Legal opinion

Protection of pregnant women from dismissal

by

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within

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Baltic Labour Law Project

Case 132, Latvia 28
Summary:
In the end of 2002 the Latvian Employers’ Confederation made a proposal for a series of amendments to the Labour Law, which has been in force since 1st June 2002. Among the proposals there is an amendment to Section 109 Paragraph 1 of the Labour Law. This provision currently reads:
Section 109.
Prohibitions and Restrictions on a Notice of Termination by an Employer

(1) An employer is prohibited from giving a notice of termination of a contract of employment to a pregnant woman, as well as to a woman following the period after birth up to one year, but if a woman is breastfeeding – during the whole period of breastfeeding except in cases set out in Section 101, Paragraph one, Clauses 1, 2, 3, 4, 5 and 10 of this Law.

(2) An employer is prohibited from giving a notice of termination of a contract of employment to an employee who is declared to be a disabled person, except in cases set out in Section 101, Paragraph one, Clauses 1, 2, 3, 4, 5, 7 and 10 of this Law.

(3) An employer does not have the right to give a notice of termination of a contract of employment during a period of temporary incapacity of an employee, as well as during a period when an employee is on leave or is not performing the work due to other justifiable reasons.

The proposed amendment should render the provision as follows:

(1) An employer is prohibited from giving a notice of termination of a contract of employment to a pregnant woman, as well as to a woman following the period after birth up to one year, but if a woman is breastfeeding – during the whole period of breastfeeding except in cases set out in Section 47, Paragraph 1, Section 101, Paragraph one, Clauses 1, 2, 3, 4, 5 and 10 of this Law.

Section 47 Paragraph 1 of the Labour Law reads as follows:
Section 47. Consequences of a Probation Period

(1) During the probation period, the employer and the employee have the right to give a notice of termination of the contract of employment in writing three-days prior to termination. An employer, when giving the notice of termination of a contract of employment during a probation period, does not have a duty to indicate the cause for such notice.
This proposed amendment has initiated discussion among trade union lawyers as to what the extent of protection for women in such cases is under EU law and ILO present standards.

The Labour Law includes protection of employees from dismissal during the period when the employee is away on leave (Section 109 Paragraph 3), which for women includes prenatal and maternity leave (Section 154), as well as parental leave (Section 156). However, a pregnant woman can obtain maternity leave (and thus protection from dismissal) at the most 70 days before the predicted birth date.

In view of the facts explained above, LBAS poses two questions in this case:

1. What protection from dismissal, in accordance with ILO and EU legal standards, can a pregnant woman obtain before the prenatal leave, i.e. approx. in the first seven months of pregnancy?
2. Is the proposed amendment to Section 109 Paragraph 1 compatible with these standards?

EXPERT OPINION CONCLUSIONS

Dismissing pregnant workers during the probation period on grounds of pregnancy is contrary to International and European legislation. Most EU Member States even provide specific protection for pregnant workers during the probation period. Dismissal on other grounds has to be carefully checked.

Trade unions should try to change the amendment of Section 109, paragraph 1, as it means a decrease of protection of pregnant workers. The not existing obligation of the employer to give grounds for dismissal in writing is unacceptable, as it is in contradiction with European legislation.

Should the law come into force with the new wording, each time a pregnant worker is dismissed during the probation period the case should be brought to court, to make sure, that the dismissal is not based on the pregnancy as such?

INTERNATIONAL EXPERT OPINION

The question asked by LBAS was the following: what protection from dismissal, in accordance with ILO and EU legal standards, can a pregnant woman obtain before the prenatal leave, i.e. approx. in the first seven months of pregnancy. The opinion will focus on maternity leave and on the probation period regarding dismissal protection.
A) International level

I) Maternity leave/ Dismissal protection

1.) Revised European Social Charter

Latvia did not sign and ratify the Revised European Social Charter but they ratified the ESC in 2002, which came into force the 02.03.2002.

In Part I 8. it is laid down that “employed women, in case of maternity, have the right to a special protection.”

