

THE LEGAL PROTECTION OF PREGNANT WORKERS AND WORKING MOTHERS ACCORDING TO TURKISH LABOUR LAW

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Abstract

The number of women that participated in the labour market is increasing with every passing day. Besides, the request to control one's own individual preferences and also the amount of time is emerging. Thus, to raise their children employees have recess to their occupation or they want to have short time working. In this context, the new regulations brought to working life that get out of traditional approach, has become to ensure harmony in work and family life.

After the women took place as workers, the necessity of protecting the women in the work life became important. The protection was firstly held by the international regulations. Regulations have been enacted to prevent the gender discrimination. These regulations contain provisions on various measures such as income inequality, the limitation of working hours, and types of work, which are not suitable for the female workers. Turkish Constitution states that the men and female workers have the equal rights, however the woman workers are granted by special rights in terms of working conditions.

Maternity in working life was reflected to the regulations also as motherhood; pregnancy and confinement. Each of these cases has led to the different regulations should be made for women in working life. All these processes are effective in women's recruitment, the organization of work, working conditions and termination of the employment contracts. The author discusses the harmonization of the Turkish Labour Code No. 4857 and the further related legislation in Turkey to the international legislation. In conclusion, the author points out the fact that, the Turkish

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and international legislation have already been successfully harmonized to a wide extent, whereas the development of the legal practice in the same way has failed.

Key words: Female worker, maternity, breast feeding leave, working at night, dismissal, discrimination.

JEL Codes: K 31, K 40, J 71, J 83.

Introduction

Article 41 of Turkish Constitution provides that family is the foundation of the Turkish society and based on the equality between the spouses². In that sense, the State is expected to take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice³.

In Turkey, with the development of labour and social security law, the regulations of female workers have been changed. Female workers are subject to various arrangements under maternity leave and maternity insurance. "The Law on the Amendment of Income Tax Law and Some Laws" numbered 6663 which is enacted in 29.01.2016 includes new regulations about parents working life. These regulations have the capacity to affect the working conditions and right to social security of the public officials and employees. The Law numbered 6663 allows female workers to work half-time or part-time work until the age of compulsory primary education of the child. The choice of half-time work will also affect the social security benefits.

With Law No. 6663 it is still difficult to say that the provisions that give women excessive flexibility in their working life respond to their needs. Because the length of working time in our country is long, and when the working time is shortened especially for female employees, the untried time will be evaluated with housework and child care (Akyol Mayatürk, 2015; Dalkılıç Sürgevil, 2015). In terms of female workers, this situation can create a time-monetary saving and balance of work-family life, as well as a risk of removing women from work life (Köstekli, 2011).

² Paragraph added on October 3, 2001; Code No. 4709.

³ Paragraph added on September 12, 2010; Code No. 5982

It is also seen that the leisure time created by flexibility spent in home work, and child care is caused extra time out of workplace.

Flexible regulations on the working time of women workers mean that employers will re-examine their current working time policies. It may be the case that a new worker is employed instead of a female worker who wants to use their rights such as part-time or part-time work (Köstekli, 2011). As a result, there will be new job opportunities in the sense of preventing unemployment. On the other hand, it will be difficult to employ female workers in terms of employers.

Most of the employers are likely to think that women workers would probably increase the costs of their undertakings. This is particularly linked with the concerns that women workers have the potential to become mothers in the short run and most probably start to exercise their maternity and parental leave rights afterwards (Foubert, 2002).

Protection against Discrimination

The purpose of Directive 2006/54 is defined as to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Art.1/I). The Directive contains provisions with a view to implementing the principle of equal treatment related to access to employment, including promotion and to vocational training; working conditions, including pay; and occupational social security schemes (Art.1/II).

Directive 2006/54 provides different forms of discrimination which also include any less favorable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85 (Burri-Prechal, 2009).

Women's rights returning from maternity leave are also guaranteed under this Directive. Therefore a woman after the end of her maternity leave period shall be entitled to return to her job or to an equivalent post under no less favourable terms and conditions for her and also to benefit from any improvement in working conditions to which she would have been entitled during her absence (Art. 15).

In our legislation there is no specific arrangement for the employer's equal treatment between men and women; equality is stated in

the 10th and 70th articles of the Constitution in terms of entering public services.

The principle of equal treatment is laid down under Art. 5 of Turkish Labour Code which prohibits any discrimination to be based on sex or similar reasons in the employment relationship.

It cannot be expected that the employer will treat equally as a rule during the recruitment of the worker (Eyrençi et al., 2004, Süzek, 2012). As a rule, the employment relationship between the employee and the employer must be established in order for the duty of equal treatment (Centel, 1994; Süzek, 2012).

