

## Sufficiency of Employment Maternity Benefits Law in Sri Lanka: comparative study with European Union Discrimination Law

BMKS Balasuriya

Examination Division, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

<kumudikab@kdu.ac.lk>

**Abstract**—The protection of the motherhood, fatherhood and family life is priority for many national governments. Yet, pregnancy and maternity related discrimination occurs across Sri Lanka in many areas in the Employment and it is common to many countries and regions in the world including the European Union. Over the last two decades one of the main aim of EU law has been the protection of pregnancy, maternity and parenthood of employment.

To achieve this purpose EU has been introduced complex array of Primary legislations (Treaty provisions) and secondary Legislations (Directives and Case Law) to EU Law. Sri Lanka mainly enacted Maternity Benefit Ordinance No 32 of 1939 to make provisions for the payment maternity benefits to women workers before and after their confinement. The original ordinance was amended many times during the history for the betterment of employees.

The main objective of the research paper is to analyse on five main headings about the sufficiency of Employment Maternity Benefits Law in Sri Lanka reference to EU discrimination law. Therefore based on those main grounds this paper analysed the sufficiency of provisions and good practices of EU law by comparing mainly the Council Directive 92/85/EEC of 19<sup>th</sup> October 1992 and Case Law of European Court of Justice with Sri Lankan Maternity Benefit Ordinance No 32 of 1939.

Protection of health and well-being of mothers and their babies and safeguard women's employment and income security during the maternity is essential for ensuring women's access to equal opportunities of the Economy. Comparatively the provisions of Maternity Benefit Ordinance No 32 of 1939 and relevant amendments are not sufficient to address the main five grounds analysed by the paper. It is hardly to ascertained single internal standard on jurisprudence relating to maternity benefits in Sri Lanka, which can be lead to internal conflicts of Law.

**Keywords**— **Discrimination, Maternity Benefits Ordinance, Maternity**

### I. INTRODUCTION

The main objective of the research is to find out the sufficiency of the employment maternity benefit law in Sri

Lanka comparing to the European Union discrimination law and to give considerations to the regulators. Maternity protection has become in to a major concern of the many organizations in the world. Mainly EU has developed vast complex of legislations as protective measures for pregnant women and women who have recently given birth to a child. All of the private and public organizations in a country are responsible for providing maximum benefits over pregnant workers, who have recently given birth or who are breast feeding.

All forms of unfair treatment against pregnant workers are considered as discrimination by the European Court of Justice (ECJ) in many decided cases. Moreover the ECJ considered that the discrimination can exist on two grounds as in direct discrimination and the indirect discrimination where in case of pregnancy the unfair treatment count as direct discrimination and which cannot be justified.

The European Union Pregnant Workers Directive (19<sup>th</sup> October 1992 [No L348]) is primarily aimed at improving health and safety at work for pregnant workers, workers who have recently given birth and who have breast feeding. It provides for two sorts of measures, namely health and safety and protection against unfavourable treatment. In terms of leave, Directive 92/85/EEC provides number of specific forms of leave for pregnant workers and women who have recently given birth (**WRGB**).

Directive has been dealt with leave obliged to grant by the employer for day time pregnant workers, night working pregnant workers, night working breast feeding workers, unfair dismissal during the pregnancy and breast feeding, remunerations, allowances and bonuses allowed by pregnant and breast feeding workers.

In Sri Lanka Maternity Benefit Ordinance No 32 of 1939 was enacted to grant provisions for the payment of maternity benefits to women workers and for other matters relating to the employment of women workers before and after their confinement. The original ordinance was amended several times under Ordinance No 35 of 1946, No 26 of 1952, No 6 of 1958, No 24 of 1962, No 1 of 1966, No 13 of 1978, No 52 of 1981 and No 43 of 1985 for the betterment of the employees.

The Ordinance applies to women workers employed in any trade. "Trade includes any industry, business undertaking, occupation, profession or calling, carried out, performed or exercised by an employer or a worker, and any branch of or any function or process in any trade" (Arosha, 2009). The nature of the contract of employment will not matter and all female employees working under contracts which are expressed, implied and oral or in writing will be covered by the Ordinance. This Ordinance excluded certain categories of employees as follows.

Women workers covered under the Shop and Office Employees Act No 19 of 1954, Women workers in any industry, business or undertaking which carried on mainly for the purpose of giving an industrial training to juvenile offenders, orphans or to persons who are destitute, dumb, deaf or blind and women workers employed in casual nature & seasonal employees are the categories excluded by the Ordinance.