Art. 81, 2.
“With a view to ensuring the effective exercise of the right of employed women to protection of maternity, the Parties undertake:
1.) to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to, a total of at least fourteen weeks;

The Committee of Independent Experts of the European Social Charter attached importance “to the fact that the length of leave provided under the Charter is a minimum, (...) It is also stressed in the Committee’s First report on certain provisions of the Charter which have not been accepted (p.19) : “As the Charter makes clear, the twelve-week period of leave, partly before and partly after the birth, is to be regarded as minimum, since it is important both to allow the mother sufficient time to prepare properly for the confinement and for her subsequent return to work and to enable the special needs of the child to be met.” As a result no inferior length of leave is admissible.”

2.) to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;
3.) (...)“The Committee, from the very first supervision cycle, interpreted this provision “as not laying down an absolute prohibition which could be removed, for instance, in the following cases:
1.) if an employed woman has been guilty of misconduct which justifies breaking off the employment relationship,
2.) if the undertaking concerned ceases to operate,
3.) if the period prescribed in the employment contract has expired”
This view has been retained by the Committee throughout all the supervision cycles (...).

When national laws permit dismissal during maternity leave in some cases, the Committee is careful to ensure that these correspond to the authorized reasons under its case law, especially when only very general terms are used in the reports, such as "urgent reasons" (Conclusions XIII-1, p.179, the Netherlands), “objective reasons” (Conclusions XIII-2, pp.215 and 216, Spain) or “serious grounds” (Addendum to Conclusions XIII-3, p.49, Luxembourg).

The Committee points out “that Article 8 para.2 “is intended to protect not only the financial security of female workers, but also their security of employment”.

2.) ILO Convention No.183 on Maternity Protection, 2000

In this Convention on Maternity Protection are regulated beneath other subjects the question of maternity leave, employment protection and non-discrimination.

The ILO Convention No. 183 is the revision of the Convention No. 103 of 1952, which revised the Convention No. 3 of 1919; all three Conventions are on maternity protection. Latvia did ratify the Convention on Maternity Protection No.3 of 1919. Already in the first Convention on Maternity Protection can be found the notion of maternity leave and a provision on dismissal protection. Nevertheless the opinion will be based on the most recent ILO Convention.

Art. 41, 5.
“1. On production of a medical certificate or other appropriate certification, as determined by national law and practice, stating the presumed date of childbirth, a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks.

(...)

5. The prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date of childbirth and the actual date of childbirth, without reduction in any compulsory portion of postnatal leave.”

Art. 8, 1.
“It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4
or 5 during a period following her return to work prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.”

II) Equal treatment

1.) Convention on the elimination of all forms of discrimination against women

14.04.1992 is the date of receipt of the accession of Latvia to this convention of the UN.

Art. 11, paragraph 2
“In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
a) to prohibit, subject to sanctions, dismissal on the grounds of pregnancy or of maternity leave and (…)

2.) Revised European Social Charter

Part II, Article 27
The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex

“1. With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields:
· access to employment, protection against dismissal and occupational resettlement;
· (…)”

III) Conclusions
On international level maternity leave shall not be less than 14 weeks. Pregnant women are protected against dismissal during the entire period of pregnancy. Dismissal because of a woman being pregnant is direct discrimination on the grounds of sex. Only dismissal for reasons not related to pregnancy are possible under very strict conditions

B) European level.
I) Council Directive 92/85/EEC concerning the implementation of measures to encourage improvements in the safety and health of pregnant workers, women workers who have recently given birth and women who are breastfeeding

1.) Maternity leave

Regarding Maternity leave the Directive provides the following:

Art. 8 Maternity leave
“1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.”

The practice in the Member States after implementation of the Directive is the following:

“In Austria, there is an absolute ban on working for 8 weeks before the birth and 8 weeks afterwards. In Belgium, maternity leave lasts for a maximum of 15 weeks, made up of a compulsory period consisting of one week before the birth and 8 weeks afterwards. The remaining 6 weeks can be taken from the 49th day before the birth or it can be taken after the 8 weeks after the birth, or it can be not taken at all (although a woman cannot be forced to give it up). In Denmark, maternity leave lasts for 28 weeks, made up of four weeks before the birth, a compulsory two weeks after the birth followed by a further 22 weeks. Finnish law lays down the period for which maternity allowance is payable, rather than specifying the length of maternity leave. Maternity allowance is payable from, at the latest, 30 days before the birth and continues for 75 days afterwards. There is no compulsory maternity leave, although for two weeks after the birth a woman can only do very light work, supported by a medical certificate that the work is risk free. French maternity leave starts 6 weeks before the birth and continues for 10 weeks after it. The woman is legally not able to work for 8 weeks, of which at least 6 weeks must be after the birth.

