelled out of work–life balance arguments and into accessibility and religious freedom arguments with a variety of effects, and the overall impact of flexibility cannot be measured

---

16 J. Conaghan, "Time to Dream? Flexibility, Families, and the Regulation of Working Time," in Fudge and Owens, *Precarious Work, Women, and the New Economy*: 101–30.

17 Ibid.

18 L. Featherstone, Speech to the Fawcett Society, May 28, 2010, http://www.homeoffice.gov.uk/media-centre/speeches/L-Featherstone-Fawcett-Society?version=2.

19 See Anderson, "Sound Bite Legislation"; Conaghan, "Time to Dream."

20 This is, in effect, an 'indirect discrimination' argument (see below). Furthermore, the Work and Families Act 2006 has, among other things, brought about increased provision of statutory maternity pay (currently 39 weeks) and increased maternity and paternity leave provision (52 weeks for mothers, one or two weeks for fathers/partners). The previous Labour government also introduced a right for fathers to take up to six months paternity leave once the mother has returned to work.

21 The Equality Act 2010 (EA) repealed much of the existing UK equalities legislation with the purported aim of simplifying and standardizing the law. According to section 19 (1) EA, indirect discrimination happens when a person applies to another person "a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's". Sex is a protected characteristic under section 19(3) EA, and shift patterns or other work-related policies that indirectly impact women can be considered to be a "provision, criterion, or practice." Employers can attempt to justify their action under section 19(2)(d) by arguing that the action is a "proportionate means of achieving a legitimate aim."

without acknowledging some of the contradictions that this travelling brings up. Again, under the Equality Act 2010 it is possible to argue that one's employer has a duty to make "reasonable adjustments" for a disability by means of alterations to working schedules, for example.[22] Flexibility-related arguments become relevant to disability claims where, for example, a person requires time away from work to visit medical practitioners in relation to a progressive illness or disability, or where a disability renders an employee temporarily unable to attend work (in the case of fluctuating mental health conditions), or where permanent alterations in a schedule are required so that a person with mobility problems can avoid rush hour on public transport. One key difference between gender arguments and disability arguments here is that changes, for women, would augment the perception of women's flexibility in balancing work and family, but in disability law they are needed to "include" disabled workers, with relatively little explicit mention of these workers' own capabilities.

Finally, the Equality Act 2010 also requires employers to make their shift patterns or timetabling amenable to employees' religious observance requirements, so that it is possible to participate in major religious holidays, as well as on a weekly or daily basis in religious meetings.[23] Flexibility is seen here to enhance equality because of the employer's ability to accommodate non-Christian religions (Christian festivals as well as the Sunday sabbath are already well catered for by the standard working week). Again, the employer is seen to be flexible, not the worker, erasing from view many non-Christian workers' ongoing flexibility in relation to clashes between religious practice and employment timetables.

Given the tendency for flexibility discourses to normalize precarious working practices as aspects of good governance,[24] it is not surprising that critical disabilities and feminist commentators have been far from willing to accept flexibility as the new work–life balance orthodoxy. Disability scholars and activists have pointed to the assumptions inherent in policies that prioritize a "flexible labour market." Flexible working practices are seen to enhance the independence, autonomy, and self-management of workers with disabilities, matching "talent" to employment opportunities, but only by ignoring ongoing experiences of inequality within the workplace.[25] Indeed, the flexibility ideal both ignores and exacerbates the very different problems that women and people with disabilities face in the labour

[22] See sections 20 and 21, and 39 of EA 2010. In short, the legal argument is that the employer has discriminated against the employee by failing to make a reasonable adjustment.

[23] Again, this is an indirect discrimination argument. See sections 19 and 39 EA. Religion or belief (or lack of it) is a protected characteristic under section 19(3) EA.

[24] K. Rittich, "Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work," in Fudge and Owens, *Precarious Work*, 31.

[25] See D. Jolly, "A Critical Evaluation of the Contradictions for Disabled Workers Arising from the Emergence of the Flexible Labour Market in Britain," *Disability & Society* 15 (2002): 795–810; D. Jolly, "The Government of Disability: Economics and Power in Welfare and Work," *Disability & Society* 18 (2003): 509–522; R.D. Wilton, "From Flexibility to Accommodation? Disabled People and the Reinvention of Paid Work," *Transactions of the Institute of British Geographers* 29 (2004): 420–432.

https://doi.org/10.3138/cjls.26.3.485 Published online by Cambridge University Press

market. Many feminist labour lawyers of the Global North argue that flexible work as a work–life balance strategy allows the outmoded concepts of work and family, such as the male breadwinner model and heteronormative nuclear family structures, to persist.[26] This argument has also been applied in the disability context, where flexibility allows ideas about "impairment" to continue.[27] The privileging of paid work over unpaid care work fails to acknowledge the unequal gendered allocation of unpaid work, and it constructs non-earners as dependents.[28] Flexibility as a gender or disability policy strategy pays little attention to job quality in employment.[29] It smoothes over labour conflict with an implicit assumption of worker co-operation, just as it also reformulates work–life balance as a disability- and gender-neutral policy objective of allowing employees to fulfill their individual desires.[30] These reservations have led some feminists to endorse more drastic universal measures, such as a four-day work week.[31]

Elastic Workers

Flexibility is therefore a challenging concept for feminists and disabilities scholars because of the way that it connects accessibility or work–life balance concerns to the demands of neo-liberal economic restructuring. Through policy and legal discourse, flexible workers embody the nexus between greater (disabled, female, "minority") labour market participation and increased business adaptability. With these reservations and contradictions in mind, a preliminary aim of the article is to pay attention to how flexibility is currently being attached to equality discourses in UK labour law.

Concepts of flexible work and of flexible working bodies populate legal regulation with an array of images, ideas, and effects. Variously imagined as "elastic," "adaptable," or "well-balanced", flexible bodies and their capacities expand or shrink, protect, accommodate or react within legal discourse as if flexibility were not an issue of time, as it is usually imagined to be, but of matter. This is not necessarily surprising. One of the most influential anthropological texts on the significance of flexibility in Western culture, Emily Martin's "Flexible Bodies," traces the emergence of a strong immune

---

26 J. Conaghan, "Women, Work, and Family: A British Revolution?" in *Labour Law in an Era of Globalization: Transformative Practices & Possibilities*, ed. J. Conaghan, R.M. Fischl, and K. Klare, 53–74 (Oxford: Oxford University Press, 2002); K. Rittich, "Feminization and Contingency: Regulating the Stakes of Work for Women," in *Labour Law in an Era of Globalization*: 117–136.

