PROTECTION OF WOMEN WORKERS IN PREGNANCY AND MATERNİTY STATUS IN THE CONTEXT OF COUNCIL DIRECTIVE 92/85/EEC OF 19 OCTOBER 1992

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AVRUPA BİRLİĞİNİN 19 EKİM 1992 TARİHLİ VE 92/85/EEC SAYILI YÖNERGESİ BAĞLAMINDA KADIN İŞÇİLERİN HAMİLELİK VE ANALIK DURUMLARINDA KORUNMASI

ÖZET

Hamile, loğusa ve emzikli kadın işçilerin özel risk tehdidi altında bir grup olarak değerlendirilmesinin bir sonucu olarak, kadın işçinin "hamilelik ve analık" durumu ifadesinin, hamile işçi kadın ile yeni doğum yapmış emzikli işçi kadın ve emzirme dönemini tamamlamış küçük çocuklu işçi kadını kapsadığı söylenebilecektir.

Hamilelik ve analık durumunda kadın işçinin korunması sadece iş sözleşmesinin kurulması aşamasında değil, iş sözleşmesi devam ederken uygulanması gereken çalışma koşullarında ve iş sözleşmesinin sona ermesinde de kendisini göstermektedir.

Çalışmamız, Avrupa Birliğinin konu hakkındaki düzenlemeleri bağlamında, Avrupa Birliği Adalet Divanı kararlarının incelenmesi, yeri geldikçe Türk Hukukundaki durumun teorik ve yargı kararları şeklinde belirtilmesinden oluşmaktadır.

Anahtar Kelimeler: *Kadın İşçiler, Kadın İşçilerin Korunması, Kadın İşçilerin Hamilelik Durunu, Kadın İşçilerin Analık Durumu*

ABSTRACT

As a result of considering pregnant workers, workers who have recently given birth or are breastfeeding as a special risk threat group, it can be argued that "pregnancy and nursing" status expression covers pregnant worker, worker who has recently given birth or breastfeeding and worker with small child who has recently completed breastfeeding period.

Protection of woman worker in pregnancy and nursing status applies not only in terms of establishing labor contract but also in terms of working conditions

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required to have during implementation of labor contract and of termination of the labor contract.

Our paper comprises analyses of the decisions of European Court of Justice within the framework of European regulations on the matter and description of the situation in Turkish Law in places in terms of theory and case law.

Key Words: *Women Workers, Protection of Women Workers, Women Workers in Pregnancy Status, Women Workers in Maternity Status*

1. Introduction

In principle, protection of workers during pregnancy and nursing periods need to be evaluated within the scope of equal treatment obligation of the employer[1].

In this context, direct and indirect discrimination concepts should primarily be clarified. Article 2 of 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 amended with Directive 2002/73/EC of the European Parliament and of the Council defines principle of equal treatment as absence of ay discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status and refers to direct and indirect discrimination concepts[2]. With reference to this, direct discrimination means treating a person on grounds of sex less favorably than the respective person was or would be treated in a comparable situation[3]. Indirect discrimination becomes the case where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex *(unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary)*[4].

1 MOLLAMAHMUTOĞLU, s.535.

2 http://eur-lex.europa.eu, 25.11.2008.

3 MOLLAMAHMUTOĞLU, s.537.

4 MOLLAMAHMUTOĞLU, s.537 ; DOĞAN YENİSEY, Eşit Davranma İlkesi, s.992.

As a result of considering pregnant workers, workers who have recently given birth or are breastfeeding as a special risk threat group, Council Directive 92/85/EEC 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 was adapted in 19 October 1992[5]. The first obligation brought for the employer is to inform pregnant workers and workers who have recently given birth or are breastfeeding about the risks that the might be imposed and the measures to be taken against respective risks (art.6) Furthermore, article 7 introduces obligations for Member States to take the necessary measures to ensure that pregnant workers and workers who have recently given birth or are breastfeeding are not obliged to perform night work during their pregnancy and for a period following childbirth.

Pursuant to Article 88 of Turkish Labour Code no.4857 titled *"Regulation for pregnant or breastfeeding women"*, *"Regulation on Working Conditions of Pregnant or Breastfeeding Women, Nursing Rooms and Child Care Nurseries"* was enacted[6] Article 5 of said Regulation titled *"General Assessment"* assesses impacts of chemical, physical and biological agents and industrial processes on safety and health of pregnant workers and workers who have recently delivered birth or are breastfeeding and introduces measures to be taken. Article 6 of the same Regulation titled *"Special Risks"* describes special risks and measures to be taken against respective risks together with the general measures to be taken at the end of assessing impacts of chemical, physical and biological agents and industrial processes on safety and health of pregnant workers and workers who have recently delivered birth or are breastfeeding and Articles 7 and 8 of the Regulation specifies *"Assessment"* process and defines measures to be taken by the employer according to conclusions of said assessment.

