SPECIAL REPORT

T U T B O B S E R V A T O R Y

PREGNANT WORKERS

The transposition of Directive 92/85/EEC on the safety and health of pregnant workers, and workers who have recently given birth or are breastfeeding (II)

The last Newsletter *carried a report on the information collected by the TUTB on the transposition of the Directive on safety and health protection for pregnant workers, workers who have recently given birth or are breast-feeding. We pointed out that the Directive fell far short of the intended aim of harmonizing national legislation upwards. In the Council vote, Italy's backing was conditional on a pledge to tighten up the Directive's provisions at an early date. That was translated into the watered-down terms of its article 14.6, which requires the Commission to assess the Directive and submit proposed amendments if needs be by October 1997 at the latest. All the signs are that this statutory deadline will be missed. This second part of the article concludes our examination of the national transpositions of the Directive.*

Leave from work

The Directive says that where an adjustment of working conditions or a move to another job is not technically and/or objectively feasible, the worker concerned must be granted leave for the whole of the period necessary to protect her safety or health. Article 11.1 provides for the maintenance of a payment of, or an entitlement to, an adequate allowance, but fails to say what is meant by "adequate".

The Directive implicitly leaves the question of leave from work within the employer's discretion if that is a possible conclusion of his risk assessment. It gives no express remedy against his decision (e.g., where a worker feels it was feasible to adjust her working conditions), but the general scope of article 12 implies that workers may assert their rights under all the Directive's provisions before a competent authority.

The French transposing legislation gives no express right to leave from work during pregnancy. This creates considerable uncertainty both as to where the decision lies (occupational doctor or employer) and how it can be challenged. Also, maintenance of pay is guaranteed only if the leave can be equated to another situation covered either by social security (sickness, maternity, short-time working) or some other provision (guaranteed minimum income terms in collective agreements, contract law). The Spanish law, too, contains no provision for leave from work.

In some countries, the decision to grant leave from work lies with the occupational health doctor (Belgium), or the labour inspectorate after a medical check-up (Italy). This responsibility of the labour inspectorate in Italy, originally laid down in the 1971 Act, has created a number of difficulties since health and safety inspection functions were transferred to the national health service (under the 1978 health reform). The span of responsibility of the two inspection systems has excited much controversy. A Constitutional Court judgement[1] of February 1993 places health control jurisdiction firmly with the Regions (through the national health service). The legislative decree transposing the Directive uses the wording of the 1971 Act, which seems to vest authority in the labour inspectorate. Literally applied, this would separate the risk assessment functions of inspection - assigned to the national health service - from the practical enforcement measures based on that evaluation (transfer to another job or leave from work) where authority lies with the provincial labour inspectorate. The Italian transposition also creates inconsistency by re-enacting in full the provisions of the 1971 Act which restrict leave from work to the period before maternity leave. The Directive contains no such limitation, which had already been censured as a breach of equal treatment by the Constitutional Court in 1988, at least as regards the financial treatment of women workers who stopped work between the third and seventh month after childbirth on maternity-related grounds[2].

Belgian legislation has long operated a dual system of pay maintenance for women on leave from work. Women who could prove a link between an occupational disease and the job from which they had to be removed were entitled to benefit (90% of their pay) from the Occupational Diseases Fund. Otherwise, they received a much lower rate of sickness benefit (60% of pay) under the general sickness insurance scheme. This situation was brought to an end by extending maternity allowance to periods of leave from work. Other legislations (Finland, Italy) also deal with guaranteed pay for leave from work on the same basis as maternity leave.

The British transposing legislation guarantees full pay but no other employment rights, while Austrian legislation guarantees both full pay and the other employment rights.

Prohibition of dismissal

The Directive deals with employment protection only in regard to dismissal. But it is evident in practice that pregnancy, not to say prospective pregnancy, is often a factor not just in dismissal, but employment discrimination. Admittedly, the case law of the Court of Justice of the European Communities has ruled employment discrimination illegal[3], but so it has discriminatory dismissal. And yet there is a link between employment discrimination and a refusal to make working conditions safe for pregnant workers. Logically, then, the Directive should not have been restricted simply to prohibition of dismissal.

The Directive's provisions on prohibition of dismissal lay down two basic rules:
a) a prohibition on dismissing workers between the beginning of their pregnancy (declared to the employer) and the end of their maternity leave, save in exceptional cases not connected with their condition;
b) exceptional cases duly substantiated in writing.

