



UNIVERSIDADE CATÓLICA PORTUGUESA

THE RIGHT OF EMPLOYED WOMEN TO PROTECTION OF MATERNITY

Are Italy and Portugal in conformity with Article 8§1, 2 and 3 of the European Social Charter?

Seminar - The Multilevel Protection of Fundamental Social Rights

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1. INTRODUCTION

The (Revised) European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights. In other words, it provides protection to everyday human rights related to employment, housing, health, education, social protection and welfare and makes sure that the enjoyment of these rights is guaranteed without discrimination.

The European Committee of Social Rights is competent to verify whether the State Parties are in conformity with the Charter through national reports drawn up by the same State Parties.

In other words, States Parties regularly submit a report on the implementation of the Charter which is examined by the Committee.

The Committee concludes whether the described national situation complies with the Charter. Otherwise, if the situation turns out to be not in conformity, the State Party concerned has to bring it into conformity. And determining whether the situation has been brought into compliance with the Charter is another task of the Committee.

The following paper is going to analyze Article 8 of the Revised European Social Charter on *The right of employed women to protection of maternity*.

Maternity protection provides for the right of all women of reproductive age to take up a job without the threat of discrimination and the right of working mothers to work in conditions of economic security and equal opportunity, as well as to benefit from adequate working conditions.

Given that only women can biologically birth and breastfeed children, maternity protection gives women the means to carry out their biological role without being marginalized in the labour market. In this sense, maternity protection is an implementation of the principle of equal opportunities and treatment at work.

Maternity protection aims to preserve the health of the mother and her child and to ensure economic security during maternity.

In particular, it safeguards against maternity-related threats to women's health through several different mechanisms, such as maternity leave, which goes to protect mother's and baby's health during the prenatal period.

Health is also guaranteed by protecting employed women from health risks and dangerous working conditions as well as supporting the healthy physical and psychological development of the mother

and the child during pregnancy, after birth and whilst breastfeeding.

On the other hand, economic security is guaranteed through cash benefits, which go to replace a portion of the income lost because of the interruption of the woman's economic activity. In fact, without income replacement, women may feel compelled to return to work right after childbirth in order to face financial hardships resulting from their absence during leave and increased costs owing to pregnancy and childbirth. And getting back to work too too soon is detrimental both for the health of the mother and for the health of the child.

Maternity protection has also an economic impact, since providing maternity leave and other maternity benefits is a good way to encourage young women, without children, to join the labour market and to incentive young mothers to return to work at the end of leave.

The paper is going to focus the attention on paragraph 1, 2 and 3 of Article 8 of the (revised) European Social Charter and to analyze how they have been implemented in law and practice by Italy and Portugal, which have ratified the revised European Social Charter respectively in 1999 and 2002. In particular, the examination is going to be led through the study of the most recent Conclusions of the European Committee of Social Rights of 2011 and 2019.

2. ARTICLE 8§1 - MATERNITY LEAVE

With a view to ensuring the effective exercise of the right of employed women to the 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;

Article 8§1 of the European Social Charter recognizes the right to Maternity Leave and to Maternity Benefits.

2.1 RIGHT TO MATERNITY LEAVE

According to the Charter, maternity leave must be at least fourteen weeks and guaranteed for all categories of employees. National law may let employed women to opt for a shorter period of maternity leave. However, at least six weeks are mandatory.

I. ITALY

In Italy maternity leave is safeguarded by Article 37 paragraph 1 of the Constitution, that states: [...] *Working conditions must allow women to fulfill their essential role in the family and ensure appropriate protection for the mother and child.*

Also Italian Civil Code in Article 2110 affirms employee's right to remuneration or adequate compensation in case of on-the-job injury, sickness, *pregnancy* or *puerperium*.

However, maternity is mostly regulated by *Testo Unico della Maternità* (Legislative Decree no. 151/2001 as amended by Budget Law of 2019).

According to Article 16 Legislative Decree no. 151/2001, maternity leave lasts five months and, as a general rule, from two months prior to the due date until three months following the delivery. However, according to Article 20, a pregnant employee can opt for the so-called *flexible* maternity: she can refrain from work from a month prior to the due date and during the four months following the delivery as long as national health service doctor or another qualified physician attests that there is no risk for her health and for the correct continuation of the pregnancy.

