

THE RIGHT OF WORKERS TO SPECIAL PROTECTION IN CASE OF MATERNITY, FROM THE PERSPECTIVE OF THE EUROPEAN SOCIAL CHARTER, INTERNATIONAL AND DOMESTIC LAW

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Abstract: *Maternity protection is a fundamental right of workers who perform dependent or independent professional activity, enshrined in the most important international human rights treaties. Maternity, in safe and healthy conditions for mother and child, is the foundation of quality of life. Maternity protection is essential for both the creation of decent jobs and the development of women's professional careers, as well as for ensuring equal treatment and opportunities at work.*

However, social reality reveals the existence of a discrepancy between assumed legal values and practice, with maternity continuing to be a criterion of discrimination both at birth and at the termination of the legal employment relationship. Pregnant women continue to lose their jobs, even those covered by protective legislation. Discrimination against women because of their reproductive role remains a major barrier to equal opportunities and treatment between men and women. Finding effective ways to combat this discrimination and ensure that practices comply with the law is a major challenge for governments and social partners.

The aim of this study is to identify, from a legal and medical perspective, the levers of action at the political decision-making level, so that the protection of working mothers does not remain just a value

recognized at the normative level but not implemented in everyday life, in contemporary society, which is in permanent and profound dynamics.

Keywords: *maternity protection; fundamental rights; discrimination.*

Introduction

Discrimination against women in relation to maternity is a widespread problem throughout the world. In countries where maternity protection legislation exists, ensuring its effective implementation remains a persistent challenge. This social reality has been taken into account by the International Labour Organization (ILO), which, since its establishment, has been concerned with identifying areas of child and maternity protection. Data provided by this organization¹ for a number of 185 countries and territories reveal that only one third of them fully meet the requirements of ILO Convention No. 183/2000 concerning the revision of the Maternity Protection Convention (Revised)² and Recommendation No. 191 of 2000³. The analysis took into account two main elements: the leave period of at least 14 weeks and the level of compensation, of at least two thirds of previous earnings, paid from social security funds or public funds.

The drastic decline in the birth rate throughout Europe requires the implementation of a strategy for maternity protection at work, the protection of pregnant women, of postpartum women, of those who are breastfeeding, of those who are caring for children, and, in general, of all

¹ ILO Report, Maternity and Paternity at Work International Law and Practice, Gender, Equality and Diversity Branch Conditions of Work and Equality Department International Labour Office.
https://webapps.ilo.org/public/libdoc/ilo/2014/114B09_84_roma.pdf

² Maternity Protection Convention, No. 183 of 15 June 2000, concerning the revision of the Maternity Protection Convention (Revised), 1952, adopted at the 88th Session of the General Conference of the International Labour Organization in Geneva on 15 June 2000*, published in the Official Gazette no. 535 of 23 July 2002

³https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312529

workers. Maternity protection is guaranteed by the treaties of the Council of Europe, in particular in the European Social Charter of 1961, revised in 1996¹, which regulates the right of workers to maternity protection. In order to ensure the effective exercise of the right of workers to maternity protection, the parties that have ratified the treaty undertake: to ensure that workers, before and after childbirth, have a rest period of a total duration of at least 14 weeks either through paid leave, through adequate social security benefits or through public funds; to consider it unlawful for an employer to give notice of dismissal to a woman during the period between the notification of her pregnancy and the end of her maternity leave, or on a date on which the notice period expires during that period; to ensure that mothers who are breastfeeding their children have sufficient breaks for this purpose; to regulate night work for pregnant women, women who have recently given birth or those who are breastfeeding their children; to prohibit the employment of pregnant women, of postpartum women or those who are breastfeeding their children in underground work in mines and in any other work of a dangerous, unhealthy or arduous nature and to take appropriate measures to protect the rights of these women in matters of employment.