2. Protection of Pregnancy and Maternity Status on Labour Contract of the Women Workers

Provisions of Council Directive 92/85/EEC adopted to bring special protection for the women workers in European Union level during their pregnancy and nursing periods are considered important especially in regards to time off for ante-natal examinations, changing the work of the pregnant woman, maternity leave and prohibition of dismissal.

[5] http://eur-lex.europa.eu, 25.11.2008.

[6] RG 14.07.2004, 25522 ; http://ab.calisma.gov.tr/, 26.11.2008.

Article 2 of Council Directive 92/85/EEC titled *"Definitions"* defines *"pregnant worker"* means a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice (art.2/a); worker who has recently given birth means a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice (art.2/b) and worker who is breastfeeding means a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice (art.2/c). According to the Directive, pregnancy period covers the period from time of detection of the situation to time of delivering birth. Maternity period covers confinement and breastfeeding periods and other times spent for growing and caring the child.

Turkish Labour Code no. 4857 does not include any definitive provision in regard to pregnancy, maternity and breastfeeding periods of women workers. On the other hand, the Regulation defines *"pregnant worker"* means pregnant worker proving her condition with any document or written instrument to be received from any healthcare organization; *"worker who has recently delivered birth"* means a worker who has recently delivered birth and informs her employer of her condition, *"breastfeeding worker"* means a worker who breastfeeds her 0- 1 year old child and informs her employer of her condition (art.4).

Then, it can be argued that *"pregnancy and maternity"* status expression covers pregnant worker, worker who has recently delivered birth and are breastfeeding and woman worker with small child who has completed breastfeeding period[7].

1.1. Protection of Pregnancy and Maternity Status of a Women Workers in Establishing Labour Agreement

Discrimination in establishment of labour agreement may appear in form of total prohibition of several job types to women or not being preferred for respective jobs.

[7] KAPLAN-SENYEN, Hamilelik ve Analık, s.69, 94 ; ONARAN YÜKSEL, s.231, 250 ; ALTAN, s.159-160 ; OZANOĞLU, s.3.

Council Directive 76/207/EEC prohibits direct or indirect discrimination on grounds of sex in employment or promotion to a particular assignment regardless of the sector or activity field (art.3/1).

Job postings limiting eligibility with the men only, criteria used for employment, questions asked during employment interviews may constitute direct or indirect discrimination. Article 76/207/EEC prohibits asking questions about marital status and family status of the individual (art.2/1). To this effect, requirement for the candidate to answer the questions raised during employment negotiations creates another aspect of the subject[8].

Under Turkish Law, there is no regulation concerning equal treatment obligation of the employer during establishment of working relationship; however, Article 10 and 70 in the Constitution states equality of woman and man in employment opportunity in public services. The same issue is emphasized further in Convention No.111 *"Elimination of All Forms of Discrimination Against Women"* of International Labour Organization that was also ratified by Turkey (art.11/b). The provision of the article regulates right to access the same employment opportunities and the right to free choice of profession and employment as well as application of the same criteria for selection in matters of employment for women and men.

Article 5/III of Labour Code no.4857 reads: *"..... the employer shall not make any discrimination, either directly or indirectly, against an employee in conclusion, ... of her employment contract due to the gender or pregnancy"*.

Respective provision reminds whether the employer has the obligation for equal treatment in employment.

In accordance with the opinion we also agree, it is claimed that the employer has the obligation for equal treatment in establishing labour agreement based on the working of Article 5/III in Turkish Labour Code reading: *"..... the employer shall not make any discrimination, either directly or indirectly, against an employee in conclusion, ... of her employment contract due to the gender or pregnancy"*. Pursuant to this provision clearly regulating prohibition of discrimination in employment, the employer shall not refrain from concluding labour agreement just because of pregnancy of the candidate

[8] ONARAN YÜKSEL, s.153.

unless it is justified with the nature of the work[9]. Even though art.5/VI uses the expression *"in execution and termination of employment relationship"* in regulation of discrimination compensation, respective expression does not necessarily mean that the employer does not have obligation during establishment of employment agreement. The fact that Labour Code does not propose a special sanction for the acts contradicting with prohibition of discrimination during establishment of employment agreement does not necessarily mean that the employer does not have such an obligation. Discrimination compensation cannot be imposed against the employer acting in breach of prohibition of discrimination during establishment of employment relationship; however, the act may be subjected to compensation according to general provisions through evaluation of said act within the framework of *"culpa in contrahendo"*[10].

