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Studia Prawnoustrojowe nr 16, 33-44

2012

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Introduction

Pregnancy, childbirth and motherhood are important social events that require intensive help of the society to a woman. This help is provided in various forms. Besides the necessary health care (prenatal and postnatal care, medical care directly related to childbirth), the help in employed women consists in their release from the fulfilment of occupational duties, and in the provision of material security during this period.

The time off, during which a woman is excused from work for these reasons, is called maternity leave. As one of the significant personal obstacles to work on the employee's part, it is embodied in the provision of Section 195 ff. Act no. 262/2006 Coll., Labour Code, as subsequently amended (hereinafter referred to as "Labour Code"). Maternity leave is a traditional legal institute, which was provided for by the previous Labour Code[1] practically in the same form. It is not a matter of dispute anywhere in the world whether it is appropriate or purposeful to provide a leave from work to an employed woman in connection with childbirth. On the contrary, the minimum duration of protection in this period is embodied in a number of international treaties and documents dealing with the protection of human rights, social rights or directly of the individuals looking after children, and which are binding for modern democratic countries.

* This article was published with financial support from the GA ČR within the grant project called "Harmonization of work and family roles of employees caring for children in the Czech republic: comparison with selected foreign legal regulations" no. P408/11/1349.

[1] Act no. 65/1965 Coll., Labour Code. Maternity leave as a personal obstacle to work (Section 127) was also embodied in Chapter 7 within the special working conditions for women (Section 149 ff.). However, this classification was completely contrary to the system because this is not a working condition that enables a woman to perform work but, on the contrary, it is an obstacle to work due to which she cannot perform work.

Maternity leave provides the most efficient and maximum protection to women in connection with childbirth. Its specificity consists in the fact that it is bound to a certain, exactly defined period in a woman's life, i.e. it is not provided throughout a pregnancy but only during the last weeks before childbirth, during the period of childbirth and immediately after that (puerperium) as well as during the first weeks of life of the newborn, during which the mother is irreplaceable for the child. Therefore, at this time, which places much physical, physical, social, and economic demands on the mother, it is necessary for her to be released from any occupational duties and tasks (she is often not even capable of full work performance) in order to protect her own health and the health of the child.

Maternity leave in Labour Code

An employee is entitled to a maternity leave in relation to the delivery and care for a newborn child in the standard duration of 28 weeks. In the event of a multiple delivery, the duration of maternity leave is more convenient, i.e. it is prolonged to 37 weeks. The strain put on such a female employee is greater, especially economically but also psychically; therefore, she needs better protection in the form of a longer leave from work.

The law also lays down the exact time period to commence maternity leave – usually, an employee commences it from the beginning of the sixth week before the presumed delivery date, yet no sooner than the start of the eighth week before such date. The decisive moment is the delivery date determined by the woman's attending physician on the basis of a medical examination. It is completely up to the decision of the woman which day[2] within the above mentioned period for the commencement of maternity leave she chooses and indicates as the commencement date in the prescribed form, which is issued by the attending physician and which also serves as the application for the provision of material security during maternal leave – maternity pay.

The law does not lay down any obligation for a woman to inform her employer about her pregnancy and to notify him/her of the commencement of maternity leave. Our Labour Code or the implementing regulations do not expressly provide for this matter. The aforesaid implies that the other party of the contractual relation, i.e. the employer, is not sufficiently protected either, and may face an unpleasant and uncertain situation in relation to

[2] It is possible to choose any day of the week (holidays as well) because the duration of maternity leave is counted in weeks as seven consecutive calendar days, not as the ordinary calendar week (Monday-Sunday).

late notification of pregnancy, which may have an impact on e.g. the organization of work of the employer during maternity leave, the employer cannot arrange for an admission of a new employee for the temporary vacancy well in advance, or in the event of giving notice to the female employee[3], etc.

In Australia, for example, it is required that a woman inform her employer about being pregnant and about taking a maternity leave at least 10 weeks in advance. In Austria, a woman has to inform her employer about being pregnant and about the probable delivery date immediately after she learns about it herself. Also, she has to inform the employer about the beginning of her maternity leave immediately. In Ireland and Great Britain, a stringent procedure must be followed when communicating such information; otherwise a woman could lose her claims in the event of a lawsuit[4].