## II. RESEARCH PROBLEM

It is important to understand how discrimination arises against women during their pregnancy. Vast number of cases appeared in European court of justice (ECJ) expressed that various types and ways of existing discrimination against pregnant workers and WRGB [see the literature].

This study analyses mainly the sufficiency of Sri Lankan jurisprudence on employment maternity benefits law and expects to determine the application of theoretical rules to resolve the moral questions arises during pregnancy at employment. Comparatively the EU discrimination law on maternity and pregnancy is thoroughly focusing on many practical issues arising during the employment and addresses on areas which had not been addressed by the Sri Lankan Law which supplies light on regulators and policy makers of Sri Lanka to reform law by adhere with the U.N. Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

Therefore the study expects to give consideration on reforming the Sri Lankan law on pregnancy and maternity by addressing many practical issues and aspire to open eyes of the policy makers of the country.

## III. LITERATURE REVIEW ON DISCRIMINATION UNDER EMPLOYMENT

Following literature discussed about the repercussions and how common law contributes for the development of pregnancy discrimination law.

*Dekker v Stichting Vormingsceturmvoor Jonge Volwassenen* ([1990] ECR I/ 3941) is a decided case by European Court of Justice (ECJ) and has identified as discrimination on the grounds of pregnancy as direct discrimination. Further stated

that a refusal to employ or a dismissal of a woman because she is pregnant amounts to direct discrimination. The distinction between direct discrimination, indirect discrimination and autonomy according to EU law, argued that anti-discrimination law is justified on the basis of duties to respect other people's autonomy [Doyle (2007)]. He further suggests from his study that the widespread impact of certain types of discrimination may support an equality-based justification for the prohibition of both direct and indirect discrimination.

ECJ sets out the principle of employment can only be refused because of pregnancy to women, such refusal is direct discrimination. The Directive precluded dismissal of a female worker at any time during her pregnancy absence due to incapability for work caused by an illness resulting from that pregnancy [*Brown v Rentokil Ltd* ([1998] ECR I /4185)]. The Decision has been reversed in the case of *Larsson v Supermarked* ([1997] ECR I / 2757).

The ECJ stated that the principle of non-discrimination required protection throughout the period of pregnancy in addition to the period of maternity leave protected by Equal Treatment Directive in the case of *Brown v Rentokil Ltd* ([1998] ECR I /4185) But this decision has been reversed in the case of *Larsson v Supermarked* ([1997] ECR I / 2757).

In *Tele v Danmark* ([2001] ECR I / 6993) the ECJ considered a duty to inform the employer of a pregnancy. But it was held that worker cannot be dismissal on the ground of pregnancy where she was recruited for a fixed period: and where she failed to inform employer that she was pregnant, even though she was aware of this when the contract of employment was concluded.

In the case of *Webb v EMO Cargo (UK) Ltd* ([1994] ECR I/ 3567) by interpreting Equal Treatment Directive the ECJ stated that, "Since pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non –medical grounds, there can be no question of comparing the situation of a woman who finds herself incapable by reason of pregnancy of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons". At the time of ECJ decided this case "The Pregnancy Directive" which had not been implemented by EU.

Welssmann (1983), published under Columbia Law Review argued on the basis of sexual equality under the pregnancy discrimination act and stated modern view of equality is that women and men should have an equal opportunity to participate in productive labour force.

Frankel, W (1983), argued on the basis of pregnancy-related medical benefits and the pregnancy discrimination act, and thus establishes that discrimination in employment on the basis of pregnancy constitutes discrimination on the basis of sex.

Adams, L. McAndrew, F. & Winterbotham, M. (2005, p.10) argued based on a quantitative data analysis of employers and pregnant, breast feeding employees found that, "one in nine mothers (11%) were either dismissed; made compulsorily redundant, where others in their workplace were not; or treated so poorly they felt they had to leave their job".

Most of women had experienced negative comments related to pregnancy or flexible working from their employer and colleagues. Some times employer discouraged them from attending antenatal appointments (Adams, L. McAndrew, F. & Winterbotham, M. (2005).

The above literature clearly shows that the pregnancy and maternity related discrimination exists in EU and all over the world.

### III. RESEARCH METHODOLOGY

In order to analyse the sufficiency of the jurisprudence of employment maternity benefits in Sri Lanka study has used five main variables. Safety, Health measures and Working conditions (SHWC), Maternity Leave (ML), Night Working conditions (NWC), Dismissal in the event of pregnancy (DIEP), Remunerations, Bonuses and allowances given in pregnancy (RBAGP) and maternity and breast feeding periods (MBFP) are using as the independent variables.

