

Labour Discrimination Related to Pregnancy and Motherhood in Croatia

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Abstract

In 2012, Croatian Office for Gender Equality published report on position of pregnant workers and working mothers on the national labour market. Survey results clearly demonstrated concerning situation in the labour market where every second pregnant woman was dismissed due to pregnancy. The remaining 50% of pregnant workers and working mothers faced denial of one or more labour rights due to pregnancy or childcare. Apart from violation of basic human rights in the labour market, pregnant workers and working mothers faced discriminatory practices in financial sector i.e. denial of right to take bank loans. These practices are contrary to current Croatian labour and gender equality legislation, as well as European and international legal standards related to protection of pregnant workers and working mothers. Nonetheless, due to high national unemployment rate, women faced with labour discrimination rarely use available legal remedies. This paper analysis legal framework applicable to labour discrimination of pregnant workers and working mothers, primarily through the lens of applicable European *acquis communautaire* i.e. Directives. It also investigates case law of Croatian courts and the European Court of Justice related to labour discrimination of pregnant workers and working mothers. More specifically, research explores convergences and divergences of national and European case law. The aim of the paper is to contribute to academic discussions on the labour market gender equality and measures necessary to achieve full respect of all national and international legal standards.

Keywords: discrimination, pregnant workers, working mothers, gender equality.

1.1. Introduction

International legal protection of pregnancy and motherhood is rooted in fundamental human rights instruments such as Convention of the Rights of Child (further: CRC) and the Convention on Elimination of All Forms of Discrimination against Women (further: CEDAW). CRC in Article 24 d requires State Parties to ensure appropriate pre-natal and post-natal health care for mothers and the Convention on Elimination of All Forms of Discrimination Against Women (further: CEDAW) which in Article 12.2. requires State Parties to ensure all appropriate services in connection with pregnancy, confinement and the post-natal period. Later Convention expanded need to provide particular legal protection to pregnant workers through the stipulation of Article 11.2 concerning prevention of discrimination of women on grounds of maternity. Convention has obliged State Parties to “take appropriate measures to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status and to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances” (CEDAW, 1979). CEDAW initially required State Parties to introduce “special protection to women during pregnancy in types of work proved to be harmful to them” but this provision has later been subject to alterations in national legislations under the evolving body of gender equality law and has moved from absolute prohibition to introduction of measures of protection. Revised European Social Charter from 1996 followed human rights standards and provided special protection to pregnant workers in Art. 8, including regulation of maternity leave, night work and breastfeeding break, stipulation on unlawfulness of dismissal during pregnancy and protection of pregnant workers or new mothers from

dangerous, unhealthy and arduous work. Finally, the Charter on Fundamental Rights has followed the same principles of prohibition of dismissal related to maternity (Art. 33.2 of the Charter).

As women were entering labour markets in larger numbers, protection of pregnancy and motherhood has advanced from human rights legal framework to labour law framework. In recent decades, we witnessed development of impressive legislative efforts at the international, regional and national levels aimed at providing protection against discrimination related to pregnancy and motherhood in the workplace. In that regard, European Union has been the most instrumental and active in legislating improvements of safety and health of pregnant women and recent mothers at work. Along with normative activities, European Court of Justice has supported prohibition of discrimination on the basis of pregnancy or motherhood at work, including prohibition of dismissal based on pregnancy, which they considered as direct sex discrimination (Grgurev, Ceronja, 2011). Lately, European Union has embarked on new round of negotiations with trade unions and employers on a new package of rights aimed at providing even stronger legal protection from dismissal for new mothers. Such progress did lead to improved national regulatory framework and case law in many of the European Union countries, but not all. Croatia as the last European Union member still struggles with a need to ensure effective implementation of international and regional legal instruments and its own national gender equality and labour laws related to the protection of pregnancy and motherhood. This paper will try to shed a light on the most pressing legal issues related to the violations of international legal standards of labour protection of pregnancy and motherhood in the context of extremely high number of dismissals of pregnant workers on the Croatia labour market that was noted in 2012 Gender Equality Report of Croatian Ombudsperson for Gender Equality (Annual Report 2012). In order to analyse the problem, we will look into the European *acquis communautaire* in the area of protection of pregnancy and motherhood at work, case law of the European Court of Justice and national regulation, primarily through the lens of labour law, but also through the lens of gender equality law, anti-discrimination law and constitutional law.