Out of the fixed duration of statutory maternity leave, six weeks are usually meant for the period before delivery, and the rest, i.e. 22 weeks, for the period after childbirth. This division is a result of double protection provided to women. A woman is entitled to health protection, i.e. necessary protection for her and the unborn child during the last weeks before the birth and during the first weeks after that (a biological factor is present here), and social protection, i.e. protection with respect to the child, who needs the care of its mother during the first months of its life.

Of course, this division should be considered as rather relative (it depends on the will of an employee when she commences maternity leave and when the birth occurs) but a certain established practice is concluded from the fact how the duration of maternity leave provided to women who are not biological mothers of a child they take care of is approached. A woman is entitled to maternity leave in the duration of 22 weeks from the moment of taking over the care of a child[5].

If a woman commences her maternity leave earlier than six weeks before the presumed delivery, or if delivery occurs later than presumed, the

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[3] The employer intends to terminate employment with a female employee by notice, e.g. for dissatisfactory working results, violation of occupational duties, for organization reasons. However, during pregnancy, a female employee is within the so-called protection period, where an express ban of dismissal is valid. This holds true even if the employer did not know about the pregnancy. It suffices that the pregnancy actually existed at the time of the notice (see Section 53 and Section 54 LC). In some types of dismissal, there is a so-called preclusive period, during which it is possible to terminate employment. Under the prov. of Section 58 Subsection 1 Labour Code, in the event of violation of an obligation arising from the legal regulations related to performed work or for a reason for which it is possible to terminate employment immediately, the employer can give notice to an employee or to terminate employment with an employee within two months from the day he/she learned about the reason for notice or immediate termination of employment, yet no later than one year from the day the reason for notice or immediate termination of employment occurred.

[4] *Ochrana mateřství ve svìtì*, "Sociální politika" 1998, no. 7–8, p. 17.

[5] Similarly – maternity leave in men (children's fathers, mothers' husbands) who take over the care of a child.

remaining period after childbirth is shortened by such period so that the total duration reaches the maximum of 28 or 37 weeks, as the case may be.

However, there are cases that a female employee cannot use up all six weeks of maternity leave before childbirth because the delivery occurred earlier than her physician determined, or due to premature birth. Such situations are relatively common since it is difficult to determine exactly when a child is born – it is a physiological event that depends on many factors that cannot be influenced by volition[6]. Therefore, a woman must not be disadvantaged under these circumstances, and she will be provided with the maternity leave in the full standard duration, even if all of this time falls on the period after childbirth (a woman does not manage to commence maternity leave before delivery due to a premature birth).

A different situation occurs if a woman does not manage to use up the six weeks before the presumed childbirth due to other causes, which are subjective; the woman decides to continue to work and commence maternity leave later – she commences her maternity leave to her own detriment[7]. This circumstance is reflected in the shortening of the total maternity leave – the woman will only be entitled to a maximum of 22 weeks after childbirth. This period cannot be extended by the time that the woman did not use up before delivery[8]. This recourse demonstrates the fact that it is both in the interest of pregnant employees (especially carrying the baby to term) and in the interest of the health of the unborn child that women commence maternity leave in time, refrain from work, and do not unnecessarily endanger their pregnancy and health, and the mission of motherhood. We will come back to this issue later herein when considering whether taking maternity leave is a woman's duty.

Maternity leave in women who have taken over the care of a child

Under Section 197 Labour Code, the claim to maternity leave is also ensured to a female employee who has not given birth to a child, i.e. is not

[6] Unless it is a planned Caesarean section delivery, especially due to health reasons on the part of the mother or the child.

[7] J. Polášek, M. Kalenská, J. Koloušek, *Žena v pracovním poměru*, Prague: Práce 1967, p. 83.