At the national level, Government Emergency Ordinance No. 96/2003 was adopted², which supplemented the existing legislative framework with specific measures to protect the health and safety of pregnant employees and mothers at their workplaces, measures that are not found in other normative acts in force. When drafting this normative act, the basic principles of Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant women, of postpartum women or breastfeeding women, of the revised European Social Charter, ratified by

¹ European Social Charter, <https://rm.coe.int/the-european-social-charter-treaty/1680a078c9>

² Emergency Ordinance No. 96/2003 on maternity protection at work, with subsequent amendments and supplements, published in the Official Gazette, Part I No. 750 of 27 October 2003

Romania by Law No. 74/1999, were taken into account, fulfilling the legal commitments contained in the provisions of Article 8 of the Charter, as well as the principles of the International Labor Organization Convention No. 183/2000 on maternity protection, ratified by Romania by Law No. 452/2002. The legal, social and economic dimensions of maternity protection for workers constitute major and decisive challenges for the development of society, for ensuring social justice and an appropriate level of education for citizens of the contemporary world, subject to unprecedented economic and technological transformations. Therefore, in the study we will address the issue of maternity protection from the perspective of the duration of maternity leave, maternity allowance, as well as the health and safety at work of workers.

1. The duration of the maternity leave

The most recent standard of the ILO regarding the duration of maternity leave stipulates a minimum leave period of 14 weeks. Recommendation No. 191 encourages ILO member States to increase the length of maternity leave to at least 18 weeks. The length of leave is essential to allow mothers to recover from childbirth and to safely return to work, while providing adequate care for their children. If the length of leave is too short, mothers do not feel ready to return to work and sometimes quit. If the length of leave is too long, women may develop a diminished attachment to their careers, with significant consequences in terms of lower income levels. Of the 185 countries and territories analyzed in the ILO Report, 98 countries met the standard of providing a minimum period of leave of 14 weeks; 42 of these countries respected or the suggested period of 18 weeks; 60 countries had established leave periods of 12-13 weeks, periods shorter than those stipulated in Convention No. 183/2000; 27 countries provide leave for periods of less than 12 weeks

Article 8 of the European Social Charter stipulates the obligation of states to ensure to workers, before and after childbirth, a rest with a total duration of at least 14 weeks, either through paid leave, or through

adequate social security benefits or through public funds. The Charter complies with the ILO standard on the minimum duration of maternity leave, applicable in the 46 member states of the Council of Europe. The European Committee of Social Rights¹ found, with regard to compliance with Article 8 paragraph 1², in the Conclusions of the Analysis of the Report of the United Kingdom of Great Britain for the period 1982-1983, that women have an obligation not to work for six weeks after giving birth. As far as national legislation is concerned, currently, the duration of maternity leave is established by the provisions of Emergency Ordinance no. 158/2005 on holidays and social health insurance benefits³. According to art. 23-24 of this normative act, insured women are entitled to pregnancy and maternity leave, for a period of 126 calendar days, during which they benefit from maternity allowance. Pregnancy leave is granted for a period of 63 days before childbirth, and maternity leave for a period of 63 days after childbirth and can be offset against each other, depending on the doctor's recommendation and the beneficiary's option, in such a way that the minimum mandatory duration of maternity leave is 42 calendar days. Insured disabled persons benefit, upon request, from pregnancy leave, starting with the 6th month of pregnancy. In the case of a stillborn child or in the event that the child dies during the maternity leave, the maternity allowance is granted for its entire duration.

¹The European Committee of Social Rights is the monitoring body of the European Social Charter. It is composed of 15 independent, impartial members which are elected by the Council of Europe's Committee of Ministers, <http://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>

² IX-1/def/GBR/8/1/EN/English|Conclusions|IX-1|30/06/1985|01/01/1982-31/12/1983 <https://hudoc.esc.coe.int/eng?i=IX-1/def/GBR/8/1/EN>

³ Published in the Official Gazette, Part I, No. 1074 of November 29, 2005, with subsequent amendments and additions.

2. Cash benefits for workers during maternity leave

According to ILO Convention No. 183, cash benefits granted during maternity leave must amount to at least two-thirds of a woman's previous earnings – or a comparable amount if other methods of calculating cash benefits are used. The basic general principle is that the level of benefits must ensure that the woman can maintain herself and her child in adequate health and at an adequate standard of living.

States that have ratified the Convention use different methods to determine the level of cash benefits paid during maternity leave. Some States grant benefits only for part of the leave, others reduce the level of benefits during the leave, and others provide maternity benefits only for certain categories of workers.

The 2013 ILO Report¹ noted that, in a subset of 167 comparable countries, only 74 countries provide cash benefits of at least two-thirds of earnings for a minimum of 14 weeks; of these, 61 countries provide 100% of previous earnings. In 93 countries, maternity leave is unpaid, the amount of the benefit is less than two-thirds of previous earnings, or the leave is paid for periods of less than 14 weeks. The most common types of financing of cash benefits during maternity leave are: social insurance, based on contributions; the employer, through direct payment of maternity benefits; a combination of the two.