27 Jolly, "The Government of Disability."

28 Jolly, "A Critical Evaluation"; Conaghan, "Women, Work, and Family"; Fudge & Owens *Precarious Work, Women, and the New Economy*; Conaghan and Rittich, *Labour Law, Work, and Family*.

29 J. Lewis and A. Plomien, "'Flexicurity' as a policy strategy: the implications for gender equality," *Economy & Society* 28 (2009): 433–459.

30 Conaghan and Rittich, *Labour Law, Work, and Family*; Rittich, "Feminization and Contingency."

31 V. Schultz and A. Hoffman, "The Need for a Reduced Workweek in the United States," in Fudge and Owen, *Precarious Work, Women, and the New Economy*: 131.

system as the epitome of embodied flexibility over the 1980s and 1990s.[32] The immune system, according to Martin's interviewees, constantly changes to anticipate and respond to challenges;[33] it is a perpetual motion machine, which produces specific antibodies to fit specific viruses,[34] and whose flexible qualities have become more apparent in an age of just-in-time production and "total quality management" (TQM; see further below). In other words, Martin's study found that trends in the ways that people (management consultants, human resources specialists) think of good, functioning businesses coexist and overlap with the ways in which a wide range of people (scientists, HIV/AIDs activists) imagine healthy, functioning bodies. In both, businesses and organic systems anticipate threat, adapt to change; they are constantly in flux, constantly at the ready to react to new problems and new opportunities.

Flexibility within labour discourse is very similar. It requires organic and inorganic bodies to adapt, stretch, and contain. Employees are expected to cope with altered shifts and even vastly new working patterns such as "zero hours" contracts. Businesses are expected to retain staff by offering them working arrangements to accommodate childcare and health appointments. All of these requirements are based on connected ideas of risk management and the entrepreneurial exploitation of opportunities. However, they are also based on assumptions about the embodied capabilities of labourers. For their part, the case reports analysed below constantly recirculate discourses of flexibility found in wider networks. As such, they simultaneously use and produce knowledge about flexible labour, which bodies it attaches to, and what form it takes.[35] Many of these hybrid ideas about flexibility tend to associate labour or the labouring body with form and with changes in form or capacity. Flexibility is a quality of matter: it expresses what organic and non-organic matter can do, and within many cultural, medical, and legal representations, the matter at hand is corporeal matter: the body. Within labour discourse and case reports, flexibility is associated, variously, with concepts of adaptability, elasticity, and pliancy, which inhere in the bodies of workers themselves.

For this reason, a preliminary conclusion about the significance of flexibility within labour discourse is that it relies just as much on ideas about bodies, and the properties that bodies, as objects, display under pressure, as it does on ideas of temporality, of adjusting one's schedule or changing working times, for example. Despite the importance of time within the employment contract and within labour activism more generally (hence debates about the working day, the working week, and hourly pay), therefore, flexibility discourse also relies on ideas about matter: its ability to respond, adapt, and stretch.

An early example of flexibility as bodily capacity/change is Diane Elson's often-quoted statement from her work on the privatizing functions of

---

32 E. Martin, *Flexible Bodies: The Role of Immunity in American Culture from the Days of Polio to the Age of AIDS* (Boston: Beacon Press, 1994).

33 Martin, *Flexible Bodies*: 80.

34 Ibid., 79.

35 M. Valverde, "Authorizing the Production of Urban Moral Order: Appellate Courts and Their Knowledge Games," *Law & Society Review* 39 (2005): 419–455, 422.

structural adjustment that "women's labour is not infinitely elastic."[36] Elson, a development specialist, argued that women's labouring bodies could not continue to carry out the demands of an increase in unpaid caring and other work in the context of market-led economic reorganizations. A similar characterization can also be found in the work of labour lawyer Judy Fudge, who, writing about the North American context, criticizes the persistence of the male employment norm in the following way:

> The problem with this gender contract is that it assumes that women's capacity to labour is completely elastic and that both men and women will continue to accept increasing demands on their time in order to maintain their standard of living.[37]

The point about elastic flexibility is that it allows a substance or a person to stretch in response to increasing tension and return to its or their original form afterwards, but there is also a snapping point beyond which the person or substance cannot stretch and indeed is unable to function. Elson and Fudge seem to be working with an idea of flexibility as something that increases tension within the body or subject of the woman. Fudge points to the assumptions of stretchiness that are imposed on women by the law; Elson points to the possibility of women not bearing that role (they are not completely elastic; they might either break or snap back into their former shape). Characterizing disabled and/or female labouring bodies as elastic implies that their main operative function within neo-liberal economies is indeed their "stretchability"; that such bodies contain the capacity to stretch and hold things together, and that any stress that these bodies feel is as a result of this tension or torque. As Robert McRuer points out, there is an implicit set of ideas about "ableness" at work here: flexible subjects are only successful when they respond to each coming crisis by reasserting their continued wholeness, which must assume a foundational understanding of ableist embodiment.[38] When critical disabilities and feminist scholars characterize flexibility as elasticity, therefore, they are calling out flexibility for what it requires and what it assumes: continued wholeness, successfully maintained even in the context of stressful change.

It is not only academic commentators who pursue ideas of elasticity in relation to flexibility. The structure of at least two types of flexibility-related equality claim—flexible working requests and indirect discrimination claims—are strongly connected with this logic of elasticity. These equality claims also often merge gender-related workplace expectations of stretchiness with understandings of "wholeness." Making this assertion recalls one of the

---

[36] Elson, "Male Bias in the Development Process: An Overview," 25. See also K. Bedford and J. Jakobsen, *Toward a Vision of Sexual and Economic Justice* (New York: Barnard Center for Research on Women, 2008).

[37] J. Fudge, "A New Gender Contract? Work/Life Balance and Working-Time Flexibility," in Conaghan and Rittich, *Labour Law*, 261–87, 285.