It is very common in practical business life that an employer directs questions asking the candidate whether she is pregnant or plans to get pregnant. To our opinion, if the nature of the job justifies directing the woman worker such a question, then, the question must be answered correctly; otherwise, such a question will outrage the principle of confidentiality of the private life secured under article 20 of the Constitution[11] After Turkey ratified the convention for *"Avoidance of All Kinds of Discrimination Against Women"*, there are authors stating questions about pregnancy of a woman worker should be considered invalid as such questions will create gender discrimination unless it is required due to the nature and/or conditions of the work[12]. In this context, it is not legal asking the candidate provide a certificate or report proving pregnancy test result.

To our opinion, it must be clarified as a rule that woman worker is not obliged to answer the questions not related with the workplace or the job; however, the woman worker must be considered obliged for answering respective questions if she cannot perform the work undertaken or the nature of the work is not suitable for the pregnancy[13].

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[9] MOLLAMAHMUTOĞLU, s.546-547.

[10] DOĞAN YENİSEY, Kadın Erkek Eşitliği, s.69 ; ÇELİK, İş Hukuku, s.175 ; EYRENCİ/ TAŞKENT/ ULUCAN, s.145 ; ERTÜRK, s.163 ; ONARAN YÜKSEL, s.334.

[11] EYRENCİ, s.253-255 ; TAŞKENT, s.179-180 ; ONARAN YÜKSEL, s.158-159 ; SÖZER, s.1050-1052 ; AKYİĞİT, s.44.

[12] EYRENCİ, s.254-255.

[13] TAŞKENT, s.179-180 ; EYRENCİ, s.253-255 ; ONARAN YÜKSEL, s.158-159 ; SÖZER,

In the event that the pregnancy of woman worker comes out after establishing employment relationship between the parties, the employer cannot terminate employment agreement claiming that he/she would not have established if he/she had known about pregnancy of the worker before establishing employment contract provided that the non- pregnancy is an inevitable condition for fulfillment of the work or the employer cannot cancel the agreement based on Codes of Obligations claiming to have made a significant error in essentials of the contract[14].

In its verdict awarded for a case in 1991 (In Case C-177/88)[15], European Court of Justice considered non-employment of a woman worker due to her pregnancy as discrimination. According to the Court, woman worker is not obliged to tell the employer that she is pregnant during work interview. If the woman worker is considered to have an obligation for informing the employer about her pregnancy, then, the guarantee for prohibition of dismissal introduced with article 10 of Council Directive 92/85/EEC will remain meaningless[16].

1.2. Protection of Pregnancy and Maternity Status of Women Workers on Working Conditions

1.2.1 In General

As also given in justification of article 5 of Turkish Labour Code no.4857, equal treatment obligation of the employer resulting from employment agreement is based on Article 10 in 1982 Constitution. Pursuant to respective provision, employers cannot make any discrimination due to gender or pregnancy of the gender and they cannot make discrimination in remuneration and working conditions during validity of employment contract (Labour Code art.5/III). The provision of the article also identifies the cases justifying the reasons for acting in contradiction with prohibition of discrimination or equal treatment obligation of the employer. These are biological reasons or reasons associated with the nature of the agreement. In the event that abovementioned reasons do exist and they necessitate discrimination, the behavior and action of the employer shall not contradict with obligation for equal treatment or it shall not be construed as discrimination.

s.1050-1052 ; AKYİĞİT, s. 44 ; ERTÜRK, s.160.

[14] ONARAN YÜKSEL, s.162-163 ; ERTÜRK, s.161.

[15] http://eur-lex.europa.eu/ 25.11.2008.

[16] In Case C-109/00 (http://curia.europa.eu/ 25.11.2008).

1.2.2 Time-off for ante-natal examinations

Article 74/III of Turkish Labour Code no.4857 and article 12 of said Regulation regulates giving pregnant workers time off without any loss of pay to attend periodic ante-natal examinations pay during their pregnancy. Said provisions aim to protect life and health of the woman worker and the baby expected.

According to Council Directive 92/85/EEC, Member States shall take the necessary measures to ensure that pregnant workers are entitled to, in accordance with national legislation and/or practice, time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours (art.9).