Labour Code provides that except for biological reasons or reasons related to the nature of the job, the employer have obligation to not make any discrimination, either directly or indirectly, against an employee in the conclusion, conditions, execution and termination of his/her employment contract due to the employee's sex or maternity. Moreover, differential remuneration for similar jobs or for work of equal value is also prohibited (Art. 5/III).

In a decision of the Court of Justice of the European Union in 2001⁴, not to recruit of female employees because of pregnancy was defined as discrimination. According to the Court; the female employee does not have to tell the employer that she is pregnant during the job interview.

Restrictions on Types of Work

Article 72 of Turkish Labour Code provides that women irrespective of their age must not be employed on underground or underwater work like in mines, cable-laying and the construction of sewers and tunnels. As obvious, the EU documents recommend the removal of those restrictive measures for women.

⁴ <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-109/00&td=ALL &parties =Tele%20Danmark>

However, international law documents such as CEDAW⁵ provide that such legislation constituting discrimination against women shall be modified or abolished (CEDAW Art. 2/I).

Commission Communication “Protective Legislation for Women in the Member States of the EC” of 1987 recommends that such restrictive provisions for women likewise the one working down mines shall be repealed and the Member States shall improve the working conditions instead (Kökkilinç-Kaya, 2016).

Restrictions on Night Work

According to the European Directive 92/85 / EEC; pregnant, maternity or breastfeeding workers are restricted from working at night. It is restricted, because it will be dangerous for their health or safety working at night. Women in pregnancy and in period after childbirth will not be obliged to work at night if they are determined by the health report in accordance with the regulations laid down in national legislation (Art. 7/I).

According to Article 73 of Turkish Labour Code, the principles and methods for employing women who have completed the age of eighteen on night shifts shall be indicated in a regulation to be prepared by the Ministry of Labour and Social Security upon receiving the opinion of the Ministry Health. Thereby, Regulation on Employment of Women Workers on Night Shifts⁶ prohibits the employment of women workers on night shifts for more than 7.5 hours while the same Regulation prohibits the employment of pregnant workers till confinement and of breastfeeding workers for one year after birth (Art. 5; Art. 9). Also, the Regulation on Working Conditions of Pregnant or Breastfeeding Women,

⁵ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the UN General Assembly in 1979 (<http://www.un.org/womenwatch/daw/cedaw>)

⁶ Regulation on Employment of Women Workers on Night Shifts published in Turkish Official Gazette No.28717 on 24.07.2013. (<http://www.resmigazete.gov.tr/eskiler/2013/07/20130724-25.htm>)

Nursing Rooms and Child Care Units⁷ provides that pregnant workers shall not be obliged to work at night for one year following birth.

Protection against Dismissal

Member States shall take the necessary measures to protect workers, from consequences of dismissal which is unlawful (Art. 10/3). Workers within the scope of the Directive are protected against any dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. If some exceptional cases which are not connected with their condition occur, provided that they are permitted under national laws and the competent authority has given its consent (Kökkilinç-Kaya, 2016).

An employment contract may not be terminated because of absence by the worker due to maternity before the lapse of time corresponding to the ordinary notice period added to a six-week period beginning at the end of the eight weeks' maternity leave (Kökkilinç-Kaya, 2016; Turunç-Sur, 2010).

Protection of Employment Rights

The employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance must be ensured in accordance with national legislation and/or national practice (Art. 11/1).

Determining the minimum level of payment during maternity leave raises serious concerns. Indeed, the ILO regulations on that matter seem to differ from what was regulated under this Directive (Kökkilinç-Kaya, 2016). In that regard, according to ILO Convention No.183 on Maternity Protection, the condition that the cash benefits are to be provided at a rate no lower than a rate payable for sickness or temporary disability in accordance with national laws, is provided for only countries whose economies and social security systems are insufficiently developed (Art.7). However, for developed countries, the amount of such benefits are provided not be less than two thirds of the woman's previous earnings (Art.6/3).

⁷ Regulation on Working Conditions of Pregnant or Breastfeeding Women, Nursing Rooms and Child Care Units published in Turkish Official Gazete No.28737 on 16.08.2013. (<http://www.resmigazete.gov.tr/eskiler/2013/08/20130816-8.htm>)

Maternity Leave

EU Legislation

Maternity leave is the most significant issue that draws attention in the 92/85 Maternity Directive⁸. Workers within the scope of the Directive are entitled to a continuous period of maternity leave of at least fourteen weeks allocated before and/or after confinement in accordance with national legislation and/or practice. The Directive stipulates a compulsory maternity leave of at least two weeks allocated before and/or after confinement (Art. 8).

