

The Careless Ideal Worker

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Olivia Smith, [*Litigating Discrimination on Grounds of Family Status*](#), **22 Fem. Legal Stud 175** (2014).

It will not surprise readers alive to anti-discrimination law's limited capacity to transform systems that Ireland's reform to protect workers in certain care relationships from discrimination based on their family status has reinforced gendered assumptions about care and workforce participation. However much its findings line up with our pessimistic hunches, Olivia Smith's study is worth reading because it exemplifies an admirable kind of feminist scholarship: quantitatively and qualitatively empirical; theoretically grounded; alert to the intersection of gender with other grounds of disadvantage, such as class; and self-conscious of its limits.

Smith offers a "contextualized assessment" of a dozen years' tribunal litigation under the "family status" discrimination ground. Prior to this ground's adoption in the Employment Equality Acts 1998-2011, women had challenged discrimination associated with their care obligations under the ground of gender. As Smith notes, that tack had confirmed the gendered view of care as women's work. Yet while the gender-neutral ground of "family status" might signal that care obligations bear on men as well as on women, the litigation record shows it to have reinforced the gendered dynamics of Irish work and family life.

Early in the paper, Smith sketches a sobering portrait of Irish family and workplace policy. She traces how it channels men away from care work at home or makes it much harder to do such work. Then she dives into the tribunal cases, the vast majority of them launched by women, to see how "family status" is playing out.

The study elaborates the distance between what "family status" and the related idea that employers must not discriminate against employees for their care responsibilities might have meant, and what they have come to mean. The decisions reveal that formal equality is the prevailing approach. In effect, employers cannot treat employees with care responsibilities worse than they treat employees without such responsibilities. In other words, the law sanctions treatment that singles out for special disadvantage employees who do care work. It does nothing, however, to challenge or modify evenly applied workplace expectations or requirements (schedules, travel obligations) that are incompatible with family life. Smith argues persuasively that this approach affirms the baseline of the ideal employee who, unencumbered by caring duties (someone at home may be shouldering them for him), responsibly prioritizes his investment in the labour market.

Smith roots her study in work such as Joan Williams's treatment of the ideal worker, Colleen Sheppard's attention to inequality's embeddedness in broader institutional contexts, and Judy Fudge's attention to the gender contract. She is appropriately sensitive to the difficulty in conceptualizing family status. On her analysis, Irish law's definition is "at once both an advance and a regression": it shifts away from law's privileging of the sexual family, but still fails to capture the full extent of family care. For instance, the focus on parent-child relationships and on carers for persons with disabilities offers no protection from discrimination for those who provide care for other family members, for kin, or for friends.

While drawing out the lessons discernible in the record of tribunal decisions, Smith notes the constraints

that shaped her data set. In particular, although a tribunal process is supposed to be inexpensive and relatively easy, the lack of legal aid and other factors undoubtedly limit its accessibility.

This paper leaves me thinking about other areas of law where our usual focus on the judgments of a jurisdiction's apex court overshadows attention to the nitty-gritty of first-instance decisions – as well as about other cases where using a logic of equality and comparison to recognize difference ends up further entrenching the privileged ideal.

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