1.2.3 Maternity leave

Article 74 of Turkish Labour Code titled "Working during maternity and breastfeeding leave reads: "*In principle female employees 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.".

Maternity leave for sixteen weeks arranged as a right from the perspective of woman worker means a prohibition for the employer. That is because compelling a pregnant worker or worker who has recently delivered birth to work constitutes contradiction with respective prohibition. Furthermore, respective periods may be increased via collective labour agreements and labour agreements[17].

Article 74 remains under Chapter 4 titled "Organization of the Work" of Turkish Labour Code no.4857. However, the basic purpose of the article

[17] TULUKÇU, s.1352.

is to protect the women more than organization of the work. To this effect, the article has a constitutional ground and the principle of public interest is dominant for the aspects of said article[18].

Council Directive 92/85/EEC introduces an important obligation for the employer in regard to maternity leave. Pursuant to Article 8 of the said Directive, 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 a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. The maternity leave stipulated must include compulsory maternity leave of at least two weeks allocated before and/or after confinement (art.8/2).

The regulations in Article 74 of Turkish are in compliance with Council Directive 92/85/EEC in terms of duration of maternity leave. However, the Directive grants respective right for both female and male workers and male and female workers dealing with adoption process are also entitled to use the same maternity leave right. Called *"parental leave"* in European Justice System[19], this right coves the right of leave for women and men to provide care for their child in the event they become parents through birth or adoption[20].

Turkish Law does not include any regulation concerning provision of right of maternity leave for male worker in case of being a parent through birth or adoption.

According to the Directive, a woman worker on maternity leave shall be entitled to return to her same job, to start a new job which shall not be less favorable than her former job and to benefit from all improvements created during her absence (art.2/7). Turkish Law does not include any regulating for returning to her same job, starting a new job which shall not be less favorable than her former job or benefiting from all improvements created during her absence. Therefore, there is non-compliance between the provisions of the Council Directive and Turkish Law in this regard. However, in its recent verdict, Court of Cassation[21] has decided the women workers have the right

[18] ÇENBERCİ, s.947.

[19] KÖKKILIÇ ERALTUĞ, s.111-132.

[20] KÖKKILIÇ ERALTUĞ, s.112, 129.

[21] Court of Cassation, Division No 9, Date: 23.06.2008, Basic No: 2007/ 41015, Verdict No: 2008/ 17093.

to return to her same job, start a new job which shall not be less favorable than her former job or benefit from all improvements created during her absence at the end of maternity leave. Respective verdict overlaps with European Union regulations and regulations in Turkish Labour Law concerning protection of woman worker in her pregnancy and maternity status.

According to Article 74 of Turkish Labour Code, in case of a premature birth, the portion of leave left from pre-natal period should be added to the confinement portion of the maternity leave as respective 16 weeks maternity leave period is a protection. In case of stillbirth or death of the baby soon after the delivery, 8 weeks post-natal part of the maternity leave cannot be shortened. Furthermore, respective period can even be prolonged with the physician's report according to wording of Article 74 in Turkish Labour Code.

Article 74/III of Turkish Labour Code no. 4857 clearly regulates provision of pregnant workers time off without any loss of pay to attend periodic ante-natal examinations pay during their pregnancy. On the other hand, pursuant to the regulation in article 25/I of Turkish Labour Code, woman worker will not be entitled for the salary during 16 weeks maternity leave given as a protection right[22]. Instead, the respective woman worker will be paid temporary disability pay during maternity period as per article Law No.5510.

In European Law, all rights of the pregnant worker excluding the salary are maintained during maternity period. In fact European Court of Justice considered deprivation of pregnant worker from particular rights within framework of Council Directive 76/207/EEC as discrimination long before clear regulation introduced with Council Directive 92/85/EEC. In a verdict awarded by European Court of Justice[23], the Court stated that the period spent in maternity leave is not taken into consideration in efficiency evaluation of the woman worker as maternity leave is considered as absence creating a discrimination against the pregnant worker. Reasoning that pregnancy status of the worker cannot be compared with another person, the Court stated that woman worker having a valid employment agreement during maternity leave should benefit from the working conditions resulting employment relationship of the staid woman worker and applicable for both genders.

[22] SÖZER, s.1061 ; TULUKÇU, s.1359-1360.

[23] In Case C-136/95 (http://eurlex.europa.eu/, 28.11.2008).

In this case, the Court considered that said woman worker would have benefited from efficiency assessment if she had not been pregnant and left for maternity leave.