It's worth to mention that the European Parliament in October 2010 adopted a report which had proposed the period of maternity leave to be extended even longer than what had been earlier proposed by the European Commission, this time from eighteen weeks to full-paid twenty weeks. European Parliament's proposal also introduced a full- paid paternity leave of two weeks (Tánczos, 2015). However, the European Council is based on that it was so much costly during such an economic crisis (Milevska, 2014). Though the European Parliament was ready to make a compromise on the proposal and lower the requirements on full-paid leave. Thus, the European Commission has announced on July 1, 2015 that it has withdrawn the draft Maternity Leave Directive.

International Labour Organization documents on maternity protection which provide that maternity leave shall include a period of six weeks' compulsory leave after childbirth⁹. Pregnant workers are also entitled to –in accordance with their national laws- time off without any loss of pay to attend to ante-natal examinations if these examinations have to take place during work hours (Art. 9).

⁸Council 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.

⁹ Art.3/III of the ILO Convention C-103, Maternity Protection Convention (Revised) 1952, (http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312248:NO); Art. 4/IV of the ILO Convention C-183, Maternity Protection Convention 2000, (http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183)

Turkish Labour Code

According to Turkish Labour Code No: 4857 Article 74, female employees in principle must not be engaged in work for a total period of sixteen weeks, eight weeks before confinement and eight weeks after confinement. In case of multiple pregnancy, an extra two week period shall be added to the eight weeks before confinement during which female employees must not work. However, a female employee whose health condition is suitable as approved by a physician's certificate may work at the establishment if she so wishes up until the three weeks before delivery. In this case the time during which she has worked shall be added to the time period allowed to her after confinement.

The time periods mentioned above may be increased before and after confinement if deemed necessary in view of the female employee's health and the nature of her work. The increased time increments shall be indicated in the physician's report. The female employee shall be granted leave with pay for periodic examinations during her pregnancy. If deemed necessary in the physician's report, the pregnant employee may be assigned to lighter duties. In this case no reduction shall be made in her wage.

Article 22 of Code No. 6663 made amendments in Article 74 of Labor Code, which were accepted on 29.01.2016, has brought judgment that if the mother loses her life at birth or after childbirth, unavailable periods are given to fathers. In addition, another innovation introduced by the related law is to use maternity leave in case of adoption. The eight-week maternity leave shall be used from the date on which the child was actually delivered to the family by one of the adoptive spouses or the adoptive child (Art. 74/I). This is true for the adoption of the same rights as the adopters because it is in line with Article 10 of the Constitution, which regulates the principle of equality.

Half-time work

The amended article 74 of Labour Code No. 4857 brings the right for half-time work due to childbirth and adoption of a child for female employees. A half-time free allowance is a possibility that can be used for the purpose of care and upbringing of the child after the maternity leave after the birth, and if the child is alive. According to Article 63 of the Labour Code, the duration of normal work in our law is forty-five

hours a week. Unless otherwise agreed, this period shall be applied equally to the working days of the workplaces (Art. 63). Half-time work has also been added to the provisions that give flexibility to working time. The term of half-time work is a new concept in labour law. The half-time work is a work done until half of the weekly working hours applied in the workplace.

Half-time work, a new term entering the Labor Code, can be examined as a special type of part-time work. Thus, the rules applied to part-time work contracts can also be applied to half-time work.

Female employees can take advantage of half-time work for a certain period of time. The female employees can use half-time unpaid leave as 60 days for first birth, 120 days for second birth, and 180 days for next birth. In the case of multiple births, the period will be added to thirty days. If the child is born with a disability, the period of unpaid half-time leave will be three hundred and sixty days. Women or male workers who adopt children who have not completed the age of three will also be able to benefit from it. It should also be noted that female workers using part-time unpaid leave will not be able to benefit from the breast feeding leave.

Part-time work

The amended article 13 of Labour Code No. 4857 brings the right for part-time work due to childbirth and adoption of a child. Also a regulation on part-time work, which shall be performed after maternity leave and unpaid leave, has been issued. Parents have the right to request a part-time work until the child has come to compulsory education age. A child who has not completed the age of three with his / her spouse or individual adopter may benefit from this date as soon as the child is actually handed over. However, if one of the parents does not work, the employee will not be able to request part-time work.

The employee who has begun to work part-time will be able to return to work full-time in order not to benefit from this work again for the same child. When the employee who has worked part time and starts to work full-time, the labour contract of the replacement employee will be automatically terminated. Employees who wish to take advantage of part-time work or to return to full-time employment must notify the employer in writing at least one month in advance. The employer cannot

make a valid termination reason for the employee to request part-time working.