Maternity leave can be asked by employees who have adopted or taken in foster (Article 26 and 27 of Legislative Decree no. 151/2001).

- CONCLUSION 2011

In 2011 the Committee concludes that Italy is in conformity with the Charter since maternity leave period covers more than fourteen weeks, in particular the two months before and the three months following the childbirth and, as results from the report submitted by Italy, it is granted to any worker: as much private as government workers, as much full-time as part-time workers.

Even though employed women can opt for *flexible maternity leave*, the Committee states that Italy doesn't violate the European Social Charter since it covers at least six weeks. According to the Charter, domestic law may make a shorter period of maternity leave available but at least six weeks must be compulsory. This is the case of Italy, whose legislation allows employees to put off their maternity leave until one month before the expected date of delivery and then continue it up to four months after the childbirth.

- CONCLUSION 2019

As it is stated in the previous Conclusion of 2011, Italy is in conformity with Article 8§1 of the European Social Charter regarding the length of the leave and the compulsory maternity leave.

In the meanwhile, Article 16 of Decree No. 151/2001 on premature end to pregnancy (spontaneous or induced for therapeutic reasons abortion) has been amended by Legislative Decree No. 119 of 18 July 2011 and the Committee takes note of this meaningful change pointed out by the report submitted by Italy.

According to Article 16 paragraph 1bis of Decree No. 151/2001 as amended by Legislative Decree No. 119/2011, if abortion occurs after 180 days from the beginning of the pregnancy or in case of death of the baby at birth or during the maternity leave, maternity leave, pay and social security benefits must be recognized by INPS (National Institute for Social Security).

What's more, as long as her health conditions permit, the employee can take up work again but she has to request it to her employer with 10 days' prior notice and provide him a certificate from a national health service doctor or another qualified physician stating that returning to work will not en-

danger her health.

Considering the aim of the legislative amendment of 2011, i.e. the protection of women workers' physical and mental health, the Committee states that the situation in Italy is in conformity with the Charter regarding Article 16 paragraph 1bis of Decree No. 151/2001.

In addition, the Italian report refers to article 17 paragraph 1 of Legislative Decree no. 151/2001. According to Article 17 paragraph 1, women workers are entitled, regardless of the nature of their work, to stop work earlier in case of:

- serious complications during pregnancy or pre-existing medical conditions liable to get worse by pregnancy
- injurious working conditions for the health of the mother or the child
- woman employed in dangerous, hard and unhealthy jobs that can't be moved to another working task

More precisely, prenatal leave may be increased by *Servizio Ispezione della Direzione Provinciale del Lavoro* to three months on the grounds of a high-risk pregnancy.

II. PORTUGAL

Article 41 paragraphs 1 and 2 of the Portuguese Labour Code establishes the so-called *subsídio parental inicial exclusivo da mãe*, i.e. Parental Leave Exclusive to the Mother, encompassing:

- a maximum of four weeks voluntary leave prior to childbirth;
- six weeks compulsory leave after childbirth

In other words, employed women can enjoy up to four weeks of the initial parental leave before giving birth and must take six weeks of leave after delivery.

Parental leave exclusive to the mother's days are included in the entitlement period corresponding to *subsídio parental inicial* (Initial Parental Benefits) which is granted to mother and/or father for the birth of the child. Pursuant to article 40 paragraph 1 of the Labour Code, the working mother and father are entitled to 120 or 150 consecutive days' initial parental leave, according to parents'

choice and without prejudice to the rights of the mother. The working parents can share the enjoyment of the period of initial parental leave after the birth of the child. However, if any indication is missing, this period of leave is given to the working mother (Article 40 paragraph 8 of the Labour Code). As article 40 paragraph 4 states, in case of multiple births the period of initial leave is increased by 30 consecutive days for each twin in addition to the first.

- CONCLUSION 2011

Considering that Portuguese Labour Code recognizes working mothers' right to 10 weeks's maternity leave (4 weeks before and 6 weeks after childbirth) to which they may decide to add up to 15-days of leave, shared or not with the working father according to a joint decision, and since that mandatory postnatal leave is of 6 weeks, the Committee concludes that the situation in Portugal is in conformity with Article 8§1 of the Charter.

