Reproducing Precarity? Pregnancy and atypical employment in EU law.
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This paper will explore the potential of a line of reasoning of the Court of Justice of the European Union which suggest an emergent fundamental social right of equal treatment between 'standard' and 'atypical workers' (Bell, 2012). This approach is significant because the legal measures (the EU Directives on fixed-term, part-time and agency workers) are distinctly informed by a labour market regulation model whereas the Court's approach draws from a perspective of fundamental social rights. This line of reasoning, argues Bell, 'repositions the goalposts' at a rhetorical level (2012:46) and helps ensure the practical effectiveness of the rather limited protections afforded by the Directives. The contribution of this paper is to explore the potential of this reading of the equal treatment principle when applied to the context of the treatment of pregnant workers within EU law. The combination of pregnancy and insecure forms of employment serves to illustrate the multifaceted nature of the experience of precarious employment that the EU Directives on atypical work totally ignore. Indeed McKay et al (2012:53) suggest that problems with access to employment rights concerning pregnancy and maternity 'reproduces precarity'. Moreover issues connected to pregnancy and employment spill-over from employment law to the closely guarded domain of welfare and citizenship rights. Exploring the rights of pregnant workers is thus an important way to 'test' the potential of the emerging fundamental social right identified by Bell, to address the real problems that workers experience (captured in sociological literatures through the concept of precarious employment). This research has significance beyond EU law and contributes to a line of literature exploring legal rights and precarious work. Attempts to define precarious work increasingly take into account not just the contractual arrangements through which an individual provides work for another but also the characteristics of that individual and the broader context in which she or he lives and works (McKay et al 2012). Legal scholars are exploring the ways in which legal norms and frameworks are disrupted by the non-legal concept 'precarity' (Fudge and Owens 2006). However within the EU, despite the introduction of 'hard' legal measures (Directives) to protect fixed-term, part-time and agency workers, legislative interventions do not explicitly acknowledge or address the concept of precarious work. This is despite the capacity of these Directives to connect with other non-legal concepts such as flexibility, modernisation and flexicurity developed through EU employment strategies. The European Parliament's resolution on precarious women workers (2010) expresses disappointment that the EU employment law does not address the precarious nature of employment. A key criticism of the EU Directives is that they focus on certain forms of contractual relationship that are juxtaposed with the model of long-term, full-time contract of employment with a single legal person, the employer and characterised as ‘atypical’. The critique of this approach is underpinned by a criticism of conceptualising emerging forms of personal work relationships narrowly by reference to an outmoded (and arguably fictitious) norm rather than exploring the experiences of those who work under such contracts. Scholars acknowledge that 'the term 'atypical employment' is rapidly becoming a misnomer' (Busby and Christie, 2005: 16). Even so the principal regulatory device through which protection is afforded by the Directives is a (limited) equal treatment principle which uses a comparator to identify 'less favourable treatment' of fixed-term, part-time and agency workers and subjects such treatment to a test of objective justification. Despite the shortcomings of this approach, Bell's analysis of the emerging jurisprudence of the Court of Justice of the European Union in interpreting the Directives cautiously reveals an interesting trend. Whilst the preamble of the Directives clearly links to policy objectives in the area of flexibility, flexicurity and modernisation, in interpreting the equal treatment provisions the CJEU has eschewed this approach and has instead interpreted the equal treatment provision as a fundamental social right that is not to be interpreted narrowly or flexibly. Is there potential for this interpretation of the equal treatment principle to connect to the material realities of precarious work or will the limitations of the comparator test continue to ‘miss the point’?