Breast feeding leave

Female employees are allowed a total of one and a half hours of breastfeeding per day for children under one year old. The employee decides at what hours and how many times this leave will be used (Art. 74).

It is obligatory for the employer to grant a breast feeding leave. Otherwise, the employee may demand severance pay by terminating the labour contract for a justifiable reason (Art. 24). At the same time, if the employer agrees to terminate the labour contract of the employee who requests breast feeding leave, this shall not constitute a valid or just cause for termination (Art. 18/III,d, e).

Rights to Social Security

Workers on mandatory maternity leave are paid by Social Security Institution. Benefit for temporary incapacity, breastfeeding benefit and half-time working allowance are paid under maternity insurance.

In order to prevent the loss of income that occurs during the periods when the insured person cannot work due to maternity, Social Security Institution has been entitled to benefit for temporary incapacity (Çelik, 1998; Güzel et al., 2014; Sözer, 2015; Tunçoma , 1982). Therefore, benefit for temporary incapacity is only provided for the insured female person. A spouse whose insured person is not an insured person is not entitled to a temporary incapacity benefit (Güzel et al., 2014; Tuncay et al., 2015; Arıcı, 2015). In case of maternity, the wages of female employees continue to be paid in full if they are paid monthly (Art. 49/III) (Çelik, 1998; Süzek, 2012).

It is necessary for the female employees to receive a work incompetence report related to the maternity in order to benefit from temporary incapacity benefit. Waiting time is sought to qualify for temporary incapacity benefit. Accordingly, the insured woman must have reported at least ninety days of short term insurance premiums within the year preceding birth (5510 Art. 18/I-c).

The benefit for temporary incapacity is limited only to the duration of the 16-week (18 weeks of multiple pregnancies) (Art. 18/I-c). The

medical reports issued outside the period of maternity of shall be deemed to be covered by sickness insurance (Sözer, 2015).

Nursing Benefit

The granting of nursing benefits to women in the form of maternity is also designated as monetary action (5510 Art. 16/III). The nursing benefit will be paid insured female or to the non-insured wife of insured male for giving birth.

In order to receive a nursing benefit, the insurer must be informed of the short term insurance premiums of at least 120 days (5510 Art. 16/IV).

The payment of benefit is dependent on the child's to be alive and to live. Payment is made separately for each child born. The amount is explained in the tariff. The tariff is established by the Board of Directors and approved by the Minister (5510 Art. 16/III).

In the institutional practice, the nursing benefit does not consist of periodic payments. It is a one-time payment after birth.

Maternity Benefit

The Supplementary Article has been added to the Law No. 6637 dated May 27, 2015 which regulates the provision of maternity benefits for all citizens by the Ministry.

According to this regulation, "*300 TL for the first born child, 400 TL for the second child and 600 TL for the third and subsequent children will be given to the Turkish citizens. This benefit is paid to the mother or father if one of them is a Turkish citizen or if they are both Turkish citizens the benefit is paid to mother. Maternity benefit can be paid to the father in compulsory cases determined by the Ministry*".

Turkish Civil Servants' Code

It's worth to mention that female civil servants are entitled to the same right stated above in accordance with Art. 104/A Civil Servants' Code¹⁰. The same article provides that the civil servant father is also

¹⁰ Law No.657, adopted by Turkish Parliament on 14.07.1965, published in Turkish Official Gazette No.12056 on 23.07.1965. (http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70499).

entitled to the same leave, in case of the death of his wife during or after confinement. Therefore, the provisions laid down under both Turkish Labour Code and Turkish Civil Servants' Code are compatible with that of the Directive 92/85 which indeed provides for the minimum duration of maternity leave and gives the discretion to Member States for granting longer periods.

Conclusion

It is necessary to state that the flexibility that has been created in the working life of women have the danger of removing women from working life. Bringing the allowance for part-time/half-time work due to childbirth could be considered positively in order to provide the sustainability of employment. But the provisions on flexibility laid down in new existing legislation can make a negative impact to employment in particular with the female workers. Because the provisions in the Turkish Labour Code and especially in the Regulation may influence negatively employers and workplaces and cause trouble and debates in practice. Especially the issues which should be brought by the law were brought by Regulation. These provisions should be amended and they should be brought by law.

In addition, it is important to ensure that workplaces reach minimum standards in order to fulfill supportive mechanisms for working mothers, bringing the working environment to adequate levels and monitoring the implementation.

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