More than half of countries provide cash benefits through national social security systems based on the contributory principle. Employer liability systems are more common in Africa, Asia and the Middle East, where the challenges of creating maternity branches of social security are considerable. Research shows that employer liability systems work against the interests of employed women by placing a financial burden on employers and creating a potential source of discrimination against

¹ Source: ILO Database on Maternity Protection Legislation at Work, 2013, www.ilo.org/travdatabase. Source of funding Unpaid Employer liability Mixed Social security. International law and practice Maternity and paternity at work

women. Employers may be reluctant to hire or promote pregnant women or women with family responsibilities, or they may find reasons to dismiss their employees to avoid the cost of replacing wages during maternity leave. In many cases, women of childbearing age are not employed for this reason.

Supporting member states in the process of progressive transition from employer-based to social security systems is a priority for ILO technical assistance. This support materializes in: activities to raise awareness among the population regarding maternity protection benefits, based on evidence, as well as the need to create fiscal facilities to subsidize them; technical expertise for the review and drafting of legislation and the preparation of financial and actuarial feasibility studies.

At the Council of Europe level, the European Social Charter provides that during maternity leave, workers should be paid either by their employer, through adequate social security benefits or through public funds. The European Committee of Social Rights noted in the Report submitted by the United Kingdom of Great Britain and Northern Ireland that certain changes had been made to maternity legislation: among other things, maternity pay became a non-contributory benefit in July 1983, and women employed by their husbands have been entitled to maternity pay since 1 December 1982.

As regards the problems raised in Conclusions VIII, the Committee found that the situation remained essentially the same, despite an increase in maternity allowance (from £22.50 to £25.95 in November 1983). This allowance had always been considered by the Committee to be too low in the light of the obligation imposed by Article 8(1) of the Charter. Furthermore, the conditions for granting the additional benefit and its amount were not sufficiently clarified in the 9th United Kingdom report for the Committee to be able to determine whether, in all the circumstances, the amount of maternity allowance plus the additional benefit could be considered to constitute an adequate benefit within the meaning of the Charter. The Committee would like the next report to contain concrete examples in this regard. The Committee also noted that,

despite the explanations provided in the British report, women receiving a low salary may be required to complete a rather long qualifying period, which could extend to two years, and that, in addition, two years of employment are required for entitlement to maternity benefit, which is paid for only six weeks.

At national level, Government Ordinance 158/2005, in Article 25, states the following: the gross monthly amount of maternity benefit is 85% of the calculation base determined as the average of the gross monthly income of the last 6 months of the 12 months of which the insurance period is constituted, up to the limit of 12 gross minimum salaries per country per month, on the basis of which the insurance contribution for work is calculated. Maternity benefit is fully covered by the budget of the Single National Health Insurance Fund. This normative act regulated the legal framework necessary for the application of social measures aimed at ensuring the right of insured persons to social health insurance leaves and allowances within the system, the right to leaves and allowances provided for by the normative act in question being conditional on the payment of the contribution intended to support these allowances.

In the case of individuals who are not employees, the regulatory provisions establish that they can optionally insure themselves in the system to benefit from medical leave and social health insurance benefits, based on an insurance contract, through which they ensure a chosen monthly income that cannot be lower than the value of the minimum gross basic salary per country guaranteed in payment, established according to the law, nor higher than the value of 3 times its value, with the exception of persons who opt for concluding an insurance contract to benefit from medical leave and maternity benefits, for whom the monthly income for which the payment of the contribution is opted for is a chosen income that cannot be lower than the value of the minimum gross basic salary per country guaranteed in payment, established according to the law, nor higher than the value of 12 times its value.

In practice, these individuals are insured for social health insurance at a minimum gross monthly salary, with the exception of persons who

are insured only for maternity leave and allowances, in which case these persons choose an income of up to the value of 12 minimum gross basic salaries per country guaranteed in payment. For the latter situation, maternity leave is insured by paying a percentage of 1% calculated on a calculation basis of 12 minimum gross monthly salaries, for 6 months, for which, from the FNUASS budget, a monthly allowance is paid, for a period of 126 days (4 months), calculated as a percentage of 85% of the average income thus declared¹.