- CONCLUSION 2019

Considering that the situation is not changed compared with 2011, the Committee confirms that Portugal is still in conformity with Article 8§1 of the Charter in regard to the duration of the maternity leave and the provision of a compulsory maternity leave.

In its previous Conclusion of 2011 the Committee asked Portugal to specify in its following report whether Civil Service employees are entitled to four weeks' pregnancy leave and six weeks' leave after childbirth. For its part, Portuguese report confirms that Article 41, paragraphs 1 and 2, of the Labour Code apply also in the public sector and the Committee, in its Conclusion of 2019, takes note of that fact.

2.2 RIGHT TO MATERNITY BENEFITS

In accordance with article 8§1 of the Charter, for the whole period of maternity leave employers must keep paying working mothers' wage, which should not be cut down heavily in comparison with the previous pay and not be less than 70% of that wage. Alternatively, social security maternity benefit or any different compensations from public funds must be provided to the employees. However, as the Chart states, a combination of all such allowances can be fixed by the States Parties.

I. ITALY

According to Article 22 paragraph 1 of the Legislative Decree no. 151/2001, Italian employees are entitled to a maternity allowance from the INPS, equal to 80% of their regular salary, for the entire maternity leave period, i.e. 5 months (2 prior to and 3 after the date of birth or 1 month prior to and 4 after). Also freelance and self employed women must be given a daily compensation, equal to 80% of the daily minimum wage, for pregnancy and post natal period (Article 66, 68 paragraphs 2 and 70 of the Legislative Decree no. 151/2001).

Maternity contributions are often supplemented by employers in accordance with collective agreements. In fact, the majority of national collective bargaining agreements states the integration of the mandatory 80% allowance up to 100%. When it happens, the employer can apply only for an 80% refunds from INPS, whereas the remaining part must be paid directly by the employer.

- CONCLUSION 2011

Considering that employed women are entitled to 80% of their regular pay as maternity contribution, often integrated by employers in accordance with collective agreements, in 2011 the Committee states that the situation in Italy is in conformity with Article 8§1 of the Charter regarding maternity allowances.

- CONCLUSION 2019

In 2019 the Committee confirms that Italy is in conformity with Article 8§1 of the Charter since the situation is not changed compared to 2011. In particular, it reaffirms that both private sector workers and public sector workers are entitled to full pay during maternity leave. Or better, full pay is awarded to public sector workers, while 80% of the pay is given to private sector workers by INPS and the remaining 20% is often made up by employers under collective agreements.

According to the European Social Charter, the minimum amount of maternity benefits should not go below the poverty threshold, that is 50% of median equivalised income calculated by Eurostat. Since data on minimum maternity benefits are missing in the report submitted by Italy, the Committee recommends to provide this information in order to verify the conformity of the state with Article 8§1.

II. PORTUGAL

According to Portuguese Law, parental contributions are ensured for the entire period of leave, only if employees have worked for at least 6 months. What's more, employees are entitled to maternity contribution amounting to 100% of their previous remuneration only if the shorter option of Initial Parental Benefits, i.e. 120 days of leave, is chosen. If instead working parents opt for 150 days, ISS (Instituto da Segurança Social) will not grant them a full compensation but only 80% of their previous salary.

In addition, an *abono de família pré-natal* (prenatal family allowance) is available. That is awarded to pregnant employees from the 13th week of pregnancy for 6 months and it aims to encourage working women to have children by refunding them for the additional costs they incur during pregnancy period. Its amount depends on a series of parameters including household's income and it cannot exceed five times the Social Support Index Value, which was around 400 euros in 2008 and 2009. Social Support Index is actually used to define income brackets and calculate contributions to social security, since it assesses whether a particular individual or family is in a situation of economic and financial need. Although this upper limit, *abono de família pré-natal* is actually increased by 20% in case of single parent families.

- CONCLUSION 2011

Considering that working mothers are entitled to 100% of their previous wage in case of 120 days' initial parental leave and a prenatal family allowance is available, the Committee concludes that Portugal is in conformity with Article 8§1 of the Charter.