[38] R. McRuer, "As Good as it Gets: Queer Theory and Critical Disability," *GLQ: A Journal of Lesbian and Gay Studies* 9 (2003): 79–105. Thank you to Jessica Cadwallader for pointing me in the direction of McRuer's work.

aims of this article: to find out how case reports both receive and recirculate legal and other knowledges about flexibility. Although there is no explicit reference to elasticity within the case reports themselves, nevertheless, the way the claims are represented arguably fits with a logic of elastic labour similar to what we find in feminist discussions around work and unpaid care. One example of this is the 2006 case of *Commotion Ltd v. Rutty*. Mrs Rutty worked in a warehouse, packaging goods to be sent off to customers. When she and her husband became responsible for their granddaughter Jasmine, Mrs Rutty began to find it difficult to work full time. First informally and then formally, she requested to work a three-day week. Her employers, Commotion Ltd, turned down her request on the following grounds:

> The packaging is a fundamental requirement of a mail order company, with you being unable to work on Thursdays and Fridays, starting late and finishing early on the other three days, there will be a detrimental impact on performance.[39]

Mrs Rutty's appeal against this decision was also turned down:

> You will understand that we are trying to change the structure of working hours within the warehouse to help create a team spirit by having a uniform working day. In addition, you must appreciate that shortening your working hours will have a negative impact on the overall warehouse performance and put a strain on our resources.[40]

Shortly after that, Mrs Rutty resigned. Later, she brought a claim among other things for unreasonable refusal of a flexible working request and for indirect discrimination (in refusing her request to work part time, Commotion Ltd were discriminating against her as a woman). This claim was basically an argument that in refusing Mrs Rutty's request, the employer had not been flexible enough. However, underlying this claim were Mrs Rutty's enormous difficulties managing care for her granddaughter and full-time work. It was not that she had not adapted properly to the working week, but instead that she did not have the physical capacity to accommodate all of her obligations. Mrs Rutty's legal arguments were structured around this limit to her elasticity. Commotion Ltd's lack of flexibility pushed Mrs Rutty's elasticity too far. When her requests for part-time work were turned down, she "snapped" and left the job.

Similar scenarios can be found in many other case reports from this period. In *Network Rail Infrastructures v. Gammie* (2009),[41] Patricia Gammie, a railway signaller, was refused an application to reduce her hours from 36 hours to 24 hours per week on return from maternity leave on the basis that this arrangement would be too expensive, it would lead to delays (caused by the signalling box not being occupied), and that Network Rail

---

39 *Commotion Ltd v. Rutty* (2006) ICR 290, 293. The case report here is the decision of the Employment Appeal Tribunal on appeal from the Employment Tribunal. The EAT upheld the Tribunal's original decision.

40 Ibid.

41 Unreported, case no: UKEATS/0044/08/BI.

had failed to find someone to job share with Ms Gammie. She resigned shortly after that, because, as the Employment Tribunal put it, she was "beginning to run into difficulties with childcare and working full time."[42] In *British Airways plc v. Starmer* (2005),[43] Jessica Starmer, an airline pilot with primary care responsibilities for a child, applied to go part time (on 50% of her contracted working time) and was informed by her employer, British Airways, that the least she could do was 75% of her full-time schedule. She brought a successful claim for indirect sex discrimination. Finally, Suzanne Finnigan, a Ministry of Defence police officer, requested part-time work on the east coast of Scotland in order to be able to commute from her home in Perthshire and care for her child.[44] When this request was refused, she resigned and brought an unsuccessful claim for sex discrimination.

All of these examples show that ideas of wholeness, and of managing shifting requirements through one's embodied labour, permeate gender conflicts in the workplace. Nevertheless, underlying these dominant ideas of flexibility is an understanding of the limits of flexibility, characterized through the figure of the elastic worker. The elastic worker also features in disabilities cases. *Meikle v. Nottinghamshire County Council*, for example, concerned a teacher, Gaynor Meikle, who was experiencing deteriorating eyesight.[45] Meikle asked the school for various measures to be put in place, including larger type on daily timetables, timetabling her classes close together in the school building, and increased "non-contact" periods so that she could finish her preparation during daylight hours. Over the following years, she faced problems obtaining these "reasonable adjustments" (as they are termed within disability discrimination law), and she was also disciplined for repeated health-related absences. When, in 2000, her solicitors were unable to conclude an agreement with the school to improve her working conditions as a precondition of her return to work, she left and brought a successful claim for disability discrimination.

In this case, as with the sex discrimination cases, Meikle's own capacities formed much of the focus of the proceedings. Despite the fact that many of the adjustments related to outside "things" or practices, central to Meikle's claim were the challenges she posed to a normative, sighted, institutional framework and the disproportionate problems this caused her, as opposed to the school itself. And what all of these cases indicate is that certain bodies are required to carry within them the tensions of organizational change or inertia: they keep things together even if they have to stretch. The concept of elasticity arguably therefore makes sense of how flexibility has been aligned with equality in neo-liberal law and policy. Gender-related flexibility puts the onus for care-related stretching on women, but gives them legal mechanisms for redress if they are stretched beyond their limits.

---

42 Ibid., para 15. She won her claim for discrimination, but the case was referred by the EAT on appeal to a fresh tribunal.
43 Unreported, case no: EAT/0306/05/SM.
44 2005, unreported, case no: EATS/0019/05.
45 *Meikle v. Nottinghamshire County Council* (2005) ICR 1.

Disabilities-related flexibility putatively requires employers to adapt, but in the meantime puts the onus on employees with disabilities to stretch into inhospitable working environments. In this way, bodies that are more commonly constructed as "dis" or "un"-abled are also endowed with enhanced stretching capabilities, as if previous experiences of adaptation will render these bodies more able in future to adapt in situations where more normatively abled bodies would not. This is a sort of hyper-flexibility, which attaches to non-normative bodies precisely because bodies without the (temporary or ongoing) experience of disability do not need to stretch or reach into new environments or situations. The built environment, organizational structures, the working day, and information technology are all oriented to re-produce experiences of "abled" physical ease.