It is needed to emphasize that article 55 of Labour Code no.4857 stipulates that absent days woman worker during maternity leave before and after the delivery as per article 74 of the same Law are listed in list of circumstances where the worker is considered to have worked when calculating annual paid leave right of the same worker (article 55/b of Labour Agreement).

1.2.4 Right of Unpaid Leave

The right of unpaid leave at the end of 8 weeks post-natal period during which it is forbidden to compel woman worker for working is regulated in article 74/V of Labour Code. Respective provision reads: "*If the female employee so wishes, she shall be granted an unpaid leave of up to six months after the expiry of the sixteen weeks, or in the case multiple pregnancy, after the expiry of the eighteen weeks indicated above. This period shall not be considered in determining the employee's one year of service for entitlement to annual leave with pay*. Such leave is given upon request of the woman worker. Furthermore, no social insurance premium can be claimed from the woman worker as no wage/salary is paid during respective period.

As one will see, this regulation intends to provide mother more time and opportunity to be with her baby in a period where the baby is in need of tenderness and care of the mother. However, as mentioned before, such leave is given upon request of the woman worker. This period shall not be considered in determining the employee's one year of service for entitlement to annual leave with pay (article 70/IV of Labour Code). That is this period is not considered as the days worked.

1.2.5 Time off for breastfeeding

Woman worker who is breastfeeding refers to the woman worker who starts working at the end of 8 weeks postnatal period or who breastfeeds her 0- 1 age child and informs her employer of her situation. Pursuant to article last paragraph of article 74 of Labour Code, the employer is obliged to give time off for breastfeeding in particular hours of the day for the women who are breastfeeding for the good health of the children. Respective provision reads: "*Female employees shall be allowed a total of one and a half hour*

time off for breastfeeding in order to enable them to feed their children below the age of one. The employee shall decide herself the time and frequency she will use this leave. The length of time off for breastfeeding shall be treated as part of the daily working. Time.". The time off spent by woman workers for breastfeeding their baby is considered within working time according to article 66/e of Labour Code.

The Employer should provide respective permission to woman worker in the event she cannot breastfeed her baby due to any reason. The essence of regulating such an issue is to provide the mother an opportunity for dealing with and caring her baby more closely.

1.2.6 Obligation of employer for assigning lighter works for pregnant worker and worker who has recently delivered birth and is breastfeeding

According to Labour Code no.4857, the pregnant employee may be assigned to lighter duties if deemed necessary in the physician's report (art.74/IV).

According to the provision of Council Directive 92/85/EEC, The measures referred to in paragraph 1 must entail the possibility, in accordance with national legislation and/or national practice, of transfer to daytime work; or leave from work or extension of maternity leave where such a transfer is not technically and/or objectively feasible or cannot reasonably by required on duly substantiated grounds.

No deduction will be made on the wage/ salary of woman worker when she is assigned for lighter works[24].

1.2.7 Prohibition of night work for pregnant worker and worker who has recently delivered birth and is breastfeeding

In Turkish Law, it is forbidden to compel worker who has delivered birth for performing night work for following 6 months after delivery. The worker who has recently delivered birth will not be obliged to perform night work at the end of eight weeks period following the delivery and a worker who is breastfeeding will not be obliged to carry out night work after provided that health risks and hazards associated with night work is proven with a physician's report. Furthermore, the pregnant workers cannot be obliged

[24] MOLLAMAHMUTOĞLU, s.529 ; KAPLAN-SENYEN, Kadın İşçi, s.107.

to perform night work for the period from the time when their pregnancy is evidenced with physician's report to the delivery.

According to provisions of Council Directive 92/85/EEC, pregnant workers, workers who has recently delivered birth and is breast feeding are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned (art.7/1).

1.3. Termination of Employment Contract Due To Pregnancy and Maternity Status of the Women Workers

Employment contract is suspended for the period during which woman worker cannot carry out her work temporarily due to pregnancy and delivering birth.

According to article 25/I, a, the right of the employer to terminate employment contract in pregnancy and delivery emerges after woman worker exceeds the notification periods stipulated in Article 17 for eight weeks. Respective period is 16 weeks in total comprising 8 weeks of prenatal period and 8 weeks postnatal period. The employment agreement remains suspended during the period that needs to be exceeded by the woman worker for justifying termination of the employment agreement and no wage/salary is paid during respective period[25]. The notification period shall not be applicable in the event that labour contracts concluded for an indefinite period are terminated obeying the essentials of the notification requirement. However, suspension period does not create any obstacle running validity period of the contract[26].