- CONCLUSION 2019

With respect to maternity benefits, the Committee states that Portugal is still in conformity with Article 8§1 of the Charter, given that working mothers are entitled to 100% of their pay during the whole period of leave, even though a minimum of six months of work is required.

What's more, the Committee takes notice of Portugal's last report on the public sector which states that the same rules apply to Civil Service employees.

According to Article 8§1 the level of income-replacement benefits should be reasonably proportioned to the previous salary (equal or close to its value) and it should never be less than 70% of the previous wage.

Moreover, the European Social Charter establishes that maternity benefits should not fall below 50% of the median equivalised income, which is calculated on the basis of the Eurostat at-risk-of-poverty threshold value. If it stands between 40% and 50% of the median equivalised income, other benefits, including social assistance and housing, should be taken into account. While, if the level of benefit is below 40% of the median equivalised income, it is manifestly inappropriate and its combination with other benefits cannot bring the situation into conformity with Article 8§1.

From Eurostat data the medium equivalised income of 2017 turns out to be €756 a month.

Therefore, 50% of the median equivalised income is €378 a month.

According to Portuguese statistics, in 2017 the minimum monthly wage was €649.83.

Even though it falls just below 50% of the median equivalised income (it stands between 40% and 50% of the median equivalised income), its combination with other maternity benefits leads the Committee to conclude that Portugal is still in conformity with Article 8§1 on this point.

3. ARTICLE 8§2 - ILLEGALITY OF DISMISSAL DURING MATERNITY LEAVE

With a view to ensuring the effective exercise of the right of employed women to the protection of maternity the Parties undertake:

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;

3.1 PROHIBITION OF DISMISSAL

Article 8§2 of the European Social Charter states that it must be considered unlawful to dismiss employees from when they notify their employer they are pregnant until the end of their maternity leave, since it puts at risk the social right to equal treatment and comes to light as a discrimination based on sex. However, it should not be read as an absolute prohibition of discharge, since the employer is allowed to dismiss in case of misconduct of the pregnant employee, closing down of the company and expiration of the work period established in the employment contract.

I. ITALY

- CONCLUSION 2011

As regards Prohibition of Dismissal, the Committee states in its Conclusion of 2011 that Italy is in conformity with Article 8§2 of the European Social Charter since Article 54 paragraph 1 of Legislative Decree No. 151/ 2001 establishes that employed women cannot be fired from the beginning of the pregnancy until the child is one year old.

As the Charter says, Article 8§2 doesn't lay down an absolute prohibition of dismissal and exceptions are allowed. As regards Italy, Article 54 paragraph 3 of the aforementioned Legislative Decree, affirms when the dismissal is justified. In particular, the employer can lay off the pregnant employee in case of:

- serious misbehavior which justifies the termination of the employment relationship
- closure of the employer's enterprise
- completion of the task for which the employee has been hired or expiration of the term of the contract
- failure of the employee's trial period.

The Committee pays attention also to Article 55 paragraph 4 of Legislative Decree No. 151/ 2001 which affirms that resignation during pregnancy and until the child is one year old must be validated by the Labour Inspectorate.

What's more, judgment No. 6199/98 of the Court of Cassation is taken in account by the Committee since it confirms that the prohibition of dismissal during pregnancy also applies to domestic workers.

- CONCLUSION 2019

In 2019 the Committee reiterates that Italy is in conformity with Article 8§2 of the Charter since the situation remains unchanged compared to 2011. Here the Committee simply takes in account judgment No. 27055/2013 of the Court of Cassation, confirming that the employer cannot dismiss the employee until the child turns one year old because of restructuring or staff cuts. On the contrary, dismissal is allowed only in the event that the company stops to operate.

II. PORTUGAL

- CONCLUSION 2011

In the matter of working mothers' dismissal, Article 63 of the Portuguese Labour Code asserts: *The dismissal of pregnant employees, employees who have recently given birth or are breastfeeding, or who are employees on parental leave shall require the prior opinion of the competent authority in the area of equal opportunities for men and women.*

The competent authority shall communicate its opinion to the employer and to the employee within 30 days and shall consider in a positive way the dismissal when it is not issued from the time she notifies her employer that she is pregnant until the end of her maternity leave. If the competent authority goes against the dismissal, the employer cannot fire the employee. In case of unfavorable opinion the employee has 30 days to take action before a court which could recognize the existence of a warranted reason of termination. In that event working mothers' dismissal is legitimized.