Flexibility therefore provides the logic both for governmental mechanisms to manage the continued privatization of care and disability, but also for disability activists and feminists to critique such privatization. However, the job of keeping things together endows these labouring bodies with pent-up force. And the torsion involved in elasticity also potentially gives bodies/subjects movement or kinetic energy: they snap back into shape. (The archetypal elastic object is the elastic band, which stretches to hold other things together, snaps on occasion, and has tensile properties that, when unleashed, allow it to fly across the room.) Elasticity, while clearly putting labouring bodies under pressure, contains a potential for uncontained outcomes that flexibility itself, with its assumption of co-operation, cannot accommodate. This unruly potential is arguably connected with its temporal underpinnings: elastic objects extend and then return to their original form in a temporal loop of stretching and snapping back, which arguably acts outside of linear, developmental ideas of progress.

Adaptable Labour

Disability activists and feminists might position the elasticity metaphor as a critical response to "adaptability," which has for many years been prevalent in neo-liberal economic reform discourse. Adaptability is a core concept within the European Employment Strategy and within EU economic discourse more generally, referring to the need for labour markets to adapt and change their form to accommodate business priorities,[46] but it also refers to the qualities of the workforce itself. Indeed, Title IX, Article 145 (ex Article 125) of the Treaty of Lisbon states that

> Member States and the Community shall, in accordance with this Title, work towards developing a co-ordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change...[47]

[46] Ashiagbor, *The European Employment Strategy.*

[47] The Treaty of Lisbon (2008/C115/01) is the most up-to-date version of the founding treaties of the European Union. It came into force on December 1, 2009. Further information can be found at http://europa.eu/lisbon_treaty/take/index_en.htm.

https://doi.org/10.3138/cjls.26.3.485 Published online by Cambridge University Press

In turn, adaptability also influences current concepts within management consultancy, such as TQM, which recasts workers as consumers of their colleagues' services and for managing quality within their teams,[48] and through which companies become "learning organizations."[49] TQM pursues a logic of adaptability to external market changes through employees' entrepreneurial behaviour, which combines continual quality management with prudent risk-taking, and which attempts to inculcate an individualistic risk culture as opposed to collective security found, for example, within trade unions.[50]

Unlike the elastic worker, who stores up tension from an external source and either stretches or snaps in response, the adaptable worker makes changes to the form of her embodied labour in response to business needs. As the Treaty of Lisbon puts it, the worker "responds" to economic change. Louise Amoore, for her part, describes the central role of adaptation within management consultancy in the following way:

> The embracing of uncertainty in employment and work has similarly celebrated the "summiteer"—the lean and adaptive firm that can harness the uncertainty of globalization, and the individual worker-entrepreneur whose combination of risk-taking and prudent self-government ensures their survival in a competitive marketplace. Meanwhile, the many "mountaineers"—subordinate or contingent workers who absorb, further displace or contest uncertainty—remain much less visible.[51]

This is a form of functional or evolutionary flexibility, which focuses on what workers do, as opposed to numerical flexibility, which refers to macro adjustments in labour inputs.[52] Also, unlike stretching, a stress that does not necessarily change the qualities of the elastic body/object (the object is always stretchy, whether or not it is stretched), adaptation sees bodies and capacities morphing out of an old form into a new form—a form or shape that responds to risk but is intimately oriented or tailored to the business need itself. Adaptability asks a great deal of its objects; it requires bodies to incorporate external requirements, uncertainties, or stresses through a change in form or function.

Logics of adaptability can be found in a number of "religious discrimination" cases over the past decade, all of which involve Christians. In the 2005 case of *Copsey v. WBB Devon Clays*, Stephen Copsey worked in a sand processing plant. His employer gained a new customer order in 2000 that required the plant to increase production, and so they brought in a rotating shift procedure that included some Sunday working. Mr Copsey, a Christian, was dismissed in 2002 after refusing to work Sundays both on the first amended shift pattern and on a further shift pattern introduced

---

48 L. Amoore, "Risk, Reward, and Discipline at Work," *Economy & Society* 33 (2004): 174–96.
49 Martin, *Flexible Bodies*: 144.
50 Amoore, "Risk, Reward, and Discipline at Work": 185.
51 Amoore, "Risk, Reward, and Discipline at Work": 191.
52 S. Fredman, "Precarious Norms for Precarious Workers," in Fudge and Owens, *Precarious Work, Women, and the New Economy*: 177.

after another new customer order in 2002. Because the acts happened prior to the coming into force of the religious discrimination legislation that preceded the Equality Act, Mr Copsey brought a claim, among other things, for a breach of his right to freedom under Article 9 of religion under the European Convention on Human Rights. The Court of Appeal held that because the employer had offered reasonable solutions (by consulting on the changes and offering him other positions), which he had not taken up, then any interference with Mr Copsey's Article 9 rights was justified.

Mr Copsey failed to adapt to a new shift rota caused by an increase in customer orders. He was deemed by the employer, and later assumed by the court, to be inflexible due to this failure to adapt. As there remains a general assumption that employers can, within reason, determine day-to-day hours and schedules of work (the "managerial prerogative"), Mr Copsey's refusal to adapt to a new rota by working some Sundays left him unprotected, even though his refusal was connected to a potential human rights or equality-related issue. One conclusion that could be drawn here is that flexibility-as-adaptability might not "stick" as comfortably to neoliberal equalities arguments as does elasticity. There was no assumption in this case that Mr Copsey was being stretched too far by working on Sundays; instead his failure to take on board the new shift rota was positioned as a refusal to a reasonable request by the employer.

However, a recent line of employment equality case law potentially challenges this suggestion. The cases concern Christian employees who have used religious discrimination law to request alterations to their conditions. These requests are similar to the functional flexibility that Sandra Fredman identifies: they aim for adaptation of workers' schedules and tasks—adaptation of the type of work carried out in the working day, leading to changes in timetable.[53] However, their goal has apparently been to avoid what these employees present as abhorrent or immoral working requirements relating to sexual orientation. The 2007 case of *McClintock v. Department of Constitutional Affairs*, for example, concerned a Justice of the Peace on a Family Panel, and practising Christian, who requested, unsuccessfully, to be exempt from presiding on matters relating to same-sex adoptions on religious grounds because he thought that adopted children were being treated as "guinea pigs."[54] In *MacFarlane v. Relate Avon*,[55] the applicant, a Christian, was dismissed from a counselling job because he refused to work with same-sex couples. His claim under religious discrimination law (now part of the

[53] Fredman, "Precarious Norms for Precarious Workers."