From the analysis of these regulations, it results unequivocally that Romania complies with the standards of the ILO and the European Social Charter, opting for the payment of maternity allowance, within a social health insurance system, which is based on the contributory principle.

3. Maternity protection in the workplace

The ILO's concerns regarding maternity protection are limited to protecting the health and safety of the mother and the newborn child, ensuring the necessary conditions for women to be able to reconcile private and professional life, implementing a non-discrimination mechanism in the workplace and promoting the principle of equal treatment between women and men. The ILO has adopted three conventions in the field of maternity protection: in 1919, 1952, and, most recently in 2000, Convention No. 183 on Maternity Protection, which contain measures of protection for pregnant women and women who have recently given birth, including the prevention of exposure to risks to their health and safety during and after pregnancy, the right to paid maternity leave, the provision of medical care for mothers and children

¹ Explanatory note to Government Emergency Ordinance no. 10/2023 amending and supplementing Government Emergency Ordinance no. 158/2005 on leave and social health insurance benefits. <https://gov.ro/ro/guvernul/procesul-legislativ/note-de-fundamentare/nota-de-fundamentare-oug-nr-10-15-03-2023&page=203>

and paid breastfeeding breaks, protection against discrimination and dismissal in connection with maternity, and a guaranteed right to return to work after maternity leave. Sixty-six countries have ratified at least one of the three conventions on maternity protection, but the influence of ILO standards goes beyond the ratification process.

Most countries have enacted measures to protect maternity and to support workers with family responsibilities, including fathers. This dynamic perspective falls within a general social context of the increase in the number of new paid jobs for women, the increasing incidence of atypical forms of work, the aging of the population, and changes in traditional family models.

At the Council of Europe level, the European Social Charter establishes, through the provisions of Article 8, standards for maternity protection at work, obliging the States Parties to ensure that mothers who are breastfeeding their children have sufficient breaks for this purpose, to regulate night work for pregnant women, women who have recently given birth or those who are breastfeeding their children, to prohibit the employment of pregnant women, women who have recently given birth or those who are breastfeeding their children, in underground work in mines and in any other work of a dangerous, unhealthy or arduous nature and to take appropriate measures to protect the rights of these women in terms of employment, to consider it unlawful for an employer to announce the dismissal of a woman during the period between the moment she notified her pregnancy and the end of her maternity leave, or on a date on which the notice period expires during this period.

At national level, Government Emergency Ordinance 96/2003 was adopted, which transposed the provisions of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC], published in the Official Journal of the European Union (OJEU), L series, No. 348 of 28 November 1992. The normative act mainly provides for the following:

- definition of terms and expressions such as: pregnant employee, employee who has recently given birth, employee who is breastfeeding, leave for prenatal consultations, maternity risk leave;

- granting the right to leave for prenatal consultations to pregnant employees during their working hours;

- establishing the right to maternity leave and allowance for pregnant employees or mothers who, under certain conditions, employers cannot change their workplace;

- establishing mandatory postnatal leave of 42 days;

- specifying the mutual obligations of the employer and the employee who requests measures to protect her health, that of her fetus or child;

- establishing sanctions for persons guilty of violating the provisions of the normative act.

Social protection measures are established for pregnant employees and mothers, postpartum women or breastfeeding mothers, of Romanian citizenship or of a member state of the European Union and the European Economic Area, citizens of other states or stateless persons who have employment or service relationships with an employer in Romania.

Analyzing the definitions presented by each legislator, it is found that maternity protection only targets female employees, and not all categories of workers. These definitions are as follows:

- maternity protection is defined as the protection of the health and/or safety of pregnant employees and/or mothers at their workplaces;

- the workplace is the area delimited in space, depending on the specifics of the work, equipped with the means and materials necessary for the work, in order to carry out an operation, work or to carry out an activity by one or more performers, with their training and skill, under appropriate technical, organizational and occupational health and safety conditions, from which an income is obtained based on an employment or service relationship with an employer;

- a pregnant employee is a woman who notifies the employer in writing of her physiological state of pregnancy and attaches a medical

document issued by the family doctor or specialist doctor attesting to this state;

- an employee who has recently given birth is a woman who has resumed her activity after taking maternity leave and requests the employer in writing the protection measures provided for by law, attaching a medical document issued by the family doctor, but no later than 6 months from the date of birth;

- a breastfeeding employee is a woman who, upon resuming work after maternity leave, breastfeeds her child and notifies the employer in writing of the presumed beginning and end of the breastfeeding period, attaching medical documents issued by the family doctor to this effect;

- the dispensation for prenatal consultations represents a number of free hours paid to the employee by the employer, during normal working hours, for carrying out prenatal consultations and examinations based on the recommendation of the family doctor or specialist doctor;

- mandatory maternity leave is the 42-day leave that the mother employee is obliged to take after giving birth, within the pregnancy and maternity leave with a total duration of 126 days, from which employees benefit under the law;

- maternity risk leave is the leave that employees benefit from provided for in letter a c)-e) for the protection of their health and safety and/or that of their fetus or child.