Article 381 of the Portuguese Labour Code, which opens Subsection II on *Unlawfulness of Dismissal* and establishes the *General Grounds for Unlawful Dismissal*, confirms the statement of Article 63. In particular Article 381 asserts that dismissing pregnant employees, employees who have recently given birth or are breastfeeding, or employees during initial parental leave is unlawful, unless

the competent authority in the area of equal opportunities for men and women, whose prior opinion is requested, speaks out in favor of the dismissal.

Considering Article 63 of the Portuguese Labour Code, the Committee states that Portugal is in conformity with Article 8§2 of the Charter as regards prohibition of dismissal.

- CONCLUSION 2019

The Committee restates that Portugal is in conformity with Article 8§2 of the Charter as regards prohibition of working mothers' dismissal since the situation is not changed from 2011.

3.2 REMEDIES IN CASE OF UNLAWFUL DISMISSAL

According to the European Social Charter, in case of unjustified dismissal the employer must reintegrate the pregnant employee. But, if the reinstatement is not possible, because for example the enterprise closes down, or the dismissed worker rejects it, the employer must provide her an adequate compensation. In addition, compensation for unlawful dismissal must be both sufficient to deter the employer from laying off and fully repay the victim (fired pregnant woman).

I. ITALY

In relation to remedies for unlawful dismissal, Article 18 of the *Statuto dei Lavoratori* (as amended) states the full reinstatement of the worker in case of laying off during pregnancy or maternity leave. In particular the employer must reinstate the employee in her post and pay her, for the entire period from the dismissal until the reinstatement, social security contributions and damage compensation. But, in any circumstances, damage compensation may not be less than five months' salary. What's more, the employed woman is entitled to choose between the reinstatement and a compensation equal to 15 months of her actual total salary.

As regards women employed in the public sector, in particular on fixed-term contracts, Article 54 paragraph 3 of the Legislative Decree No. 151/2001 is extremely relevant.

Pursuant to paragraph 3 dismissal during pregnancy or maternity leave is allowed upon expiry of fixed-term contracts.

As a general rule, the employer can dismiss the pregnant employee only when their contract ends.

While, in case of fixed-term contracts, the employer cannot dismiss the employee before the

expiration of the contract, otherwise the dismissal is unlawful and the worker is entitled to a compensation equal to all the remuneration she should have received up to the expiry date of the contract.

- CONCLUSION 2011

In 2011 the Committee affirms that Italy is in conformity with Article 8§2 of the Charter in relation to the remedies established in case of unlawful dismissal, since discharge during maternity leave is considered null and void (Article 54 paragraph 5 of Legislative Decree No. 151/ 2001). As a result the employer must rehire the employee and in case of denial administrative fines are imposed (Article 54 paragraph 8 of Legislative Decree No. 151/2001).

- CONCLUSION 2019

According to the European Social Charter, in case of unlawful dismissal the woman must be entitled to the reinstatement. But if it is impossible (e.g. because the enterprise is closing) or the employee doesn't want it, the employer must award her an adequate compensation. In 2019 the Committee states that the situation in Italy is not in conformity with Article 8§2 the Charter on the ground that adequate compensation may not be provided to the woman who does not want to be rehired.

II. PORTUGAL

In Portugal, Article 63 of the Labour Code asserts: *If the dismissal is declared unlawful, the employer cannot oppose the reintegration of the worker under paragraph 1 of article 392 and the employee is entitled, as an alternative to reintegration, the compensation calculated according to paragraph 3 of article 39.* In other words, if the court claims that the dismissal is illicit, the employer cannot go against the reinstatement of the employed woman. However, as an alternative to the reintegration, the employee has right to a compensation.

- CONCLUSION 2011

Despite Article 63 of the Portuguese Labour Code grants protection in case of working mothers' dismissal and Portugal turns out to be in conformity to the Charter as regards prohibition of dismissal and effects of unlawful dismissal, the Committee defers its conclusion asking Portugal for a report on the level of compensation that can be awarded by who is unfairly fired.