In Germany work is prohibited for 6 weeks before the birth, although the woman can request to work during that period. She may not work for 8 weeks after the birth. Greek maternity leave is for 16 weeks, 8 weeks before the birth and 8 weeks afterwards, all of which is compulsory. In Ireland, women can take up to 14 weeks' maternity leave, of which 4 weeks
are compulsory before the birth and 4 weeks are compulsory after the birth. At the end of the 14 weeks, women have the right to take a further 4 weeks immediately. Italy bans women from working in the two months preceding the birth and in the three months following it. If the woman does heavy work she may not work for three months before the birth. In Luxembourg a pregnant woman must stop work 8 weeks before the birth and is not allowed to work in the 8 weeks that follow the birth. This compulsory post-natal period is extended to 12 weeks for women who are breastfeeding. The Netherlands grants women 16 weeks maternity leave, of which 4 weeks before the birth and 8 weeks following the birth are compulsory. Portugal provides for 98 days maternity leave, 14 days of which are compulsory. 60 of the days must be taken after the birth; the remaining 30 can be taken either before or after the birth.

Spanish law provides for 16 weeks of maternity leave, which can be taken before or after the birth as the woman decides, but at least 6 weeks must be taken after the birth, during which time the woman may not work. In Sweden women are entitled to 7 weeks off work before the birth and 7 weeks after the birth. They are also entitled to leave if they are breastfeeding the baby. There is no period of compulsory maternity leave. In the UK maternity leave is 14 weeks of which 2 weeks must be taken, compulsorily, after the birth. Women working in factories must take 4 weeks after the birth. Women who have worked for the same employer for two years are entitled, after the 14 weeks maternity leave, to maternity absence up to the end of the 28th week following the birth. In Gibraltar maternity leave is for 14 weeks, of which the 2 weeks following the birth are compulsory. Although the generous maternity allowances in Finland and Sweden mean that nearly all women are on leave following the birth of a child, Directives must be implemented by legislative measures rather than practice or administrative action. Therefore the lack of a compulsory period of at least two weeks maternity leave in Sweden and Finland will be the subject of infringement proceedings.”

2.) Dismissal protection

“The Directive prohibits the dismissal of pregnant woman or a woman on maternity leave, unless it is for reasons unconnected with the pregnancy. Although such dismissals were already unlawful in most Member States, the requirement that the employer provide written reasons for any dismissal of a woman during pregnancy or maternity leave strengthens the protection afforded to pregnant women and women on maternity leave.”

Art. 10 Prohibition of dismissal
“In order to guarantee workers, with the meaning of Article 2, the exercise of their health and safety protection rights are recognized under this Article, it shall be provided that:
1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;
2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;
3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.”

“The only exception to this provision is if the dismissal is for reasons unconnected to the pregnancy, which are permitted under national law and where the appropriate authority has given its consent. If a worker protected by the Directive is dismissed during period, she has the right to be given the reason in writing. (…)

If a woman is dismissed during pregnancy or maternity leave, most of the Member States require the employer to prove that the dismissal was for an objective reason unconnected to pregnancy. In Germany the Länder supervisory authority must declare the dismissal lawful, as must the Equal Employment Commission in Portugal. In Greece the Labour Inspectorate of the Prefecture must be informed of any dismissal during pregnancy or the year that follows. In Luxembourg the employer does not appear to be under a specific duty to prove that the dismissal was for reasons unconnected with the pregnancy, although there is a special procedure which allows the dismissed woman to request the President of the Labour Court to look at her case urgently. In the other Member States there is no official authority which must authorize dismissals in these circumstances; if the woman considers that she has been unfairly dismissed she must take her case to the Labour Courts. It should be noted that Directive 97/80/EC on the burden of proof in cases of discrimination based on sex will apply to those provisions of Directive 92/85/EEC where the principle non-discrimination between women and men is to be applied, once it enters into force (1.1.2001 for the 14 Member States, 22.7.2001 for the UK).” The reversal of the burden of proof means, that it is up to the employer to proof the non-discriminatory character of a dismissal.
3.) Equal treatment

Council Directive 76/207/EEC 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

Article 2
“1. For the purpose of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital and family status.”