[8] Until 1 July 1987 it was possible for a woman to use up less than four weeks of maternity leave before childbirth for other reasons than premature birth, only on the basis of an express written permission of the physician stating that with regard to her good health status and good working conditions she can continue to work. This permission had to be issued in advance. Until the entry into force of the amendment to Labour Code no. 52/1987 Coll., which changes and amends some of the provisions of the Labour Code, which cancelled this option, the commencement of maternity leave was laid down within the period of eight and four weeks before the determined date of delivery – maternity leave took 26 weeks.

the child's biological mother, but has taken over the care of a child on the basis of the decision of the relevant authority or a child whose mother has died – to substitute mother care.

A decision of the relevant authority on resigning a child to the care substituting mother care is needed in such situations where the child's mother has not died but abandoned the child or stopped taking care of it for other reasons. This concerns the decision of a court or an authority of social and legal protection of children defined in the provision of Section 7 Subsection 11 Act no. 117/1995 Coll., on State Social Support, as subsequently amended[9].

In the event of taking over the care of a child whose mother has died, no decision of the relevant authority is required. In case of doubt, a confirmation of an authority of social and legal protection of children can be requested that the given female employee actually takes care of the child[10]. Mainly, this concerns the situations where the care of the child is taken over by the sister or mother of a deceased female employee, i.e. the aunt or grandmother of the orphan child.

The duration of maternity leave in such women is six weeks shorter, which corresponds to the leave that female employees usually take before childbirth in relation to advanced pregnancy, therefore there is no reason to preserve this period for women who have not given birth to the child. The leave in such cases is provided for the period of care for a newborn child or a child taken over to care because these women do not require any health protection (they have not given birth) but only social protection – necessary care for a child.

The day of taking over the child is the crucial moment for the commencement of maternity leave. The duration is determined for 22 weeks. If a female employee takes over two or more children, she is entitled to a leave of 31 weeks. However, the maternity leave can only be provided until this child reaches the maximum age of one year. The maternity leave is meant to secure proper care of a newborn child during the first months of its life, and it cannot be provided if a woman takes over the care of a child older than one year, or if she does not use up all of her maternity leave as of the child's first birthday.

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[9] A court decision on placing a child in the care of another natural person than its parents (usually a child's relative) under Section 45 Act no. 94/1963, on Family, as subsequently amended, an OSPOD decision on the so-called pre-adoption care (Section 69 Family Act), a court decision on placing a child into foster care under Section 45a through Section 45d FA, preliminary measures of child care under Section 45 FA and Section 76a Civil Procedure Code.

[10] L. Kalinová, K. Karásková, *Nemocenské pojištìní zaměstnanců a osob samostatnì výdělečnì činných*, Prague: Codex 1996, p. 114.

Commencement of maternity leave – right or duty?

With respect to the changing social and economic climate, it is interesting to consider the question whether a pregnant woman is obliged to commence maternity leave. Over the past twenty years, women have started holding higher working positions, performing leading and managerial functions in the management of both state and private companies, and maternity may have a considerable effect on their occupation. The commencement of maternity leave often means a significant impact on the financial situation of a family as well as the interruption of qualification growth, decrease in professional knowledge and experience as well as in the maintenance of working potential.

The current legislation and the legal obligations ensuing from international treaties declare the right of a woman for special care during pregnancy and protection within labour relations. This right must be respected, protected, and nobody may infringe it or take it away from a woman. The provision of Section 195 Subsection 1 states: "In relation to the birth and care of a newborn child, a female employee is entitled to maternity leave...", and Subsection 2 states: "A female employee usually commences maternity leave from the beginning of the sixth week before the presumed date of childbirth...". The wording of the provision thus unequivocally lays down that a female employee is entitled to commence maternity leave and when she can do so at the earliest.

For our purposes, we have to distinguish two basic situations:

1) a female employee intends to take maternity leave but delays its commencement or gets back to work before using up the complete leave, or

2) a female employee decides not to make use of her right to maternity leave at all.