In addition, the Committee warns Portugal that it will not be declared in conformity with Article 8§2 of the Charter whether the following report doesn't provide all these information.

- CONCLUSION 2019

In response to the previous Conclusion of the Committee, Portugal submits a report containing any information regarding unlawful dismissal's remedies.

In case of unlawful dismissal, the employer must reinstate the employee.

However, if the reinstatement is not possible or is not agreed by the employee, the employer has to pay the employee a compensation. According to this report, the amount that could be awarded as compensation is ranging from 30 to 60 days of the base remuneration plus any additional amounts for seniority. Moreover, it cannot be less than six months of remuneration plus the applicable seniority bonuses.

In this account Portugal points out that compensation isn't awarded for non-pecuniary damages, unless the employer is found guilty of having breached employment contract's obligations and harmed the employed woman's dignity.

What's more, Article 28 of the Labour Code, entitled *Compensation for a discriminatory act*, affirms employee's right to compensation for both pecuniary and non-pecuniary damages in the event that the employer carries out a discriminatory act towards the employee.

And this rule applies to both private-sector and public-sector workers.

In response to the previous Conclusion of 2011 and the request of the Committee for information regarding public-sector workers, Portuguese report asserts that all these rules on termination of the employment relationship apply without distinction to women employed in the private and public sector, on open-ended and fixed-term contracts.

Considering all the information provided by Portugal, the Committee is led to conclude that the situation is in conformity with Article 8§2 of the Charter as regards the remedies established in case of unlawful dismissal.

4. ARTICLE 8§3 - TIME OFF FOR NURSING

With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:

3. To provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;

Article 8§3 of the European Social Charter states that all employed mothers who are breast-feeding must be entitled to sufficient time off for this purpose, especially in order to protect the health of their baby. What's more, according to the Charter, breaks for breastfeeding must be treated as normal working time and, as such, be remunerated. In addition, time off for nursing must be granted by national legislation at least until the child turns nine months. However, it should be noted that the provisions have not been fully extended in all Member States to cover breastfeeding mothers.

I. ITALY

In Italy breastfeeding mothers are only partially mentioned in health and safety regulations. In particular, the Italian legislator does not explicitly mention the term 'breastfeeding' in the relevant law, i.e. Legislative Decree N. 151/2001, with the sole exception of Article 8, paragraph 3 which states *It is also forbidden to force women who are breastfeeding to conduct activities involving a risk of contamination.*

Legislative Decree N. 151/2001 only lays down daily breaks for working mothers. In particular, according to Article 39 paragraph 1, they are entitled to:

- two hours of time-off if daily working time is equal to or exceeds six hours
- one hour of time-off if daily working time is less than six hours.

According to paragraph 2, breaks for nursing must be considered working time and, as such, paid. What's more they must be strictly set pursuant to an agreement between employer and working mother or by DPL (*Direzione Provinciale del Lavoro*).

According to Article 40, time off for nursing is granted to the father when he has the exclusive custody of the child or when the mother is self-employed, freelancer or when she decides not to use it.

- CONCLUSION 2011

In 2011 the Committee concludes that the situation in Italy is not in conformity with Article 8§3 of the Charter since paid breaks to breastfeed are not granted to domestic workers and home workers. In fact, according to Article 8§3, all working mothers who are breast-feeding must be entitled to sufficient time off for this purpose.

- CONCLUSION 2019

In 2019 the Committee turns back to consider and analyze the situation of home workers and domestic workers on the topic of time off for nursing. As regards home workers, the Committee, according to which in 2011 Italy was not in conformity with the Charter since it didn't grant them time off for nursing, takes note of the statement presented by Italy, which explains that legislation on nursing breaks cannot apply to this category of women workers since their remuneration is based not on hours worked but on piece rates (Article 8 Law No. 877/1973, as amended by Law No. 850/1980 and Legislative Decree No. 112/2008) and, therefore, it is impossible to calculate the share of working time corresponding to breaks.

As regards domestic workers, by referring to the report, the Committee states that if the employee works full time with the employer's family, she may take nursing breaks, which are going to be paid; while if the employee works part-time, nursing breaks are left to the discretion of the parties.

Despite all of these observations, in 2019 the Committee doesn't take a decision but defers its conclusion waiting for more information from Italy regarding full time domestic workers' right to paid nursing breaks.