Member States must:
a) stipulate what are admissible exceptions;

b) lay down procedures for administrative authorizations, if relevant;
c) provide remedies for wrongful dismissal.

National transpositions differ considerably, inasmuch as prohibition of discriminatory dismissal is organized differently, and with varying effectiveness, from one State to another.

Some transposing provisions fall well short of the Directive's minimum requirements. So, in Belgium, the obligation to give written grounds for dismissal has been replaced by a duty to notify the employee in writing of the grounds for dismissal at her request. The situation in the United Kingdom is more problematic still - there is no general statutory prohibition on dismissing pregnant workers. The position here is governed entirely by fairly uncertain case law criteria[4]. The result of the Webb case is now that a dismissal will be unlawful only if pregnancy is the decisive factor[5].

Penalties for wrongful dismissal are the most sensitive area. Some legislation provides only financial compensation but does not require reinstatement - Belgium and France are cases in point[6]. Some countries set a limit on the amount of financial compensation which is not necessarily related to the actual loss incurred by the sacking. So, in Ireland and Finland, the maximum compensation is two years' gross earnings. In Belgium, the special protection allowance for such dismissals is six months' gross pay. It is questionable how far such limits are compatible with the case law of the Court of Justice of the European Communities which, in the Marshall judgement of 2 August 1993, held that an upper limit on compensation for discriminatory dismissal was incompatible with Community law if it was not adequate to make good the loss and damage actually sustained.

Prior authorizations are required in Portugal (from the Commission for Equality at Work and in Employment), in Austria (from the Labour Tribunal in cases of *Entlassung*, see below), and Germany (from the labour inspectorate since 1997, from the courts before that).

The grounds which can be considered as unrelated to the worker's pregnancy have been construed in various ways. French legislation has established a dual system of protection. The worker may be dismissed only for gross misconduct or on grounds unconnected with pregnancy or childbirth (e.g., redundancy). But notice of dismissal on either ground cannot be served or take effect during the period of maternity leave. The Luxembourg legislation affords particularly effective protection against dismissal - a pregnant worker may not be dismissed during her pregnancy or within twelve weeks after childbirth. There are no exceptions. German legislation prohibits dismissal in principle between conception and the fourth month after childbirth. The labour inspectorate has sole authority to grant exemptions in exceptional circumstances. While the Act gives no inkling as to what constitutes such circumstances, the previous law accepted the closure or downsizing of the firm or section of the firm in which the worker was employed as exceptions to the prohibition of dismissal.

The Directive is silent on the onus of proof. In many cases, workers will find it hard to prove that the employer's ostensible reasons in fact conceal discrimination on the grounds of pregnancy. In some countries (Denmark, Spain, Finland, Portugal), the legislation reverses the burden of proof, and the employer must prove that a pregnant worker's dismissal is for reasons other than pregnancy.

The Italian legislation extends the prohibition of dismissal from conception until the child's first birthday, and even to adoption in certain circumstances. The only grounds for dismissal are gross misconduct or the closure of the firm. The case law on the consequences of the unlawful dismissal of a pregnant worker is uncertain, but following a 1991 Constitutional Court judgement, predominant thinking is that it is null and void, which implies a right of reinstatement[7].

The Austrian legislation distinguishes two forms of dismissal: *Kündigung* and *Entlassung*. The former - dismissal with notice - is unlawful on any grounds during pregnancy and within four months of childbirth. The only condition is that the employer must be aware of the pregnancy. This may be given by notice after the dismissal (in principle, the worker has five days in which to do so). The second - summary dismissal for gross misconduct - requires the authorization of the Labour Tribunal. The grounds for dismissal are listed exhaustively (gross negligence by the worker in the performance of her duties, dishonesty, disclosure of confidential business information, physical assault or serious verbal abuse of the employer, his family, co-workers, etc.). These rules also apply to the parents of adopted children during a period of four months following the adoption or pre-adoption settling-in period. They also apply to domestic staff.

The Portuguese legislation does not make dismissal unlawful. The section headed "prohibition of dismissal" (taken from the Directive) makes dismissal subject to prior authorization from a Ministry of Labour committee, and creates a statutory presumption that the dismissal of a pregnant or breastfeeding worker is unfair. This effect of the presumption is to reverse the onus of proof. In practice, the committee accepts gross misconduct or collective redundancies as valid grounds.