The important point that needs to be focused on is whether termination of woman worker's employment contact due to her pregnancy status contradicts with article 5 of Labour Code in case of a workplace where female workers work only. In regard to issue of employer's equal treatment obligation in termination of the agreement, some of the authors claim that equal treatment obligation of the employer cannot apply in principle for termination of the employment due to justified reasons. However, the authors

[25] AKTAY/ ARICI/ KAPLAN-SENYEN, s.166 ; ERTÜRK, s.162.

[26] KAPLAN-SENYEN, Feshe Karşı Koruma, s.1236 ; SÜZEK, Askıya Alınma, s.90 ; ONARAN YÜKSEL, s.240-241 ; SÖZER, s.1066-1067 ; ÇENBERCİ, s.559.

supporting this idea accept that the freedom is not absolute and the employer should not misuse his/her right[27]. On the other hand, another group of Labour Law authors suggests that the employer has the obligation for equal treatment in termination of the labour contract[28].

According to Council Directive 92/85/EEC, the employer cannot dismiss of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave referred save in the exceptional cases. If a woman worker is dismissed during this period, the employer must cite duly substantiated grounds for her dismissal in writing.

European Court of Justice concludes that article 10 of the Directive covers limited employment contracts also as well as employment contracts for in indefinite period[29]. European Court of Justice decided that it does not create a case of termination prohibited under article 10 of the Directive it is claimed that an employment agreement is not renewed after its expiry due to pregnancy status of the woman worker.

However, respective situation may be construed as rejection of her employment due to her pregnancy status which contradicts with article 2/1,3 of Council Directive 76/207/EEC.

In its various verdicts, European Court of Justice repeated that material losses or operational requirements exposed by the employer cannot be considered as justification for dismissal of the pregnant worker as the employer has undertaken economic risks and those related with work order introduced by pregnancy of the woman worker[30].

The Court concludes that termination of a woman worker's employment contract due to her pregnancy or delivery contradicts with article 10 of Council Directive 92/85/EEC and article 5/1 of Council Directive 76/207/EEC[31].

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[27] DEMİR, s.126-127 ; DOĞAN YENİSEY, Ayrımcılık Yasağı, s.69 ; GÜVEN/ AYDIN, s.12.

[28] AKYİĞİT, s.292.

[29] In Case C-438/99 (http://eur-lex.europa.eu/, 05.12.2008) ; In Case C-109/00 (www.europa.eu.int/eur-lex, 06.12.2008).

[30] In Case C-32/93 (http://eur-lex.europa.eu/, 15.12.2008) ; In Case C-109/00 (http://eur-lex.europa.eu/, 15.12.2008).

[31] In Case C-460/06 http://eur-lex.europa.eu/, 15.12.2008) ; In Case C-32/93 (http://eur-lex.europa.eu/, 15.12.2008) ; In Case C- 421/92 (http://eur-lex.europa.eu/, 15.12.2008) ; In Case C-179/88 (http://eur-lex.europa.eu/, 15.12.2008) ; In Case C-109/00 (www.europa.eu.int/eur-lex, 18.12.2008).

When the verdicts awarded by European Court of Justice are analysed, it is clearly seen that majority of the decisions concerning pregnancy and confinement have questioned the reference point for comparing the status of pregnant woman. In its decisions awarded, the Court has always repeated that the status of a woman that can not work due to her pregnancy status can never be compared with status of a man who cannot work due to medical reasons or other circumstances and the status of the woman cannot be reduced to an absence situation resulting from pathological or other medical reasons which will then justify dismissal of the woman from the work. Therefore, in the event that unfavourable or negative attitudes against the woman worker are due or related to her pregnancy, the Court automatically decides existence of discrimination without any further requirement for comparison.

3. Sanctions to be Imposed Against The Employer Discrimination Due To Pregnancy or Maternity of Women Workers

1.4. In Principle

As discrimination compensation of an amount equivalent to four salary amounts of the woman worker as stipulated in article 5 of Turkish Labour Code no.4857 is applicable after establishment or termination of employment relation between the parties, there is no legal sanction for discriminating behaviour of the employer during establishment stage of employment relation. Lack of compensation sanction in Labour Code applicable against the discrimination during employment process decreases efficiency of the regulation[32]. Compensation amounting equal to four months' salary amount of respective worker can apply only for the behaviours of the employer during employment relation or at termination of the respective relation between the parties[33]. As already mentioned above, discrimination compensation cannot be imposed against the employer acting in breach of prohibition of discrimination during establishment of employment relationship; however, the act may be subjected to compensation according to general provisions through evaluation of said act within the framework of *"culpa in contrahendo"*[34]. Thus, the worker may claim her material losses resulting from employment negotiations

[32] MOLLAMAHMUTOĞLU, s.552.