[54] Unreported. Case no: UKEAT/0223/07/CEA. Transcript obtained from Westlaw. The Employment Appeal Tribunal upheld the initial tribunal's rejection of his claim on the grounds that Mr McClintock had not identified his objections as being rooted in any religion or philosophy, he had not been subject to direct discrimination, and even if it was possible to make out an argument of indirect discrimination (which was doubtful), then such discrimination could be justified, and any possible violation of Article 9 would also be subject to a successful defence.

[55] Unreported. Case no: UKEAT/0106/09/DA. Transcript obtained from Westlaw.

Equality Act) and Article 9 was unsuccessful.[56] Finally, in *Ladele v. Islington Borough Council* (Liberty Intervening),[57] a Christian working as a registrar in an office for marriages and civil partnerships was dismissed after she requested not to preside over civil partnerships because of her religious objections to same-sex relationships. The Court of Appeal found against Ms Ladele on her arguments of direct discrimination, harassment, and indirect discrimination on the ground of her religion.[58]

This latter set of claims presents an illuminating contrast to mainstream equality-related flexibility arguments in the employment sphere. They relate to religion but they clearly do not fit the discrimination scenarios that the legislators had in mind when drafting the legislation, which is now incorporated into the Equality Act.[59] Their lack of success in employment tribunals (note, however, that one claim to date has got as far as the Court of Appeal) belies their wider conceptual significance. In effect, these claimants attempted use the new "flexibility" approach to the employment relationship, which has developed through the combination of discrimination legislation, contract law, and market-based rhetoric, to try to avoid people or situations that disgusted or worried them. More specifically, it appears that adaptation arguments were key to each claim.

There are two conflicting interpretations of the adaptation argument in these cases. One view would be that workers have unsuccessfully asked employers to adapt the workplace in order to accommodate strongly held, purportedly religious, views about sexuality. In other words, the flexibility argument is "on" the employers: the employers have failed to "adapt" to accommodate the workers' religious views. Another view would be that the workers themselves failed to adapt to equality-related "progress" in the

---

[56] An appeal to the Employment Appeal Tribunal also failed on the basis that the employer treated Mr MacFarlane in the same way as it would have treated a non-Christian who was unwilling to work with same-sex couples, that Article 9 of the ECHR did not provide an unqualified right in relation to religious freedom, and that any indirect discrimination was justified. The EAT also dismissed an appeal on the issue of unfair dismissal.

[57] (2009) EWCA Civ 1357.

[58] It also found that Islington Borough Council had no alternative but to insist on Ms Ladele performing her duties as it had an obligation not to discriminate on the ground of sexual orientation in the way that it provided its services.

[59] These legislators would have included members of the EU Parliament. The religion provisions within the Equality Act 2010 give effect to the United Kingdom's obligation to legislate in the area of religion and belief following the Framework Directive 2000, which was made possible by Article 13 of the EU Treaty.
Article 13 EU states:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The EU Framework Directive (2000/78/EC) established a general framework for equal treatment in employment and occupation on grounds of religion or belief, disability, age and sexual orientation. It required the UK to take steps to implement obligations relating to religion or belief by December 2, 2003. These measures now form part of the EA 2010.

workplace. If the latter view is held (and it was in the courts), then the failure to adapt or to be sufficiently flexible is, once again, on the workers. Is this not a good thing? After all, it leads to an outcome in which institutional mechanisms supporting queer equality in the workplace and beyond (in providing adoption services to alternative families, for example) are not put under pressure by employees bringing discrimination claims. If flexibility is gaining ground as a potential means of smoothing over conflict in the workplace, then it is not surprising that claimants feel the emerging norm of flexible working is there to help them avoid what they do not want to do or see or countenance in the workplace. These cases show that the concept of adaptation is likely to underpin courts' negative responses to such arguments.

However, aligning employment equality with "progress" and adaptability takes us back into the territory of market-based labour flexibility, in which governmental mechanisms supporting rights and equality are primarily oriented to achieving better business outcomes. The temporality underpinning adaptation is a generational, future-oriented, linear temporality: through change on the part of the worker, even "equalities-friendly" change, the business will be able to progress. Refusal to adapt in effect implies that the worker refuses to help the business improve. The problem is that this is just as likely to work against progressive workplace practices as it is to aid them.

Adaptation carries a particularly persuasive force because of resonances between the ideas of development inherent in market-based understandings of adaptability, on the one hand, and concepts of natural selection and evolutionary biology, on the other. Evolution through adaptability concerns itself with becoming and generation. Adaptation to the external environment enables organisms (workers, companies) to change and survive in the hostile environment of free market economics. However, as Elizabeth Grosz has indicated, even Darwinian concepts of evolution remain open for feminist re-analysis.[60] Grosz finds Darwin's theory "ingenious" in the way that it imagines change and proliferation in physical form and capacities, both through the slow time of inheritance and the cataclysmic time of sudden geographical or climactic upheavals.[61] In contrast, the adaptability found in EU employment policy and within TQM works with a fore-shortened and functionalist concept of transformation. It knows what it wants—it is put to the task of reducing unemployment and increasing prosperity even as it apparently embraces "uncertainty." As Martin points out, adaptation is often associated with the idea of "loose coupling"—systems that can incorporate shocks or pressures and make spur-of-the-moment changes.[62] The shunting motion of loose coupling is mechanical—it recalls train carriages or motor vehicle crashes. Within this type of adaptation, the way forward happens in the

[60] E. Grosz, *Time Travels: Feminism, Nature, Power* (Durham, NC: Duke University Press, 2005).
[61] Grosz, *Time Travels: Feminism, Nature, Power*: 25.
[62] Martin, *Flexible Bodies*: 144.

instantaneous present, not in the open future. If this adaptation creates or changes anything, it does so not incrementally or generationally, but through transferred force within the extended, instantaneous present.