1.2. European Legal Framework Applicable to Protection of Pregnancy and Motherhood

European Union has tackled issue of protection of pregnant workers and new mothers in several key Directives. Chronologically, the first important legal instrument for female workers was adoption of *Directive 79/7 of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security*, followed by *Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood*.

Further on, Union has adopted *Directive 92/85/EC 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*. Later on, Union Member States have adopted the *Directive 2000/78/EC4 on establishing a general framework for equal treatment in employment and occupation*, and *Directive 2002/73/EC5 on amending Directive 76/207/EEC on the principle of equal treatment*. Union realized new legal challenges in regulation of equal opportunities and equal treatment of men and women in employment and has adopted recast of *Directive 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*. In matters of parental leave, particular importance has *Directive 2010/18 of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive of 3 June 1996*. Due to changes of contemporary employment trends and newly identified legal challenges applicable to self-employed workers, in 2010 Member States agreed to repeal *Directive of 11 December 1986* and adopt new and modern *Directive 2010/41 of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*.

In the context of this paper and research of legal norms that are relevant to analyze the topic of legal protection of pregnancy and motherhood and prohibition of labor discrimination and dismissal based on pregnancy and motherhood, it is necessary to go into the more details of one particular Directive, which is *Directive 92/85/EC prohibiting dismissal of pregnant workers*. Directive has explicitly acknowledged that pregnant workers, workers who have recently given birth and breastfeeding mothers at work are group of specific risk. Furthermore, preamble of Directive explains possible harmful consequences of dismissal due to pregnancy or motherhood to the physical and mental state of pregnant workers, workers who have recently

given birth or who are breastfeeding. Therefore, EU legislator rendered it justified to lay down absolute prohibition of dismissal of pregnant workers and new mothers.

Two key provisions relevant for our research are provisions of Article 10 about prohibition of dismissal and Article 12 on defense of rights. Directive stipulates obligation of a Member State to regulate absolute prohibition of dismissal of pregnant workers from the beginning of pregnancy to the end of the maternity leave, unless justified by public interest, duly substantiated grounds for dismissal or under the consent of the competent authority. Directive also stipulates obligation of a Member State to protect worker from unlawful dismissals in breach of the provisions of this Directive and national legislation. Second provision is even more important for our discourse as it is provision on duty of Member States to "introduce into their national legal systems such measures as are necessary to enable all workers who should themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities." (Directive 92/85/EC, Art. 12).

In line with above mentioned international and European legal framework, the case law of the European Court of Justice has been very instrumental in reinforcing that labor discrimination related to pregnancy and motherhood is proclaimed unlawful and in violation of the EU Directives. The EU Court has thus considered dismissal or any discriminatory practice against pregnant woman or mother as straightforward cases of sex discrimination (Cases C-177/88 *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* [1990] ECR I-3941; C-179/88 *Handels- og Kontorfunktionærenes Forbund I Danmark (Hertz) v Dansk Arbejdsgiverforening* [1990] ECR I-3979; C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567, C-421/92 *Habermann-Beltermann v Arbeiterwohlfart* [1994] ECR I-1657).

In *Paquay* case, the Court has moved the standard of protection from dismissal for pregnant women or new mothers even further deciding that protection "must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that article (of Directive 92/85/EC) but also the taking of preparatory steps for such a decision, such as searching for and finding a permanent replacement for the relevant employee, before the end of that period." (C-460/06 *Paquay v Societe d'architectes Hoet and Minne SPRL* [2007] ECR I-8511). Such position of the European Court is crucial as it extended meaning of Directive's provision referring to the protected period from beginning of pregnancy until the end of maternity leave. Therefore, national courts should carefully examine whether the employer has commenced search for a replacement employee during the protected period, as well as immediately after the return to work of a new mother and if this was the case, dismissal should be declared unlawful.