[33] MOLLAMAHMUTOĞLU, s.552 ; ERTÜRK, s.163.

[34] DOĞAN YENİSEY, Kadın-Erkek Eşitliği, s.69 ; SÜZEK, İş Hukuku, s.404 ; ÇELİK, İş Hukuku, s.175 ; EYRENCİ/ TAŞKENT/ ULUCAN, s.145 ; ERTÜRK, s.163 ; ONARAN YÜKSEL, s.334.

without burden of proving employer's default *(provided that material loss resulting from wage loss due to not applying for another job, loss of more favourable contracting opportunities or loss of former job are evidenced)*.

However, no compensation can be claimed in presence of a discriminating labour advertisement as betrayal of one's trust cannot be claimed.

1.5. Legal Sanctions

According to article 5/VI of Turkish Labour Code, the employer may be sanctioned to pay discrimination compensation amounting equal to four mounts salary of respective work in the event that discrimination is evidenced during or at termination of employment relation between the parties[35] and the worker may further claim the rights divested[36].

The authors state that limiting discrimination compensation with an amount equalling to four months' salary of the worker is contradictory to the essence of European Union norms and therefore the ceiling limit of the sanction should be eliminated[37].

As the term "employment relation" exists in the Law, respective compensation can be claimed during validation of employment relationship as well as at termination of the said relationship. General provisions *(culpa in contrahendo)* can be applied only in case of discrimination during establishment of employment relationship[38].

The wage to constitute basis for discrimination compensation is the original wage according to justification of the Law[39].

The authors argue that respective compensation is partially dictating and therefore there is no obstacle for increasing respective amount under collective

[35] MOLLAMAHMUTOĞLU, s.553 ; ÇELİK, İş Hukuku, s.175 ; AKTAY/ ARICI/ KAPLAN-SENYEN, s.161 ; KANDEMİR, s.420.

[36] Court of Cassation, Division of Law No 9, Date 06.10.2003, Basis No 2003/3501, Decision No 2003/16308 ; GÜLER, s.59 ; AKTAY/ ARICI/ KAPLAN-SENYEN, s.161 ; KANDEMİR, s.420.

[37] DOĞAN YENİSEY, Ayrımcılık Yasağı, s.77.

[38] SÜZEK, İş Hukuku, s.414 ; EYRENCİ/ TAŞKENT/ ULUCAN, s.145 ; BACAK/ YİĞİT, s.24.

[39] ÇELİK, İş Hukuku, s.175 ; AKTAY/ ARICI/ KAPLAN-SENYEN, s.161 ; ŞAHLANAN, s.35-36 ; CANİKLİOĞLU/ CANBOLAT, s.230 ; BACAK/ YİĞİT, s.24.

labour agreements or labour agreements[40]. As discrimination compensation is a legal sanction for contradiction with absolute non-discrimination liability of the employer under article 5/VI of Turkish Labour Code, the worker may claim respective compensation in absence of any material loss[41].

An employer terminating employment agreement violating non-discrimination rule is deemed to have misused his/her termination right or to have conducted invalid or unfair termination right[42].

The authors argue that labour assurance compensation cannot be imposed together with discrimination compensation on grounds that more than one legal sanctions cannot be imposed against the same behaviour of the employer[43]. In the other hand, dominant opinion of the authors is that both compensations can be imposed together[44].

1.6. Administrative and Penal Sanctions

Article 99 of Turkish Labour Code dictates that the employer or his representative who; acts in violation of the principles and obligation foreseen in Articles 5 and 7 of this Act shall be liable to a fine of fifty million liras for each employee in this category (art.99/a) and it is further dictated that an employer or his representative shall be liable to a fine of five hundred million liras if he causes pregnant or confined women to work in periods before and after birth or fails to grant them leave without pay contrary to the provisions of Article 74 (article 104 of Turkish Labour Code).

Article 122 of Turkish Penal Code no.5237 title *"Discrimination"* reads that "any person who discriminates against another person on the grounds of language, race, colour, gender, disability, political view, philosophical belief, religion, sect or any similar by preventing enjoyment of a service or who offers employment or refuses employment or preventing a person from carrying out

[40] MOLLAMAHMUTOĞLU, s.553 ; SÜZEK, İş Hukuku, s.414 ; ÇANKAYA/ GÜNAY/ GÖKTAŞ, s.55 ; ÇİL, s. 321.