The neo-liberal fantasy is that the workforce is rendered almost instantaneously adaptable through connected socio-technical devices of the (flexibilized) employment contract and national and EU economic policy. Within UK equality law, in turn, the environment to which workers have to adapt is the changing economy, and the temporality in which change is required is not the uncertain temporality of generation and proliferation (as imagined by Grosz), but instead the rather more certain present.

Balance, Time, and Accumulated Labour

Although some ideas of adaptation may seem to enhance equality within UK law, the wider implications of flexibility-as-adaptation are that they further entrench neo-liberal labour policies. In contrast, more explicit centre-left ideas of "work–life balance" seem to hold more potential for workers, including women and people with disabilities. These ideas suggest that, for women, an optimum point can be achieved where the stresses of managing unpaid care and paid work can be eliminated. For people with disabilities, meanwhile, it is possible to manage competing work and access requirements.

Arguments related to balance and equilibrium are, as would be expected, endemic to UK equality law. One permutation of balance arguments sees them functioning as a means of avoiding formal law altogether. For example, the right to request flexible working, outlined above, is overwhelmingly presented as a mechanism to encourage dialogue between employers and workers and, in doing so, avoid conflicts that might otherwise lead to equality claims. Another permutation of balance arguments runs through all indirect discrimination claims that raise "flexibility issues." Claimants are required to show evidence that the provision or practice puts her or him (and the claimant's protected group, for example, women) at a disadvantage and is not a "proportionate means of achieving a legitimate aim."[63] Through the concept of proportionality, balance therefore acts within the law on indirect discrimination as a potential long-stop to a claim; it provides a measuring stick for determining what employers are not obliged to do to accommodate protected classes of workers.

A similar logic can be found in work–life balance policies. Balance has been presented as an alternative to "pendulum politics" in which policies lurch between engagement in the labour market, on the one hand, and care, health, "well-being," or religion, on the other. Ruth Lister advocates this idea in the context of gender equality; She argues that the link between balance and flexibility is that if workers have sufficient control over flexibility, then they can achieve equal distribution of unpaid and paid work between

[63] Section 19 EA 2010.

men and women.[64] This is a very common view, especially within UK policy literatures, and it effectively positions "balance" as the goal of family-friendly policies. The Government Equalities Office, for example, recently stated that

> Different individuals and families will have different ideas of the balance they would like to strike, but it is important that everyone has the opportunity to find an arrangement which suits them, their family and their employer.[65]

The UK statutory equalities body, the Equality and Human Rights Commission, while more explicit about the gender issues involved, also recently positioned balance as a core concern:

> ... women, who now represent almost half of the workforce, face difficult and loaded choices over how they balance career and care, and all too often pay a penalty for the choices they make.[66]

This aspirational language around balance fits easily into the contractual underpinnings of the employment relationship: workers and employers can achieve harmonious working relations through bargaining over labour time, flexibility, and remuneration. It also fits well, however, with feminist critiques of social contract theories, in which a man's social and political participation in work is enabled by a woman's unpaid labour (following Carol Pateman).[67] Both uses of balance prioritize, or aim for, the goal of equilibrium, a state in which either (i) workers and employers agree or (ii) women's unpaid labour no longer subsidizes or enables formal economic structures.

However, alongside equilibrium, in its many different guises, many work–life balance arguments also rely on ideas of alienated and accumulated labour. According to Lisa Adkins, they rely on the assumption that work is alienating in the classical Marxist sense, and that labour accumulates in the body before being exchanged.[68] They also rely on what Adkins terms a "retroactivation" model of labour in which labour is congealed, stored up in the body, and then sold or exchanged, unlike what we have seen with the elasticity model, in which accumulated labour just keeps on accumulating. In other words, work–life balance arguments view labour as oriented to the past and not to the future. In this model, the way to redress the gender imbalance in care and work is to change working conditions to allow women or other excluded groups to accumulate skills in the workplace over time, something that they have not been able to do. However, according to Adkins, the ideas that underpin the balancing mechanisms—such as the idea that

---

64 R. Lister, "The Dilemmas of Pendulum Politics: Balancing Paid Work, Care, and Citizenship," *Economy & Society* 31 (2002): 520–32.

65 Government Equalities Office, *Working Towards Equality: A Framework for Action* (2010), 24, http://www.equalities.gov.uk/pdf/MAINGEO_WorkingTogether_acc.pdf (last accessed April 9, 2010).

66 Equality and Human Rights Commission, *Working Better: Meeting the Changing Needs of Families, Workers and Employers in the 21st Century*, 6, http://www.equalityhumanrights.com/uploaded_files/working_better_final_pdf_250309.pdf.

67 L. Adkins, "From Retroactivation to Futurity: The End of the Sexual Contract?" *NORA - Nordic Journal of Feminist and Gender Research* 16 (2008): 182–201.

68 Adkins, "From Retroactivation to Futurity," 189–91.

women are excluded from the labour market, or even that labour is "retroactively" imagined by workers—are being challenged by research that shows the increasing valorization of young women in the labour market, and an increase in future-oriented labour practices (e.g., a web designer paid for the generation of hits on a Web site, and not for the time spent working to create it) instead of practices oriented to the past (through stored-up labour time).

In attempting to focus on flexibility and balance as an issue of labouring bodies and their elastic or adaptive qualities, it therefore becomes difficult to eradicate issues of time. And the measures that Lisa Adkins critiques for being attached to retroactive concepts of time are the measures that form the basis of this article: work–life balance initiatives, which aim, variously at achieving gender balance, business efficacy, or lower unemployment. Do these concepts rely on retroactivation—stored-up, congealed labour time—or on ideas of futurity? Case law engaging with ideas of flexible work in the United Kingdom suggests that within the legal imagination, at least, flexibility is most often aligned with future-oriented working patterns, adapting to sudden changes and uncertainty, and not overtly with the accumulation of skills and capacities that Adkins terms the "retroactivation" model. If the idea of accumulated labour therefore motivates legal provisions and practices around flexible work, then the knowledges produced by these practices do not stick with a model of retroactivation and balance. The logic of futurity carries considerable weight within legal discourses of adaptability: workers are expected to develop skills and capacities in relation to a task, capacities that can then be transferred to another task, so even while learning on the job, they are expected to have regard for future applications of the skills they are acquiring. On the other hand, as we have just seen, adaptability's future may not always be as open-ended as expected; it functions instead as a sort of reiterated present in which workers are presented with a task or problem, solve it or complete it (having adapted to the business need), and are then given another problem to solve from scratch. In other words, while, as Adkins argues, emerging work practices might augur a shift from retroactive to future-oriented labour relationships, legal knowledges (as evidenced through case reports and legal policy documents) present a heavily circumscribed version of future-oriented, flexible labour.