II. PORTUGAL

In Portugal Time Off for Nursing is regulated by Articles 47 and 48 of the Labour Code.

Article 47, entitled *Dispensa para amamentação ou aleitação* (Dispensing for breastfeeding), states nursing mothers' right to work leave in order to breastfeed. In particular, they are entitled to two breastfeeding hours per working day. Besides, in case of multiple births time off for nursing is going to rise by a further 30 minutes for each twin in addition to the first.

Also part-time workers are entitled to breaks for breastfeeding that must be proportioned to their normal working hours. However, they cannot be less than 30 minutes.

What's more, Article 47 paragraph 2 states: *If there is no breastfeeding, if both parents exercise professional activity, either one or both, according to a joint decision, are entitled to leave until the child reaches one year.* In other words, if the working mother doesn't breastfeed the child, the "nursing" leave may be enjoyed by the working father, who can take these two hours instead, until the child turns a year old. According to this provision, parents may also share the "nursing" leave by taking one hour each per day.

- CONCLUSION 2011

Considering Article 47 of the Labour Code, the Committee concludes that the situation in Portugal is in conformity with Article 8§3 of the Charter as regards the right to paid time off for nursing.

- CONCLUSION 2019

In 2019 the Committee reconfirms Portugal's conformity with Article 8§3 of the Charter as the situation regarding time off for nursing mothers is not changed since the previous Conclusion of 2011. In fact Portuguese Labour Code, in particular Article 47 paragraph 1, recognizes the so-called *Dispensa para amamentação ou aleitação*. That is a working woman who is breastfeeding is entitled to two breaks of up to one hour each to do it.

In order to get the leave for breastfeeding, the woman employed has to inform her employer, 10 days before, that she is breastfeeding the child. In addition, if the nursing goes beyond the first year of life of the kid, the working mother has to present a medical certificate proving it (Article 48 paragraph 1 of the Labour Code).

In 2019 the Committee underlines what has been stated previously, in 2011, considering that breaks for nursing mothers' regulation is remained basically unchanged. The Committee restates the legal provision of Article 47 of the Labour Code paragraph 2, according to which in case of no breastfeeding either one or both working parents are entitled to nursing breaks until the child turns one year of age.

Moreover, it asserts again what is said in paragraph 5 of Article 47 of the Labour Code, that is part-

time workers are entitled to breaks for nursing, in proportion to their working hours. However they must be of at least 30 minutes each.

In Conclusion of 2019 the Committee takes note of the report on breastfeeding breaks submitted by Portugal in response to the Committee request of 2011. In particular it refers to Article 392 paragraph 3 of the Labour Code that determines an upper limit for the amount that can be paid for breastfeeding breaks. According to this provision, maximum 60 days plus any additional amounts due for seniority can be waged.

What's more, Portuguese report confirms that all these provisions of the Labour Code concerning breastfeeding breaks also apply to women employed in the public sector.

Another relevant rule regarding nursing breaks is Article 65 of the Labor Code. Even though it isn't mentioned by the Committee in its Conclusion of 2019, it's important to highlight it. Paragraph 1 of Article 65 regulates *dispensas* such as leave at a clinical risk during pregnancy, leave for termination of pregnancy or adoption leave. They don't determine the loss of any rights, *except for the remuneration* and they are considered as effective work benefits. On the contrary, *Dispensa para amamentação ou aleitação*, i.e. time-off for nursing, which is regulated by paragraph 2 of Article 65, not only does not determine the loss of any rights and is considered effective work (meaning that breaks for nursing are regarded for all legal intents and purposes as time worked), but it also does not involve the loss of the wage.

5. CONCLUSION

The examination of Article 8, paragraph 1, 2 and 3 of the (revised) European Social Charter brings out the importance of the maternity protection in promoting equal opportunities and treatment in employment and occupation, without prejudice to health or economic security.

In other words, the right of employed women to protection of maternity is meaningful since it safeguards the health and well-being of the mother and the child, protects the economic vulnerability owing to pregnancy and maternity and thus gives a significant contribution to the enforcement of the gender equality in employment.