Spain is a case apart. The Directive has been transposed piecemeal, so no express rule on the dismissal of pregnant workers has been enacted. There is no doubt that this situation violates the "certainty of the law" requirements laid down by the Court of Justice for the minimum conditions of transposition. The position is governed by the general provisions on discriminatory dismissals. Royal Legislative Decree 1/95 provides that dismissal on any grounds of discrimination prohibited by the Constitution or legislation, or which violates fundamental freedoms or civil liberties, is void. This entitles the worker to immediate reinstatement. Also, where there is circumstantial evidence of sex discrimination, the employer must show sufficient proof that the steps taken were objectively and reasonably required, and not disproportionate.

Some national transposing legislation also provides employment protection. So, under French legislation, the employer may not refuse to employ a pregnant worker, cancel her employment contract during the trial period, or transfer her because of her pregnancy[8]. To this end, he may not inquire or have inquiries made as to whether a worker is pregnant. Female job applicants are not required to disclose their pregnancy. In the event of dispute, the employer must provide the court with full substantiation for his decision. The benefit of the doubt goes to the pregnant employee.

Defence of rights

The Directive as transposed in the different Member States did little to change the remedies available to pregnant workers. Generally-speaking, the aspects (like prohibition of dismissal) connected with the general anti-discriminatory provisions of labour law will be brought before

the authorities designated by national legislation to deal with sex discrimination. Generally, the remedies are more effective than those for breach of the employer's health and safety obligations. Other aspects (compliance with the hierarchy of preventive measures, risk assessment, etc.) are far harder to enforce through the courts unless financial loss can be shown. Their success generally depends mainly on the labour inspectorate's ability to police the rules. One of the Directive's main failings is that, unlike the other health at work Directives, there is no requirement to consult the workers' representatives on preventive measures[9]. The danger is that this may exacerbate the tendency to treat the safety and health protection of pregnant workers as a case of individuals in an anomalous situation rather than as a collective matter for the company workforce. In practice, the effectiveness of the labour inspectorate's enforcement does depend to a large degree on the activity of the employees' representative bodies.

A recent Industrial Tribunal decision in the United Kingdom shows how a dispute over financial loss may bring the coherence of a prevention policy under review[10]. A worker was forced to take sick leave due to the employer's refusal to adapt her job or transfer her to a different job. Had she been on leave from work because of pregnancy, she would have been entitled to full pay; her sick pay was much lower. She claimed her full pay. The Industrial Tribunal found in her favour on the grounds that the employer had not carried out a risk assessment as required by the British regulations transposing the Directive.

Conclusions

This examination of national transpositions suggests that the limitations of the Directive must be looked at. They become clear whenever the Directive touches on labour law matters which fall outside the traditional health and safety rules. The linkages between the right to equal treatment and the right to healthy working conditions are crucially important ones which the Directive fails to address coherently. To treat occupational health law as an isolated body of technical rules would render it toothless in circumstances governed by workplace labour relations. One major failing of the Pregnant Workers Directive is the half-hearted way in which it addresses these other areas. The previous article showed how the Directive failed to provide sufficient guarantees for maintenance of pay during maternity leave. One reason for this was the objection of various States (especially France) to the inclusion of social security matters. In this respect, it can only be repeated that article 118A gives the Community institutions much wider powers and that any attempt to limit Directives adopted under it purely to technical and organizational rules on the prevention of occupational risks or management-labour relations must be opposed. This is the path followed by the Court of Justice of the European Communities' judgement of 12 November 1996 on the Working Time Directive.

Added to this is a second, more fundamental, limitation stemming from the essential nature of national and Community labour law alike [11]. Labour law has developed by implicit reference to male workers. Consequently, the right to equal treatment uses the same touchstone: a situation in which women are discriminated against compared to men in the same situation is unlawful. Maternity is thus seen as an exceptional situation related to women's biological difference[12]. This is the approach followed by Directive 76/207 and the case law of the Court of Justice of the European Communities. Equal Treatment Directive 76/207 stipulates that "this directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity", while the Court of Justice has officially sanctioned the biological character of this exception. Surely, however, far from being treated as exceptional

situations in which labour law may validly disregard the male yardstick of equal treatment, pregnancy and maternity could be addressed far more coherently by a right to equal treatment framed as a means of changing the social inequalities which oppress women in the organization of work. Moving away from the "biological" exception (almost inevitably treated as an abnormal if not pathological condition) into the arena of labour relations would doubtless have given the Directive the legitimacy needed to make a more incisive and effective impact on labour relations. It would also doubtless have resolved the contradiction between the possibility of taking maternity leave and the denial of that possibility by the lack of income guarantees. It might also have helped clarify the need for a risk assessment which takes account from the start - before any worker notifies her pregnancy - that working conditions should be safe for pregnant workers and their unborn children.