In the first case above, the maternity leave is shortened by the time the female employee commenced it later than the fixed term, i.e. the beginning of the sixth week before the presumed date of delivery. If she decides to return to work before using up the complete leave of 28 weeks, possibly shortened by the unused period before childbirth, it is necessary to take into account the clause stated in Section 195 Subsection 5 Labour Code: "Maternity leave in relation to childbirth must not be shorter than 14 weeks and must not be terminated or interrupted before the expiry of the period of six months from childbirth"[11]. This minimum duration of maternity leave is to be interpreted not only as the necessary protection of employed women in

[11] Also, it applies in the event that a child is born dead or dies after the birth, the mother abandons the child or the child stays, due to health reasons, at an infant home or another health care facility.

relation to childbirth and puerperium[12] but also as the absolute and general ban to perform any work whatsoever.

It is questionable whether this ban to perform work during the puerperium, along with the minimum duration of maternity leave, can be applied to those female employees who decide not to make use of their right to this time off work. If the Labour Code provides protection from the performance of work to the women who have given birth, it is necessary, in our opinion, to apply it to the women who do not commence maternity leave (do not notify their employer of the obstacle to work, do not submit to the employer the prescribed form in proof of this obstacle, used as the application for maternity benefits) but e.g. commence convalescent leave. Thus, it makes not difference to an employer whether an employee commences her maternity leave or not. During the period of six weeks after childbirth, the employer must not assign any work to a female employee, within the total uninterrupted duration of at least 14 weeks of release from occupational obligation.

As implied above, we believe that it is not contrary to statutory provisions if a pregnant employee stays at work before the presumed date of delivery even if the period of six weeks until the determined date of delivery has expired, and the employer assigns work to her in accordance with the employment contract, if such work does not endanger her health and corresponds to her health status and capabilities during pregnancy[13]. Of course, such cases will not occur frequently since the absolute majority of women commence maternity leave within the defined period; however, there are professions where the performance of work immediately before childbirth does not have to form an obstacle. Also, until recently (see note no. 6) it was possible to perform work during such period if the woman's physician approved this. However, it is crucial that the female employee intends to use up the time off work in relation to childbirth in the future (convalescent leave, time off without wage compensation). We understand the moment of childbirth, in compliance with the cited provision of Section 195 Subsection 2 Labour Code, as the latest possible day of commencement of this leave from work.

However, it should not be ignored that during advanced pregnancy, i.e. immediately before delivery, the employee exposes herself, at her own discretion and decision, to an increased health hazard both to herself and the

[12] Puerperium is the period in which a woman – birth mother recovers from the delivery and its consequences, various injuries related to childbirth heal, etc. Therefore, she needs to be protected at this stage of life more than after its lapse. A stringent principle applies saying that maternity leave and the related provision of maternity benefits cannot be interrupted or terminated during this period for any reason whatsoever.

[13] Compare J. Jakubka, P. Hloušková, E. Hofmannová, Z. Schmied, Z. Šubertová, L. Tomandlová, L. Trylč, *Zákoník práce provádìcí nařízení vlády a další související předpisy s komentářem*, Olomouc: ANAG 2007, p. 275.

unborn child, even though she must be aware of the possible consequences and risks for herself and the child related to the performance of work during advanced pregnancy. Therefore, the crucial factor will not only be the difficulty of work to be performed but also reasonable consideration of a woman as to whether she manages to perform her work with regard to her health status. Thus, each case needs to be approached individually.

In this regard, let me raise quite a "daring" question as to what would happen if damage to the woman's health or to the foetus or a job-related injury occurs, and the relation of such damage and the performance of work during pregnancy is proved when the woman was already supposed to take maternity leave? Why could not the employer in this case be fully or partially released from the liability to damage?[14]

Similarly, in the event that a woman decides to terminate her maternity leave prematurely and return to work before the expiry of the total period of maternity leave, the employer is not allowed to reject her and refer her to the time she has used up this leave completely. Moreover, this is related to another question as to whether such action causes certain operational and organizational problems to the employer if he/she does not expect the action of the employee and assumes that she will use up the total period of maternity leave she is entitled to. This is why there should be willingness on both parts (especially on the part of the employee) to negotiate and inform the other contractual party in advance of one's future intentions. This will prevent certain difficulties related to premature return to work.