Employers are required to adopt the necessary measures to prevent employees from being exposed to risks that may affect their health and safety and not to force them to perform work that is harmful to their health or their pregnancy or their newborn child, as the case may be.

For all activities that may present a specific risk of exposure to agents, processes or working conditions, the employer must assess the nature, degree and duration of the employees' exposure in the enterprise and/or unit concerned and, subsequently, to any change in working conditions, either directly or through protection and prevention services in the field of occupational safety and health.

The employer is required to maintain confidentiality regarding the employee's pregnancy and will not notify other employees except with

her written consent and only in the interest of the smooth running of the work process, when the pregnancy is not visible.

Based on the recommendation of the family doctor, a pregnant employee who cannot work the normal working hours for health reasons, her own or her fetus's, has the right to a reduction of one-fourth of the normal working hours, while maintaining her salary, fully borne by the employer's payroll, according to legal regulations.

Employers are obliged to grant pregnant employees leave for prenatal consultations within a maximum of 16 hours per month, if the investigations can only be carried out during working hours, without reducing salary rights.

Employers are obliged to grant breastfeeding employees, during working hours, two breastfeeding breaks of one hour each, until the child is one year old. These breaks also include the time needed to travel back and forth from the place where the child is. At the mother's request, breastfeeding breaks will be replaced by a reduction in the normal working hours by two hours daily.

In order to ensure the safety and health at work of pregnant employees and/or mothers, postpartum women or those who are breastfeeding, the internal regulations of the units must contain measures regarding their hygiene, health protection and safety at work, in accordance with the provisions of this emergency ordinance and other normative acts in force. Pregnant employees cannot be required to perform night work, in unsanitary or unbearable conditions.

Maternity protection also includes the temporary prohibition of dismissal of pregnant women, of those who are on maternity leave, of maternal risk leave, as well as of leave for raising a child up to 2 years old or 3 years old in the case of a disabled child. By establishing these cases of temporary prohibitions on dismissal, the Romanian legislator aimed to protect employees in certain situations perceived, in essence, as vulnerable (Dimitriu, 2017)¹. These prohibitions are found not only in the

¹ <https://www.universuljuridic.ro/prezenta-femeilor-pe-piata-muncii/>

content of the Emergency Ordinance 96/2003, but also in the provisions of the Labor Code, of Law 202/2002 on equal opportunities and treatment between women and men, of the Emergency Ordinance no. 111/2010 on leave and allowance for raising the child. The purpose of establishing these prohibitions is to prevent abuses by employers, who could otherwise fire employees who are unable to defend themselves, to protect their rights and interests and to contribute to the creation of a work environment governed by social justice.

Conclusions

Maternity protection constitutes a challenge at the legislative, political, doctrinal, jurisprudential, economic and social levels. In Romania, maternity protection at work only considers salaried women, those who perform work on the basis of a classic legal employment relationship. leaving uncovered the independent professional activity of women, an activity that is acquiring increasingly broad dimensions in contemporary society. The architecture of the types of legal employment relationships is constantly changing and therefore it is necessary to ensure the protection of workers regardless of the contractual nature in which the professional activity is carried out.

Normative regulations regarding maternity protection need permanent adaptation to the requirements of social reality and jurisprudential optics. Maternity is a concept that benefits from legal protection, being in its essence an emotional-physiological state of a woman, generated by her biological capacity to procreate and give birth to children. Maternity thus relates to the state of a mother-in-becoming and subsequently to the legal status and quality of being the mother of a newborn child, essentially expressing the social role of the woman.

Putting maternity protection at the center of a normative social security system is a proof of social responsibility, which has as its main objective demographic growth, but also ensuring a high level of education for children and a better society, which ensures the necessary

conditions for a superior quality of life for citizens, in an intensely regulated and technologically advanced world.

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