Sources - legislation, regulations and administrative orders:

Germany: Maternity Protection (Amendment) Act of 20 December 1996 (*Mutterschutzrechts*)
Austria: Federal Act of 30 June 1995 (*Bundesgesetzblatt* No 434) amending the Maternity Protection Act 1979 (*Mutterschutzgesetz*) and the Parental Leave Act 1989 (*Eltern-Karenzurlaubsgesetz*)
Belgium: Maternity Protection Regulations (Royal Decree) of 2 May 1995; Act of 4 August 1996
Denmark: Employment Regulation 867/1994
Spain: Prevention of Occupational Risks Act 31/95 of 8 November 1995
Finland: amendment to Contracts of Employment Act (320/1970); Council of State Decree 1043/1991 on workplace genetic hazards to the unborn child and reproduction; Ministry of Labour Order 1044/1991 applying the Decree
France: Labour Code; Circular of 2 May 1985 on the functions of the occupational health doctor regarding pregnant workers; Act 93-121 of 27 January 1993; Decree 96-364 of 30 April 1996
Ireland: Safety Health and Welfare At Work (Pregnant Employees etc.) Regulations 1994 (S.I. No 446, 1994), Maternity Act Protection, 1994
Italy: Workers (Maternity) Protection Act No 1204 of 30 December 1971, Legislative Decree 645/96 of 25 November 1996
Luxembourg: Maternity Protection At Work Act of 3 July 1975. At the date of completion of this survey (June 1997), Luxembourg had not yet transposed the Directive. The information here is based on the Bill intended to do so.
Norway: Reproductive Health Hazards at Work Regulations (Royal Decree 768) of 25 August 1995 (AT-535)
Portugal: Maternity and Paternity Protection Act 4 of 5 April 1984; Act 17/95 of 9 June 1995 amending Act 5/84; Legislative Decree 333 of 23 December 1995; Order (*Portaria*) 229 of 26 June 1996; legislative Decree 194 of 16 October 1996
United Kingdom: Trade Union Reform and Employment Rights Act 1993; 1994 amendments to Management of Health and Safety At Work Regulations 1992, and Employment Protection (Consolidation) Act 1978
Sweden: Factory Inspectorate, Pregnant and Breastfeeding Workers Order of 17 November 1994 (AFS 1994:32); Labour inspectorate general guidance on the application of the Order

At the date of completion of this survey (June 1997), the Luxembourg Bill had not passed into law. No information was received from Greece or the Netherlands.

[1] Constitutional Court judgement n° 58/1993.

[2] Constitutional Court judgement n° 972 of 11 October 1988.

[3] See Dekker judgement of 8 November 1990, ECR, 1990; p. 3941.

[4] The case law is examined in: TUC, Guide to maternity rights and benefits, London, 1994.

[5] The Webb case first went to an Industrial Tribunal in 1987, and thereafter on appeal all the way up to the Court of Justice of the European Communities, whose ruling of 14 July 1994 was followed by a House of Lords judgement on 19 October 1995. For a detailed examination, see C. Boch, *Common Market Law Review*, 33, pp. 547-567, 1996.

[6] French legislation says the dismissal is "void", but the courts tend simply to award compensation rather than ordering reinstatement.

[7] Constitutional Court judgement n° 61 of 15 March 1991.

[8] Italian case law is broadly similar. Belgian case law is more uncertain.

[9] Article 4.2 of the Directive merely requires information for workers "likely" to be pregnant or breastfeeding and/or their representatives. It is the only individual Directive under the Framework Directive to not to expressly require consultation of the workers. It should be borne in mind, however, that the Framework Directive is generally applicable, and the fact that no express provision is made for worker consultation is not grounds for seeking to deny workers' representative bodies jurisdiction over the protection of pregnant workers.

[10] See S. Cox, Employer's failure to assess pregnancy risks leads to maternity suspension, *Health and Safety Bulletin*, 260, August 1997, pp. 14-15.

[11] See Yota Kravaritou (ed.), *Le sexe du droit du travail en Europe*, The Hague, Kluwer, 1996.

[12] In Community case law, this interpretation of maternity and pregnancy based on biological difference or the special relationship between mother and child is very clearly expressed in the Hofmann judgement of 12 July 1984 (ECR 1984, p. 3047).