Through these variables study is trying to prove the sufficiency of rules and regulations in Sri Lanka reference to Directive 92/85/EEC by comparing to Maternity Benefit Ordinance in Sri Lanka (MBO/SL). Therefore the sufficiency (S) of the rules and regulations determine through above five variables, hence this sufficiency variable would be the dependent variable.

### IV. ANALYSIS

The study has analysed based on five main grounds as follows.

#### a. Safety, Health measures and Working Conditions

Directive 92/85/EEC stated that, "Every worker must enjoy satisfactory health and safety conditions in his working environment". Further appropriate measures must be taken by the employee in order to achieve harmonization of the conditions in this area.

"Art 15 of the Council Directive 89/391/EEC 12<sup>th</sup> June 1989 on the introduction of measures to encourage improvements in health and safety of workers at work provides particularly risk groups must be protected against

dangers which specifically affect to them: whereas pregnant workers, WRGB or breast feeding must be considered a specific risk group in many respects, measures must be taken with regard to their health and safety" mainly the EU Directive supplied a greater amount of health, safety and working conditions rules and regulations to employers should need to implement for workers specially in the ground of pregnancy.

Act further states that, pregnant workers, workers who have recently given birth and breast feeding must not engage in activities which have been assessed as revealing a risk exposure, jeopardizing (Shocks, vibration, noise, ionizing radiation, extremes of cold or heat, chemical agents, mercury and mercury derivatives, Ant mitotic drugs, carbon monoxide, physical agents, Biological agents, underground mining work, safety and health, to certain particularly dangerous agents or working conditions.)

When comparing this variable with Sri Lankan Maternity Benefit Ordinance, what study can identified as, in Sri Lankan ordinance, specifically has not mentioned about health, safety and working conditions in the ground of pregnancy. Sri Lanka has implemented separate health, safety and working conditions act for those grounds. Even though there is a separate act, that also not given successful elaboration about what kind of health and safety measures to be taken in the events of pregnancy. It seems to be partially ignored about the health and safety measures that should need to implement by the employers which have been given a general idea but not specifically to whom should apply the ground.

In this ground it can be questioned the sufficiency of Sri Lankan jurisdiction where the EU law Pregnancy Directive, which is very clear and precise for the both employers and employees to identify responsibilities and rights.

#### b. Maternity leave

Under Sri Lankan Maternity Benefit Ordinance, in the event of live birth of a child, women workers are entitled to 12 weeks leave in relation to the birth of the first or second child, in this case non-working days (holidays) are also included in the calculation of said 12 weeks. The 12 weeks have can be taken as 2 weeks for pre-confinement leave and 10 weeks post-confinement weeks. In relation to third child women is entitled only for 6 weeks leave including the non-working days. In the issue of a dead child or a viable foetus (Foetus of at least 28 gestation and at least 12 inches, at least 2 pounds) a total 6 weeks can be taken pre and 4 weeks post to the confinement.

Directive 92/85/EEC, statute specifically requests to grant 14 weeks of continuous maternity leave without segregation of first, second or third child. It has not been specified whether non-working days should include when calculating

the maternity leave. It has not restricted specifically by the Directive.

In Sri Lankan context, if only women can obtain maternity leave on in the event of viable foetus 28 weeks old. Before 28 weeks of a viable foetus would not covered under any provision of Sri Lanka. According to the personal experience of the researcher any complication in first three months of a pregnant mother (bleeding, unfit uterus etc.) would not cover under the Ordinance. Women worker has to get leave by her personal leave, which would not cover under the maternity leave.

In this scenario what can conclude is Directive must specify more than this on maternity leave, but considering to Sri Lankan context providing two different maternity leave durations for first, second and third child is cannot be justifiable as in second and third child are purely a new born who expects love and affection from mother equal to the first child.

According to the establishment code of democratic socialist republic of Sri Lanka status that, mother who gave birth to an illegitimate child would not eligible for maternity leave. An Illegitimate child born not just because of the adultery of the mother but also there can be several other structural economic factors affecting to the matter. As described in above paragraph if mother who has an illegitimate child and who lost her job due to the same would jeopardize the condition of both mother and child.

c. Night working conditions

According to Directive "Member states shall take the necessary measures to ensure that workers referred in to Article 2 (Definition - Directive 92/85/EEC) are not obliged to perform night working during their pregnancy and for a period following child birth which shall be determined by the national authority competent for health and safety .....in accordance with national legislation transfer them to day time, leave from work or extension of maternity leave".