It is completely irrelevant to consider the right to take maternity leave in relation to taking over the care of a child to substitute mother care as there exists no minimum protection period of maternity leave for these women. This is only provided for the purpose of health protection of women in relation to childbirth. Therefore, the exercise of the right to maternity leave when a woman takes over the care of a child is her free choice.

Protective function of maternity leave

The particular manifestations of the protective function of maternity leave can be found in the following legal institutes:

[14] Comp. the provision of Section 367 Subsection 2b) Labour Code. Under this provision, an employer is partially released from the liability to a job-related injury if it is proven that the employer has incurred a damage because an employee had acted contrary to the common way of conduct, so it is obvious that although he/she did not violate any statutory or other provisions or instructions to ensure occupational safety and health protection, he/she acted carelessly, although he/she, with regard to his/her qualification, must have been aware of the fact that he/she can inflict damage to his/her health. Common unwariness and acting ensuing from occupational risk cannot be considered as a careless action.

- leave from work (Section 191 Labour Code),
- dismissal ban (Section 53 in rel. to Section 54 Labour Code),
- ban of immediate termination of employment (Section 55 Subsection 2 Labour Code),
- return from maternity leave (Section 47 Labour Code),
- material security during maternity leave[15].

These areas reflect the EC Directive on the equal treatment for men and women, and the EC directive on parental leave[16] because the protective function also applies to men who take parental leave, which has the same duration as the maternity leave a woman is entitled to take (28 or 37 weeks), beginning with the birth of the child.

Further, we will only deal briefly with the leave from work and the return from maternity leave because the other aspects of women protection are beyond the scope of this text.

Leave from work

Maternity leave is a time off work that every employer must provide to an employee in relation to her advance pregnancy, childbirth and care of the newborn child. It is a legal claim of every such woman to a leave from work without being obliged to apply for the provision of maternity leave separately or fulfil further conditions, it is sufficient to prove the existence of the obstacle to work.

The employee only informs the employer about the commencement of maternity leave usually by indicating this date in a prescribed form, which is used to exercise the claim to material security during this leave (maternity pay), and which is issued by the woman's attending physician, determining the presumed date of childbirth. Of course, different forms of notification or earlier notification of pregnancy are not excluded – such action is welcome and beneficial, it reflects the correct and good relations between the employee and the employer, and brings legal safeguard to the sphere of employment.

Under Section 191 Labour Code, an employer is obliged to excuse the absence of a female employee from work during maternity leave because this constitutes one of the statutory provided, significant personal obstacles to work on the employee's part.

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[15] During maternity leave women are provided maternity benefits from the social security system, under the conditions laid down in Section 32 ff. Act no. 187/2006 Coll., on Sickness Insurance, as subsequently amended.

[16] EC Directive no. 76/207/EC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Directive no. 96/34/EC, on parental leave.

The method of notification of the commencement of maternity leave is not formally provided for and it is not determined when a woman is obliged to inform her employer of this fact at the latest. In the Czech Republic, pregnant women have more rights and automatic protection regardless of the moment their employer learns about their pregnancy, which is different in other countries.

Return from maternity leave

As regards the legal safeguard of employees, the obligation of the employer related to the return of an employee to work after the extinction of one of the defined obstacles due to which the employee could not objectively perform work and was excused from work is very important. This obligation of an employer also applies to the situation when a woman returns to work after the end of maternity leave.

In accordance with the provision of Section 47 Labour Code, an employer is obliged to place an employee returning to work after the end of maternity leave to her previous job and workplace. This provision represents an advantage for the employees who take maternity leave as opposed to those who also take parental leave[17] because the law guarantees them their previous job at the previous workplace. If this is not possible because the previous job or workplace were cancelled, the employer will place them in accordance with the employment contract.

Conclusion

The fixed duration of maternity leave in our country is in compliance with the European Social Charter[18] and Convention no. 103 on Maternity Protection[19]. The minimum duration of time off work for the purpose of health protection of a woman at the time of childbirth, immediately before it and during the puerperium is fixed for 12 weeks.