On the matter of Art. 12 of Directive 92/85/EC referring to provision of effective judicial protection in cases of dismissal on grounds of pregnancy and motherhood, the EU Court has brought important decision in Case C-63/08 *Virginie Pontin v T-Comalux (SA)* [2009] ECR I-10467. In this case, the Court declared discriminatory to set particularly short limitation period (in this case, of 15 days, shortened by post delivery of written dismissal notice) to have a legal remedy available in order to assert rights following dismissal of a pregnant worker. Court considered that this limitation period "rendered practically impossible the exercise of rights conferred by Community law." Subsequently, the Court considered the standard of effectiveness of judicial remedy in light of particular circumstances related to pregnancy and inability to prepare the legal case and seek legal aid within unreasonably short limitation period.

1.3. Croatian Legal Framework and Case Law Related to Pregnancy and Motherhood at Work

Croatian Constitution (Official Gazette No 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14) explicitly protects maternity in general and motherhood in relation to workplace in articles 62. and 64. Directive 92/85/EC has been implemented into Croatian legislation through provisions of three laws: Labor Law (Official Gazette No 93/14), Law on Occupational Safety at Work (Official Gazette No 71/14, 118/14, 154/14) and Law on Pregnancy and Parental Allowances (Official Gazette No 85/08, 110/08, 34/11, 54/13, 152/14). In this paper, we will focus on provisions of the Labour Law because it has been the main source of legal protection of pregnant workers and new mothers from dismissal and unfavorable treatment at work. Croatian regulation of protection of workers based on pregnancy and motherhood or fatherhood refers to absolute prohibition of dismissal during pregnancy, maternity, paternity or adoption leave, part-time work, work with reduced working hours due to increased care for a child, leave of absence of a pregnant woman or breastfeeding mother, leave of absence or work with reduced working hours due to care for a child with developmental

disabilities, and during 15 days after termination of a pregnancy or any of those rights (Art. 34.2 of the Labour Law). Dismissal is null and void if employer knew about pregnancy or parenthood or if worker proves it by certified medical record within 15 days following dismissal (Art. 34.3.). Only legally justified exceptions to this prohibition are death of employer who is a natural person, closure of a craft and liquidation of the company. In all of these cases, employment contract is terminated regardless of statutory provisions. Violation of absolute prohibition of dismissal by employer is considered as the most severe violation of labour law and fined by the maximum fine as stipulated by the article 229.9 of the Labour Law.

According to the Croatian Labour Law, all labour disputes should firstly be referred to the employer who has limitation period of 15 days to respond. If employer fails to deal with the request for protection of right or fails to reinstate the right, worker has further limitation period of 15 days to refer the matter to the court as per Art. 133 of the Labour Law.

In addition to labour legislation, Croatia also has very elaborate laws on prevention of discrimination and gender equality, as well as fully functional mechanisms of protection of human rights through institutions of Ombudsperson and specialized Ombudsperson for Gender Equality.

National Supreme Court has ruled that absolute prohibition of dismissal for pregnant and new mothers means that decision on dismissal could not be legally enforced as long as worker is using his pregnancy or parental right, regardless of the fact that termination of work would be enforced after cessation of pregnancy or parental right (Supreme Court of Croatia Rev 1805/01 of 1.10. 2002).