When considering on Sri Lankan context, ordinance did not mention any regulation regarding the night working conditions for pregnant women, women who given recently birth to a child and breast feeding. Mainly the Sri Lankan apparel sector thousands of female workers are working during night as in "night shifts" which is govern under the ordinance. In some of the garment factories "night shift" is compulsory. The international banks and trades in Sri Lanka also having these "night shifts" for employees, who governed under Maternity Benefits Ordinance and the Shop and Office Act have not mentioned any regulation to exclude night shifts from pregnant and WRGB workers.

d. Dismissal in the event of pregnancy

Directive clearly stated that, member states shall take necessary actions to prohibit the dismissal of workers, within the meaning of Article 2 during the period of beginning of the pregnancy to the end of the maternity leave.

In Sri Lankan context employer should not terminate the services of an employee by reason only for her pregnancy or confinement or any illness consequent of her pregnancy or confinement. As according to the conditions of pregnancy if she absence from work, employer cannot lawfully give notice to dismissal to the employee during her absence.

The study can provide a justification for the Directive due to supplying regulations more practically than in Sri Lankan context. As mentioned in the above cases decided by ECJ addressed greater number of practical issues regarding the dismissal in the event of pregnancy. In Sri Lankan case

e. Remunerations, Bonuses and allowance

In Sri Lankan context during the period of pregnancy employees should paid on a time –rate basis-6/7 of her wages for the period of maternity leave. "If the employee paid on a piece-rate basis -6/7 of her average daily earnings should paid in the period of pregnancy" (Chandrasekara 2002).

Directive has provided that, the workers within the meaning of Article 2 entitle for maintenance of a payment or entitlement to an adequate allowances. EU law provided mainly adequate allowances during the period of pregnancy and maternity which is not a practice in Sri Lanka.

V. FINDINGS

When considering on the five main grounds of the study, it is well understand that the sufficiency of employment maternity benefits rules and regulations are insufficient and Sri Lankan legislations should reform in line with the international jurisprudence in order to par with human rights during pregnancy, maternity and WRGB and a child.

During the time of pregnancy of a woman her mentality would purely changed and also can have many difficulties on carrying out the same work load in any job performed. There can be structural changes in working patterns that pregnant women are may not have the skill of working during long hours. Sometimes there can be many difficulties on carrying out same work load during night shifts (especially in sectors of nursing ,radiography and apparel in Sri Lanka).

In Sri Lankan context Maternity Benefit Ordinance No 32 of 1939 and relevant amendments and Shop & Office Act No 19 of 1954 and relevant amendments has not been addressed

in mentality of a pregnant worker, breast feeding worker and WRGB. Even though the women worker is pregnant or breast feeding their Job descriptions would not change. Performances are evaluated on the same criteria which are equal as without pregnancy.

In Sri Lanka there are several acts and ordinances (Shop & Office Act No 19 of 1954, Maternity Benefit Ordinance No 32 of 1939, Employment of Women, Young Persons and Children Act No 29 of 1973 and relevant amendments, Government Establishment code) covered pregnant and breast feeding workers. All those acts and ordinances are not having any consistency on jurisdiction where all those have been decided according to the work carried out and mainly considering on the specific field. But difficulties in pregnancy and the breast feeding period are equal for all women workers and children.

Most of the private and public banks of Sri Lanka are having a normal practice of not obtaining nursing intervals as an internal regulation of the company even though that has been a unpublished rule which has become in to a internal regulation where all women are not obtaining the benefit and due to that reason no one try to obtain in future (ex: Bank of Ceylon Sri Lanka, Pan Asia Bank, National Development Bank and Standard Chartered etc). All these are regulating under the Shop & Office Act No 19 of 1954, which is entitle for one hour nursing interval for the WRGB and breast feeding women. But even though they like or dislike they had to accept the internal practice of not to obtain nursing intervals which is not practical with their job descriptions and also which is affecting to their career. This reflects that the practices of some companies and some sectors are not fair enough to address the mentality of the infant and breast feeding mother.

The love, affection and warmth expected by the child cannot be differentiated according to the laws and regulations of different kind of governing acts, ordinances and practices. There should be a consistency on providing benefits for pregnant and breast feeding workers. Therefore sufficiency of law which are available is not enough to fulfil all these requirements.

#### VI. RECOMMENDATIONS AND FUTURE STUDY REQUIREMENTS

In line with the findings of the research study, it is recommending to law regulators and policy makers to reform law in the basis of pregnant and maternity related law in accordance to solve moral and practical issues at employment.