Article 5
“1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”

Is a woman dismissed because of her being pregnant this is direct discrimination on grounds of sex.

4.) Conclusions
On European level the period of maternity leave cannot be less than 14 weeks. Pregnant women are protected during the entire period of pregnancy against dismissal. They can only be dismissed in exceptional cases for reasons not related to the pregnancy.

C) Judgments ECJ
Case C-109/00 Tele Danmark A/S and Handels- og Kontorfunktionærernes Forbund i Danmark (HK)


26. It was also in view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions, that the Community legislature, in Article 10 of Directive 92/85, laid down special
protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave.

27. During that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition of dismissing pregnant workers, save in exceptional cases not connected with their condition where the employer justifies the dismissal in writing. “

The same reasoning can be found in Case C-394/96 of the ECJ.

D) Conclusion

At International and European level women are protected from dismissal during the whole period of pregnancy. The actual start of protection can depend on the notification of the pregnancy to the employer. The duration of maternity leave cannot be less than 14 weeks. This protection was ensured “in view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, (…), including the particularly serious risk that they may be encouraged to have abortions.” That is the reason why it covers the whole period of pregnancy and why nearly no exceptions are permitted.

Is a woman dismissed because of her pregnancy this is discrimination on grounds of sex under the UN Convention on the elimination of all forms of discrimination against women, the Revised European Social Charter and EU Directive 76/207/EEC.

In most EU Member States a discriminatory dismissal is either sanctioned by obliging the employer to pay compensation or to reintegrate the dismissed women. Exceptions to this general protection can be found at International level only in the interpretation of the European Social Charter of the Committee of Experts. The reasons given under which dismissal of pregnant women is possible are those, which are not in relation with the pregnancy. The same exception exists at European level in Council Directive 92/85/EEC. Under this legislation dismissal is possible when unconnected to pregnancy. The employer is obliged to give written reasons for the dismissal. Any other exception to protection of pregnant workers cannot be found.

As well the ECJ underlines in the above-mentioned judgments that no exception to the protection of pregnant workers exists under Directive 92/85/EC except on grounds not related to pregnancy.

Probation period – dismissal

A probation period is a period at the beginning of an employment relationship in which the employee shall have the possibility to see if the
work is adequate for him and the employer shall be able to check if he has chosen the right person for this work.

In this period termination of employment is easier for both sides than after this period of time. The probation period is only regulated at national level.

1.) Practice in EU Member States - probation period regarding open-ended contracts

In Austria the trial period is one month and workers can be dismissed without notice. Pregnant women cannot be dismissed during pregnancy (§ 10 MSchG) when the employer knows of the pregnancy or is informed within 5 days after the dismissal. Dismissal is only possible with prior court approval.

In Belgium a probationary clause must be integrated in the employment contract. The probation period has to respect minimal and maximal duration. For workers this is 7 days minimum and 14 days maximum; for employees 1 month minimum and 6 months maximum, if the annual remuneration is less than 30.301 Euros, is it more, than the maximum can be up to 12 months.

Pregnant women are protected from dismissal from the day the employer is informed about the pregnancy. Pregnant women can only be dismissed for reasons which have nothing to do with her physical condition, such as very serious reasons or economic or technical reasons.

In Finland the probation period can have a maximum length of four months. The employment relationship can be terminated without giving a notice period. The provisions on dismissal protection do normally not apply in the probation period. However the termination cannot be discriminatory.

In France the probation period is not restricted to a certain time limit, but it must take place at the beginning of an employment relationship. Termination is possible without notice or compensation. During the probation period a pregnant woman cannot be dismissed because of her pregnancy, only for reasons not in relation with it.