Elasticity potentially holds out alternative temporal possibilities for thinking about labour and care. However, this is where Adkins's argument, again, has a great deal of salience. Elasticity relies on a logic of accumulation—retroactive labour that is stored up against, and that challenges, the limits of the body. However, the point about elasticity is that it parodies the idea of accumulating congealed labour in the body by showing what happens if all that spent labour time is not more equitably redistributed: it gathers together, refuses to leave, and when the limits are reached, the body, or the co-operative relationship between state and carer, snaps. The latent potential for an elastic object, body, or worker to reach its limits means that ideas of neo-liberal linear progress are fragile at best within this conceptual paradigm. This affords great hope to feminists who criticize the imposition of fresh

rounds of care obligations on women; the implication is that non-co-operation is always imminent. As a critical reappropriation of the neo-liberal urge to adapt, elasticity remains indebted to sexual contract theory and to the idea of retroactive, accumulated labour, but it does something very different from work–life balance arguments. It turns the idea of congealed, accumulated, retroactive labour in on itself in an attempt to push feminists and disability activists into action. Paradoxically, it puts limits on the body's putative capacities to absorb labour, implying that within development and labour policy, at least, there are limits to what flexibility can achieve.

Flexibility and Legal Form

As such, elasticity can be understood as a critical strategic response to neo-liberal concepts of future-oriented adaptation: it uses, and magnifies, ideas of congealed, accumulated labour in order to present discursive barriers to free market labour reform. Representations and conceptual mobilizations of elasticity defy usual expectations about the requirements that flexiblity imposes on workers. But flexibility is not just a matter of representation within equality law—it is also a matter of form, fact, and patterning. If, as Annelise Riles proposes, the "fact" is something that can be collected and patterned as much as it is treated as an epistemological object,[69] then the "legal fact" can similarly be analysed as a question of selection and collation. In this section, I attempt to achieve an altered perspective on legal flexibility, which takes some of these insights into account. I use the patterning of non-human objects between case reports as an example of how ideas about flexibility exist not only at the level of representation, but also, and perhaps more interestingly, at the level of legal form.

Although the dilemmas within the reports ostensibly revolved around inter-human disagreements and conflicts, nevertheless it appears that work–life balance cases are intimately attached to, and produced by, a range of "things." In Meikle, as we have already seen, daylight (not an object as such, but a non-human phenomenon), classrooms, and small-print timetables appeared as actors in a conflict over a teacher's flexible working practices. In Gammie, a railway signalling box in Stirlingshire in Scotland, which had to be operated despite Network Rail's efforts to find a job share for the claimant, eventually caused the claimant to lose her case. In Rutty, a warehouse and its (apparently) very fragile operating system in Tonbridge in Kent, was proffered as the business reason why the claimant should not be allowed to work part time. And in Copsey, the Old Testament's requirement to refrain from Sunday working motivated the claimant to refuse a flexible schedule.

In each of these cases, non-human actors pulled knowledges about time into different directions. Flexibility was therefore made concrete, to a certain extent, within the case reports, through these non-human actors.

[69] Riles, *The Network Inside Out*: 139.

https://doi.org/10.3138/cjls.26.3.485 Published online by Cambridge University Press

However, flexibility also became a question of legal form. To be more specific, ideas about flexibility were patterned throughout the case reports through legal citation practices. The reports acted within legal and policy networks as "living documents," inorganic actors that "felt" and produced social relations.[70] All case reports, as is usual within legal process, referred to principles established in previous cases. This provided routes for non-human actors in earlier cases to become dislodged from their legal "homes" and travel into new scenarios through legal procedural and formal conventions. If the non-human objects were not referred to directly, they did nevertheless influence the outcome of later cases, as something akin to legal "ghosts" or "traces." For example, in the case report for MacMillan, a much earlier and very influential case called *London Underground v. Edwards* was discussed.[71] The legal issue at hand was the (now largely defunct) question of comparing pools of people to work out whether a claimant has been sufficiently disadvantaged by an employer's action. Edwards contained the famous/infamous non-human actor of a shift rota that disadvantaged women by requiring workers to start work at 4.45 a.m. and end at 1.30 p.m., sometimes working 11 consecutive days. This shift rota has considerable notoriety of its own within UK equality law and policy. Although it was the necessity to consider legal precedent that brought Edwards into MacMillan, nevertheless, the legal treatment of flexibility in MacMillan (cars, driving distances, and part-time work) assumed the non-human ghostly traces of the shift rota in Edwards.

In this way, legal form influenced the productive relationship, within and across the case reports, between non-human actors and flexibility. This recalls Riles's concern with form and patterning within policy documents. Riles focuses on understanding the inter-governmental document, the "Pacific Platform for Action," which ostensibly contained development policies around women in advance of the 1995 Beijing Conference on Women. She analyses the document both as independent object and as pattern.[72] Treating the document as an anthropological object, she notes that its structure enabled a linear progression from "Preamble" to "Mission Statement" and eventually to "Institutional Arrangements."[73] However, each section consisted of self-contained paragraphs, which could be read in any order without losing understanding of the document. In turn, the form of this document was repeated in documents at other levels of negotiation, and this, coupled with rigid conventions, technical language, and a preferred typeface, meant that innovative details were less important to drafters than the successful replication of language and patterns from one document to the next.[74]

---

70 S. Hunter, "Living Documents: A Feminist Psychosocial Approach to the Relational Politics of Policy Documentation," *Critical Social Policy* 28 (2008): 506–28, 507. See also B. Bhandar, "Constituting Practices and Things: The Concept of the Network and Studies in Law, Gender and Sexuality," *Feminist Legal Studies* 17 (2009): 325–32.

71 *London Underground v. Edwards* (1999) ICR 494.