The paper, which is committed in the analysis of the maternity protection legislation of Italy and Portugal through the study of the last Conclusions of the European Committee of Social Rights, underlines that both the State Parties have implemented in their law and practice Article 8, paragraph 1, 2 and 3 of the European Social Charter.

Even though the European Committee of Social Rights defers its decision on paragraph 2 regarding the right to adequate compensation in case of unlawful dismissal and on paragraph 3 concerning the right of domestic workers to paid time off for breastfeeding, the review points out that Italy respects Article 8. Also Portugal turns out to comply with it despite all the issues that the Committee had to deal with, since national reports about maternity protection were not clear enough.

Since the legislative framework is referred to Italian and Portuguese situation until 2017, as the last Conclusions of the European Committee of Social Rights analyze the Italian and Portuguese law in force until that year, and considering that in four years both Italian and Portuguese legislator have stepped in maternity protection by giving more protection to pregnant employees and working mothers, the reader should wait for the next Conclusions of the Committee in order to see first hand this growing conformity with Article 8 of the (revised) European Social Charter.

6. BIBLIOGRAPHY

- INTERNATIONAL LABOUR ORGANIZATION. Maternity Protection Resource Package: *From Aspiration to Reality for All/International Labour Office, Conditions of Work and Employment Programme* (2012).
- EUROFOUND. *Maternity leave provisions in the EU Member States: Duration and allowances*, Publications Office of the European Union, Luxembourg, 2015.

Conclusions

- Conclusions of the European Social Committee 2011 - Italy

[https://hudoc.esc.coe.int/eng#{"sort":\["ESCPublicationDate%20Descending"\],"ESCArticle":\["08-01-000","08-02-000","08-03-000"\],"ESCDcType":\["CON"\],"ESCPublicationDate":\["2011-04-06T00:00:00.0Z","2021-04-06T00:00:00.0Z"\],"ESCStateParty":\["ITA"\]}](https://hudoc.esc.coe.int/eng#{)

- Conclusions of the European Social Committee 2019 - Italy

[https://hudoc.esc.coe.int/eng#{"sort":\["ESCPublicationDate%20Descending"\],"ESCArticle":\["08-01-000","08-02-000","08-03-000"\],"ESCDcType":\["CON"\],"ESCPublicationDate":\["2011-04-06T00:00:00.0Z","2021-04-06T00:00:00.0Z"\],"ESCStateParty":\["ITA"\]}](https://hudoc.esc.coe.int/eng#{)

- Conclusions of the European Social Committee 2011 - Portugal

[https://hudoc.esc.coe.int/eng#{"sort":\["ESCPublicationDate%20Descending"\],"ESCArticle":\["08-01-000","08-02-000","08-03-000"\],"ESCDcType":\["CON"\],"ESCStateParty":\["PRT"\]}](https://hudoc.esc.coe.int/eng#{)

- Conclusions of the European Social Committee 2019 - Portugal

[https://hudoc.esc.coe.int/eng#{"sort":\["ESCPublicationDate%20Descending"\],"ESCArticle":\["08-01-000","08-02-000","08-03-000"\],"ESCDcType":\["CON"\],"ESCStateParty":\["PRT"\]}](https://hudoc.esc.coe.int/eng#{)

Italian Legislation

- Italian Civil Code (1942)
- Italian Constitution (1948)
- Statuto dei Lavoratori (Law No. 300/1970)
- Law No. 877/1973
- *Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità* (Legislative Decree No. 151/2001)

Portuguese Legislation

- Decreto Lei No. 308-A/2007
- Código do Trabalho (Law no. 7/2009)

Sites

- European Social Charter

Available in <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93>

- European Committee of Social Rights

Available in <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>

- Digest of the Case Law of the European Committee of Social Rights (2018)

Available in <https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

- European Commission. Employment, Social Affairs and Inclusion:

- Italy. Maternity and paternity leave allowance

Available in <https://ec.europa.eu/social/main.jsp?catId=1116&langId=en&intPageId=4618>

- Portugal. Maternity, paternity and adoption benefits

Available in <https://ec.europa.eu/social/main.jsp?catId=1125&langId=en&intPageId=4733>

- INPS (National Social Insurance Agency)

Available in <https://www.inps.it/nuovoportaleinps/default.aspx?itemdir=45698>