[17] If a female employee returns to work after the end of parental leave (max. until the age of three of the child), the employer is obliged to assign work to her in accordance with employment contract, i.e. also at another workplace and other work than before childbirth, yet only within the sort of work and at the place of work performance stipulated in the employment contract (Section 38 Subsection 1a) Labour Code).

[18] Notification no. 14/2000 Coll., on European Social Charter.

[19] A convention of the International Labour Organization. However, it has not been ratified by the Czech Republic so far, and therefore, it is not part of our legal system. This convention provides the minimum duration of maternity leave – always in the duration of at least 12 weeks. Virtually, in all European countries, including the Czech Republic, the duration is longer at present.

The duration of maternity leave differs from country to country – it depends on many factors, especially the demographic (development of population), historical and economic ones, and on the traditions of the given country. The Czech Republic and a few other countries (e.g. Slovakia and Sweden) hold worldwide primacy in the extent of maternity leave. Over the years, maternity leave has been prolonged several times in our country but it has always by far exceeded the general standard in the duration and intensity of protection.

Along with the fact that the legislation provides for longer maternity in the event of multiple childbirth, it can be stated that employed women in our country are provided with a high level of protection during advanced pregnancy and maternity. Nevertheless, we can find certain aspects for improvement and alteration.

In case a woman does not exercise her statutory right to maternity leave (takes e.g. convalescence leave at the time of childbirth), there should be a special ban to perform any work within six weeks after childbirth. The provision of Section 195 Subsection 5 Labour Code only covers this issue in relation to maternity leave, and some employers or employees might interpret it as if it did not apply to them.

As has been indicated above, the lawmakers should lay down the periods to be adhered to by an employee with respect to her employer when exercising her right to take maternity leave, when notifying him/her of her pregnancy, of the date of commencement of maternity leave and end of this leave. E.g. in the event of premature return to work during maternity leave, the woman would have to notify the employer of this fact one month in advance, the information of her pregnancy would have to be provided before the completion of the 1st trimester, etc.

Streszczenie

Urlop macierzyński i kwestie prawne z tym związane

Słowa kluczowe: urlop macierzyński, ciąża, prawo pracy, prawa kobiet.

Urlop macierzyński jest tradycyjną instytucją ochrony kobiet pracujących w okresie ciąży, połogu i opieki nad nowo narodzonym dzieckiem. W odpowiedzi na zmiany społeczne (równouprawnienie płci, emancypację kobiet, rosnącą rolę ojca) regulacje wspólnotowe pozwalają również pracownikowi płci męskiej w pełni osobiście uczestniczyć w opiece nad dzieckiem od momentu jego narodzin do określonego wieku. Czas trwania urlopu macierzyńskiego w Republice Czeskiej wynosi 28 tygodni (w przypadku wieloracz-

ków 37 tygodni). Opiekujący się dzieckiem mają prawo do czasu wolnego w wymiarze 22 (31) tygodni.

Autorka artykułu zastanawia się, czy rozpoczęcie urlopu macierzyńskiego jest prawem, czy też obowiązkiem pracownika. Rozpatruje też możliwe konsekwencje prawne tychże regulacji. Pracodawca jest zobowiązany pozwolić pracownikowi na opuszczenie pracy. Zakazane jest zwolnienie kobiety w trakcie ciąży lub urlopu macierzyńskiego (z wyjątkiem przyczyn organizacyjnych) oraz natychmiastowe zakończenie zatrudnienia w tym okresie. Po powrocie z urlopu macierzyńskiego pracownik ma prawo do wykonywania tej samej pracy. Pracodawca jest zobowiązany przypisać mu te same zadania na tym samym stanowisku. Ta regulacja prawna jest korzystniejsza dla pracowników przebywających na urlopie macierzyńskim niż tych na urlopie rodzicielskim (aż do ukończenia 3 roku przez dziecko) – w przypadku urlopu macierzyńskiego prawo gwarantuje pracownikowi przywrócenie do pracy na tym samym stanowisku. Podczas urlopu macierzyńskiego kobiety korzystają z zabezpieczenia społecznego w postaci dodatków macierzyńskich.