It is hard to find out perfect system of law in a particular country but any country can par with the national standard of the world which would reach to the perfection of a system. For the future study requirements any researcher can use other provisions govern the pregnant and WRGB women.

#### VII. CONCLUSION

This comparative study proves that the Sri Lankan jurisdiction is insufficient on addressing the issues and questions related to the employees who are pregnant, WRGB and breast feeding. Many important areas have not been addressed and partially evaded.

Even though the EU council Directive 92/85/EEC of 19<sup>th</sup> October 1992, sufficient enough to address above matters rather than Sri Lanka. There are grey areas in several matters like wise, amount of work load supplied, performance evaluation criteria and job description of a pregnant, WRGB and breast feeding worker. On the other hand Sri Lankan Law has not answer for the moral issues arising due to the inconsistency of law especially in the case of illegitimate child, amount of the maternity leave, night working conditions and health and safety measures of sectors in nursing, apparel and radiography.

Moreover most of the enacted legislations in these acts, ordinances and Directive explained in employer's perspective. All these legislations have developed to supply legal grounds for the possible disputes can arise in a working place and to provide them a solution, which is not interpreted in the perspective of pregnant, WRGB and breast feeding women and infants.

It is hardly to interpret all possible aspects in a particular legislation. If only a dispute come behind to a court, law can be developed through Judges. In this scenario study can conclude that in humanitarian and moral perspective both jurisdictions are failed to interpret laws and regulations in sufficient manner.

#### ACKNOWLEDGEMENT

Author thanks extensively to Dr. Thusitha Abeysekara.

#### BIOGRAPHY OF AUTHOR



Author is the Assistant Registrar (Examinations) in the Examination Division, General Sir John Kotelawala Defence University, Ratmalana. She is currently reading for her Attorney-at-Law and MBA in Finance (University of Colombo).

She holds BA (Hons) in Economics specialized in Banking and Finance Stream (University of Colombo) and LL.B. (Hons) (University of London). Her research areas are Development Economics, Applied Econometrics, Macro Economics, Human Rights of women & children and Jurisprudence Law. She expects to combine Economics and Law for the betterment of the country.

Shop & Office Act No 19 of 1954 and relevant amendments. Employment of Women, Young Persons and Children Act No 29 of 1973 and relevant amendments.

Case Law:

*Dekker v Stichting Vormingscetrum voor Jonge\_Volwassenen* ([1990] ECR I / 3941)

*Brown v Rentokil Ltd* ([1998] ECR I /4185}

*Larsson v Supermarked* ([1997] ECR I / 2757).

*Tele v Danmark* ([2001] ECR I / 6993)

*Webb v EMO Cargo (UK) Ltd* ([1994] ECR I / 3567)

LIST OF REFERENCES

Adams, L. McAndrew, F. & Winterbotham, M. (2005). *Pregnancy Discrimination at Work: a Survey of Women, Working Paper Series No. 24, Manchester. Equal Opportunities Commission.*

Arossha, S.(2009). *Labour Laws and Relations 2<sup>nd</sup> edition, Maharagama: Stamford(pvt) Ltd.*

Chandrasekara, M.T.R. (2002). *The Law relating to the payment of maternity benefits in Sri Lanka. Understanding Labour Law (2<sup>nd</sup> ed.).Colombo: Ministry of Employment and Labour in Sri Lanka.*

Doyle, O., (2007). *Direct Discrimination, Indirect Discrimination and Autonomy. Oxford Journals, Vol 27, No 03*

Edwards, M.E. (1996). *Pregnancy Discrimination Litigation: Legal Erosion of Capitalist Ideology under Equal Employment Opportunity Law. Oxford Journals, Vol 75, No 01*

Frankel, W.G. (1983). *Dependents' Pregnancy –Related Medical Benefits and the Pregnancy Discrimination Act. Duke Law Journal, Vol 1983, No 01*

Horspool, M. & Humphreys, M. (2008). *European Union Law 5<sup>th</sup> edition, New York. Oxford University Press*

Pagonis, K. (2002). *Pregnancy-related Discrimination in Employment: A Review of Employment Tribunal Decisions from November 1999 through April 2002, Manchester: Equal Opportunities Commission.*

Welssmann, A. (1983). *Sexual Equality under Pregnancy Discrimination Act. Columbia Law Review Association, Vol 83, No 03*

Council Directive 92/85/EEC of 19<sup>th</sup> October 1992 Artical 2.

Art 15 of the Council Directive 89/391/EEC 12<sup>th</sup> June 1989 Artical 15.

Maternity Benefit Ordinance No 32 of 1939 and relevant amendments.