[41] MOLLAMAHMUTOĞLU, s.553 ; SÜZEK, İş Hukuku, s.415 ; DOĞAN YENİSEY, Ayrımcılık Yasağı, s.77 ; BACAK/ YİĞİT, s.24.

[42] MOLLAMAHMUTOĞLU, s.553 ; SÜZEK, İş Hukuku, s.415 ; DOĞAN YENİSEY, Ayrımcılık Yasağı, s.77 ; BACAK/ YİĞİT, s.24.

[43] ÇANKAYA/ GÜNAY/ GÖKTAŞ, s.57-58 ; ÇELİK, Tazminatlar, s.493 ; Court of Cassation, Division of Law No 9, Date 06.06.2007, Merit No 2007/ 30630, Decision No 2007/ 18174.

[44] MOLLAMAHMUTOĞLU, s.555 ; SÜZEK, İş Hukuku, s.416-417 ; DEMİR, s.123-125 ; ÇİL, s.676-677 ; GÜVEN/ AYDIN, s.124-125 ; DOĞAN/ YENİSEY, Ayrımcılık Yasağı, s.78-79.

an ordinary economic activity shall be sentenced to a penalty of imprisonment for a term of six months to one year or a judicial fine (art.122)[45].

1.7. Burden of Proof

One of the most important conditions for effective implementation of prohibition of discrimination is regulation of burden of proof.

The last paragraph in article 5 of Labour Code dictates that the burden of proof in regard to the violation of the abovementioned provisions by the employer rests on the employee[46]. However, considering the difficulty of burden of proof in this matter, the law maker softens burden of proof of the employee and dictates shifting the burden of proof in particular conditions. The said article reads: *"While the provisions of Article 20 are reserved, the burden of proof in regard to the violation of the above – stated provisions by the employer rests on the employee. However, if the employee shows a strong likelihood of such a violation, the burden of proof that the alleged violation has not materialized shall rest on the employer."*

Article 4 of Council Directive dictates that member countries shall be liable to take measures for proving inexistence of discrimination based on gender by the party claiming inexistence of the discrimination provided that a worker claiming to have subjected to discrimination provides cases causing to arise thought of discrimination directly or indirectly before the courts or any other competent authority according to national legal systems of the member countries.

4. Conclusion

As a result of assuming pregnant workers, workers who have recently given birth or are breastfeeding as a special risk threat group, it can be argued that *"pregnancy and maternity"* status expression covers pregnant worker, worker who has recently given birth or breastfeeding and worker with small child who has recently completed breastfeeding period.

Discrimination in establishment of labour agreement may appear in form of total prohibition of several job types to women or not being preferred for respective jobs. To our opinion, it must be clarified as a rule that woman

[45] OJ 12.10.2004, 25611 ; for the text of the law please refer to (http://www.tbmm.gov.tr/kanunlar/k5237.html).

[46] MOLLAMAHMUTOĞLU, s.553 ; ÇELİK, İş Hukuku, s.175 ; AKTAY/ ARICI/ KAPLAN-SENYEN, s.161.

worker is not obliged to answer the questions not related with the workplace or the job; however, the woman worker must be considered obliged for answering respective questions if she cannot perform the work undertaken or the nature of the work is not suitable for the pregnancy.

Pregnancy is a case requiring re-regulation of working conditions of woman worker defined under employment contract. The matter appears as impact of pregnancy period to working conditions and impacts of the maternity period starting with delivery of the woman worker to working conditions.

Employment contract is suspended for the period during which woman worker cannot carry out her work temporarily due to pregnancy and delivering birth.

The fact that no compensation sanction is defined under Labour Code against the behaviour of the employer contradictory to non-discrimination rule during employment of employment relation diminishes the efficiency of this sanction. To our opinion, the acts of employer during establishment of employment relation may be subjected to compensation amount according to general provisions through evaluation of said act within the framework of "*culpa in contrahendo*".

The employer may be sanctioned to pay discrimination compensation amounting equal to four mounts salary of respective work in the event that discrimination is evidenced during or at termination of employment relation between the parties or the worker may further claim the rights divested. As the term *"employment relation"* exists in the Law, respective compensation can be claimed during validation of employment relationship as well as at termination of the said relationship.

The wage to constitute basis for discrimination compensation is the original wage according to justification of the Law.

In principle, the burden of proof in regard to the violation of equal treatment liability by the employer rests on the employee.

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