In Germany the length of the probation period for an open-ended contract follows the principle of proportionality. Case law normally sees the maximum length reached after six months. In a probation period up to six months the notice period is two weeks. In the probation period the dismissal protection for special groups of workers applies. So pregnant
women cannot be dismissed if the employer is informed of the pregnancy or notified of it within 14 days following the dismissal.

In Italy the employment relationship can be terminated during the probation period without notice and without compensation.

In the Netherlands the probation period cannot exceed two months. The employment relationship can be terminated without respecting a notice period. An employee is not protected during this period of time against unjustified dismissal. However, following case law an employer has to pay compensation if he terminated the employment relationship based on discriminatory reasons, such as pregnancy.

In Spain during the probation period the employment relationship can be terminated by either party without giving reasons and without the obligation to pay compensation. This is not the case if provisions in this respect have been laid down in collective agreements or in the employment contract. Is a worker pregnant during the probation period this period can be suspended, if both parties agree on it?

In Sweden during the probation period the employment relationship can be terminated in any way. The employee must be informed on the matters, as well as the trade union (two weeks before the termination). This means that no real notice period exists but that the delay of 2 weeks has to be respected.

In the United Kingdom the rights to protection before birth giving and giving reasons by writing for a dismissal during pregnancy do apply from the beginning of an employment relationship.

2.) Conclusion

In the EU Member States during the probation period no notice or only a very short notice has to be respected, no compensation has to be paid in case of dismissal. The trial period is with the exception of France restricted in time, in Germany this restriction is introduced via case law. In most EU Member States the dismissal of a pregnant worker on grounds of the pregnancy is discriminatory or dismissal is not possible at all.

3.) Latvian Law

Under the new amendments of the Latvian Labour Law dismissal of a pregnant woman would be possible during the probation period, which may
not exceed three months. But it would be impossible from the moment a woman is on prenatal leave, as paragraph 3 of Section 109 does not refer to Section 47, paragraph 1. Prenatal leave is accorded to pregnant women 56 calendar days before giving birth.

So, it is most important to see, if the lack of protection before prenatal leave being in the probation period do meet international and European standards.

First of all must be pointed out, that the fact that the employer does not have the duty to indicate the cause of termination during a probation period cannot be applied in the case of dismissing pregnant women. On European level the employer is obliged to give substantial grounds for the dismissal in writing (Directive 92/85/EC). If the employer would not be obliged to give reasons it would be too easy for him saying that the dismissal is not related to pregnancy.

The wording of the amended paragraph is therefore in this respect contrary to European legislation.

The other exceptions given to the protection of dismissal of pregnant workers under Latvian law are the following (Section 101, paragraph 1, Clauses 1 to 5 and 10):

· the employee has without justified cause significantly violated the employment contract or the specified working procedures
· the employee, when performing work, has acted illegally and therefore has lost the trust of the employer
· the employee, when performing work, has acted contrary to moral principles and such action is incompatible with the continuation of employment legal relationships
· the employee, when performing work, is under the influence of alcohol, narcotic or toxic substances
· the employee has grossly violated labour protection regulations and has jeopardized the safety and health of other persons
· the employer – legal person or partnership – is being liquidated

These are all reasons for dismissal not in relation with the pregnancy of a worker. As the reasons given are quite precise, they might be admitted under the case law of the Committee of Independent Experts of the European Social Charter.

By amending the Labour Code and adding another possibility of dismissal of pregnant workers, in case of a probation period, to the once listed above, the government wanted to enlarge the possibility of dismissal and to decrease the level of protection of pregnant workers. In the probation
period a pregnant woman could then be dismissed for any reason not just the once listed in Section 101.

Final conclusion
Dismissing pregnant workers during the probation period on grounds of pregnancy is contrary to International and European legislation. Most EU Member States even provide specific protection for pregnant workers during the probation period. Dismissal on other grounds has to be carefully checked. Trade unions should try to change the amendment of Section 109, paragraph 1, as it means a decrease of protection of pregnant workers. The not existing obligation of the employer to give grounds for dismissal in writing is unacceptable, as it is in contradiction with European legislation.

Should the law come into force with the new wording, each time a pregnant worker is dismissed during the probation period the case should be brought to court, to make sure, that the dismissal is not based on the pregnancy as such?

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