If we look into the statutory provisions of applicable national laws, we could conclude that pregnant workers and new mothers in Croatia do enjoy sufficient level of protection from dismissal or discrimination at work based on pregnancy or motherhood. Formally, this is certainly well regulated area of labour and gender equality law. It is also harmonized with the relevant provisions of the EU law Directives, primarily Directive 92/85/EC 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. In reality, Annual Report for 2012 of Croatian Ombudsperson for Gender Equality disclosed results of one-of-a-kind survey according to which every second pregnant woman in Croatia was dismissed due to pregnancy. The remaining 50% of pregnant workers and working mothers faced denial of one or more labour rights due to pregnancy or childcare. Apart from violation of basic human rights in the labour market, pregnant workers and working mothers faced discriminatory practices in financial sector i.e. denial of right to take bank loans. These concerning practices were not subsequently followed up by relevant state authorities demonstrate deeply rooted issues closely linked to discrimination and gender inequality. In those circumstances, it would be expected that number of labour disputes raises, but actually, according to the data of trade unions, number of national labour disputes is constantly decreasing. Reasons for that can be found in domestic unemployment rate being currently at 15%, with female unemployment of well above 22% and numerous other factors limiting internal labour mobility of all categories of workers, and particularly pregnant workers and new mothers. Legal provisions on protection of pregnancy and motherhood have a very little impact unless workers can seek redress at labour tribunals, as it is stipulated in Directive 92/85/EC on effective judicial protection. In Croatian context, effective judicial protection means very limited, if any, options to use free legal based on income and lengthy and complicated procedure of approval. Having in mind short limitation periods of 15+15 days to seek judicial redress for unlawful dismissal, in practice free legal aid could probably not be activated so quickly due to legal constraints related to requirements to use free legal aid. Thus, pregnant women and new mothers faced with unlawful dismissal during pregnancy or parental leave are expected to expose themselves to search for a legal representative, preparation of a case for the court, additional costs during pregnancy or motherhood and complicated court procedures. On the other side, Croatian courts are still in favour of awarding relatively small amounts of labour-dispute compensations. Plaintiffs are also faced with great uncertainty of reinstatement of labour relation, specially if labour relation was between a worker and a private employer.

Due to numerous obstacles to effective judicial recourse in cases of labour discrimination of pregnant workers and new mothers and weakening of trade unions, specially in private sector where they became virtually non-existent, the best solution would be to expand mandate of one of the existing gender or anti-discrimination bodies to be able to legally represent pregnant workers and new mothers in all cases of unlawful dismissal due to pregnancy or motherhood. In this way, women who become victims of sex discrimination at work related to their reproductive rights would deal with a very simple redress procedure and would use expert assistance at no cost. Having in mind importance of ensuring full protection

of all reproductive rights at all stages – particularly during employment – it is justified to shift a burden of labour dispute recourse from pregnant workers and new mothers to specialized, fully staffed state funded, but independent body.

1.4. Conclusion

Labor protection of pregnancy and motherhood is one of the corner stones of anti-discrimination law and gender equality. Having in mind that only female workers encounter pregnancy related work discrimination and could face unlawful dismissal due to the fact that employers consider them as financial burden during their absence from work, legislators have to be particularly vigilant on legal regulation of protection of pregnancy and parental rights at work. Leveling labor related sex discrimination of pregnant workers and new mothers to other forms of labor discrimination is unfair and fails to acknowledge special vulnerability of pregnant workers and new mothers. The mere notion of absolute prohibition of dismissal during pregnancy and new motherhood at the European level was adopted with the intention to protect women during reproductive absences from adverse consequences of their fundamental human right to procreate to their employment relation. Normative protection has very little impact unless it has meaningful judicial remedy available for violation of that protection. In last several years, exceptionally high number of pregnant workers in Croatia is dismissed because of their pregnancies, and it seems all those pregnant workers are unable and unwilling to engage in traditional labor dispute. In order to fully implement international human rights standards and European legislation in the area of protection of pregnant workers and new mothers, access to judicial recourse should be reconsidered and modeled in a way that allows easier access to labor tribunals. This can be done through amendments of labor legislation that would allow involvement of state bodies for gender equality or anti-discrimination bodies, so that victims of sex discrimination based on pregnancy or motherhood would be able to fully realize their fundamental human rights and their labor rights.

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