72 Riles, *The Network Inside Out*: 73.

73 Ibid., 78.

74 Ibid., 79.

https://doi.org/10.3138/cjls.26.3.485 Published online by Cambridge University Press

Patterning itself was supported by negotiators' seeming lack of interest in the meaning of keywords and phrases; instead negotiators favoured repetition of keywords, the rhythm and feel of particular words alongside each other (for example, structural adjustment), and word patterns ("universal" did not make sense unless it sat next to "human rights").

Without wishing to make too much of the analogy, the flexibility cases are reminiscent of Riles's description of the negotiations around the "Pacific Platform for Action." Case reports are less the subject of negotiation than are policy documents of this type, but they too are heavily stylized, formal, and, due to the mandates of legal provisions and clusters of policy knowledges, they tend to contain patterned phrases and combinations of words ("unfair dismissal," "indirect discrimination," "flexible work"). Like policy documents of the type that Riles analysed, each case report that fell within my study has been written with the expectation that it will be read and acted on at a different level. Reports are written with a consciousness of what exists outside the network of the tribunal itself, cross-referencing paragraphs within case reports to paragraphs or pages within other case reports. Furthermore, segments from lower court decisions are often quoted at length in higher court decisions, giving the impression of a world within a world—the analogousness of form reinforcing the impression of a tight legal network.

All judgments begin with the names of the parties, proceed often to a summary of the main legal points and cases used in argument, and present the facts, the law, and the decision in linear order, in consecutively numbered paragraphs. This sequential structuring of knowledge provides a key difference to Riles's policy documents, which could be read in any direction. Furthermore, the unilinear temporality of citation means that replication and repetition of key legal arguments, facts, even the motion of non-legal actors, can only happen prospectively in time, from earlier case to later case. Ironically, therefore, while the cases themselves deal with flexible timetables or working patterns, at a meta-level, these cases follow a largely chronological, future-oriented direction. While citation lifts particular constellations of artefacts, people, events from one tribunal and therefore one case report to another, or even to a higher court, thereby plucking "things" from one legal moment to another, this movement is sequential, making it impossible to understand the legal principles involved without following a similar, forward-looking, linear path.

This is not just a matter of legal interpretation, it is a matter of how legal networks orient themselves in time.[75] However, it has the effect of explaining the networked context of these flexibility decisions. In an organizational, meaning-creating system in which decisions are cited prospectively, and in which legal principles cannot be understood outside of their sequenced temporal moorings, forward-looking ideas of adaptation and progress make a lot

[75] See also Valverde, "Authorizing the Production of Urban Moral Order."

https://doi.org/10.3138/cjls.26.3.485 Published online by Cambridge University Press

more sense. Within this forward-looking temporal milieu, flexibility can never realistically be let loose in all of its anti-linear, anti-chronological guises to really mess with the organization of labour practices. The structure, meaning, and networked inertia of law means that flexibility, and flexible labour, is most likely to be interpreted in the context of a forward march of progress. This, in turn, means that flexibility tends to be an inherently conservative and employer-friendly concept; workers who do not adapt have much to prove. The most that critical voices can do is parody what this flexibility requires of workers, or shift the argument from time to matter, or from time to bodies, hence feminist arguments about elasticity.

Concluding Remarks

Human actors and significant non-human actors combine within and across case reports to produce a general set of understandings about legal flexibility. These understandings, as we have seen, suggest that flexibility is just as much a matter of organic or physical capabilities as it is of time. Concepts of elasticity, adaptability, and balance force us to reconsider the meanings and motivations of governmental and oppositional constructions of work–life dilemmas. Working with the hypothesis that capabilities motivate legal and governmental rhetorics around flexibility therefore requires a shift in how we imagine labour regulation. Struggles over clock time have long dominated labour struggles and labour policy since the first organized unions brought the working day, the working week, the schedule, and the rota to the bargaining table, and, as a result, many feminists conceive work–life balance as an issue of time allocation. If, alongside these temporal concerns, we acknowledge flexible concepts of elasticity and adaptability, how might this change the way we think about neo-liberal interventions into work–life balance?

Abstract

This paper focuses on the increasing significance of flexibility arguments to UK employment equality law. It makes use of the well-evidenced legal and governmental preoccupation with working time to investigate the production and circulation of concepts of flexibility through equality law case reports from the period 2001–2010. With case reports as my main focus, I trace how flexibility emerges through legal documental networks, so as to work out the contours of our collectively imagined "efficient" and "well-balanced" working practices. Human actors and significant non-human actors combine within and across case reports to produce and support a general set of understandings about legal flexibility. These understandings, as we have seen, suggest that flexibility is just as much a matter of organic or physical capabilities as it is of time. Concepts of elasticity, adaptability, and balance, therefore, force us to reconsider the meanings and motivations of governmental and oppositional constructions of work–life dilemmas.

Keywords: work/life balance, equality, labour, gender, flexibility, objects

Résumé

Cet article s'intéresse à l'importance grandissante de la souplesse dans les lois britanniques sur l'égalité en matière d'emploi. En tenant compte de la préoccupation du temps de travail des systèmes légaux et gouvernementaux, nous examinons l'élaboration et la propagation des concepts de souplesse à l'aide de rapports d'enquête légaux en matière d'égalité durant les années 2001 à 2010. En portant une attention particulière sur des rapports d'enquête, nous soulignons la présence de la souplesse dans les réseaux de documents légaux, afin de circonscrire les notions collectives et imaginaires que sont les conditions de travail « efficaces » et « équilibées ». Dans ces documents ainsi qu'ailleurs, des facteurs importants, de nature humaine et non humaine, influencent notre compréhension de la souplesse légale. Comme nous l'avons vu, la souplesse semble résulter tant d'aptitudes organiques ou physiques que de la notion du temps. Par conséquent, les concepts d'élasticité, d'adaptabilité et d'équilibre viennent souligner les significations ainsi que les motivations présentes dans les constructions gouvernementales et contestataires des dilemmes travail-vie.

Mots clés : conciliation travail-vie, égalité, main d'oeuvre, sexe, souplesse, objets

Dr Emily Grabham
Senior Lecturer
Kent Law School
University of Kent
CT2 7NS
UK