



UNIVERSIDADE CATÓLICA PORTUGUESA

The right of employed women to protection

What does the European Committee of Social Rights have to say
about the Portuguese situation regarding article 8§1, 2 and 3 of
the (Revised) European Social Charter?

The Multilevel Protection of Fundamental Social Rights

Hugo Vieira Marques

340113121

Faculty of Law | Oporto School

January 2019

Index

Objectives and Introduction..... 3

Paragraph 1 – Maternity leave..... 4

Paragraph 2 – Illegality of dismissal during maternity leave 6

Paragraph 3 – Time off for nursing mothers 8

Conclusion..... 9

Bibliography 10

Objectives and Introduction

In scope of the final evaluation for the Multilevel Protection of Fundamental Social Rights Seminar, we propose to make a careful analysis of the latest Conclusions of the European Committee of Social Rights regarding the Portuguese situation in relation to article 8, paragraphs 1, 2 and 3 of the Revised European Social Charter. Therefore, we're going to review in detail the latter Conclusions, which date back to 2011, and, if we consider it relevant, we will call upon previous Conclusions on this article (1995, 1997, 2001, 2005). We'll also do our best to answer every question requested by the European Committee of Social Rights.

The Revised European Social Charter [(R)ESC] is a Council of Europe treaty that guarantees fundamental social and economic rights, laying specific emphasis on the protection of vulnerable persons without discrimination. Portugal ratified it in 2002 and is one of the 43 Member States that is bound to either this revised treaty or its original version. There are two monitoring mechanisms: the reporting system and the collective complaints system¹. The surveillance body of the (R)ESC, which examines compliance under these mechanisms is the European Committee of Social Rights (ECSR). The Conclusions adopted by the ECSR are declaratory and binding.

Article 8 of the (R)ESC is about the rights of employed women to protection. This is one of the most important social rights as it helps protect a gender that has suffered from discrimination throughout the ages, namely in the ambit of employment. Naturally, this article focuses on the most vulnerable moment of women's lives, which is pregnancy. For instance, even though we're not going to analyse article 8§5, it lists all the dangerous, unhealthy or arduous works that, for this reason, are prohibited for pregnant women, as it jeopardizes their lives and their baby's life as well. A few decades ago, some types of works used to be prohibited to women in general as "they ruin hair, and a woman's hair is her crowning glory²". Fortunately, International and European legal acts like the article that we're about to scrutinize came along and established a very important and just equality between genders.

¹ Which emerged with the Additional Protocol of 1995.

² *Jeremiah v. Ministry of Defense* (1979) - Justification of the British Court of Appeal for the prohibition of work in underground mines by women in general.

Article 8 – Right of employed women to protection

Paragraph 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;*

Paragraph 1 can be divided into three subcategories, all of them interlinked between each other.

Firstly, we have the **existence of a right to maternity leave**. The (R)ESC states that there must exist a maternity leave for employed women to take advantage of, both before and after the birth of the child and that this leave needs to be of at least 14 weeks, which is roughly 125 days. In Portugal, the existence of this right has been perfectly clear throughout all of the ECSR Conclusions. Even back in 1995, when Portugal failed to comply with article 8§1³, the legal existence of the maternity leave was not called into question, as it was explicitly protected by Act 4/84⁴. In its latest Conclusions, the ECSR recognized that Portugal indeed has a maternity leave consolidated in Article 41° of the Labour Code⁵.

A part of the maternity leave needs to have a **compulsory nature**. This means that this part of the leave is not optional and can't be renounced under any circumstances. This is clearly because of the utmost importance of recovery time postpartum and the strengthening of bonds between the mother and her baby. Even though article 8§1 mentions a 14 week leave, the ECSR has already clarified that only six weeks should be compulsory⁶. For the first three Conclusions on this matter (1995⁷, 1997⁸ and 2001⁹), Portugal struggled to comply with this requirement, as the national law only established

³ Conclusions XIII-3/def/PRT/8/1/EN (reference period: 01/01/1991 and 31/12/1993) - <http://hudoc.esc.coe.int/eng?i=XIII-3/def/PRT/8/1/EN>

⁴ https://dre.pt/web/guest/pesquisa/-/search/654496/details/normal?p_p_auth=CcTaBK7P

⁵ In its composition given by Act 105/2009, of 14 September, which remains the same to this day.

⁶ According to the Statement of Interpretation on Article 8§1 – Conclusions VIII of the ECSR.

⁷ Footnote 3

⁸ Conclusions XIII-5/def/PRT/8/1/EN (reference period: 30/09/1994 and 31/12/1995) - <http://hudoc.esc.coe.int/eng?i=XIII-5/def/PRT/8/1/EN>

⁹ Conclusions XV-2/def/PRT/8/1/EN (reference period: 1/1/1996 and 31/12/1998) - <http://hudoc.esc.coe.int/eng?i=XV-2/def/PRT/8/1/EN>

a compulsory leave of 14 days. Right after 2001s Conclusions a new law came into force (Act 142/99¹⁰, namely its article 4º) and a six week compulsory leave was adopted. From this point on, Portugal started respecting this requirement of article 8§1. In 2011, the ECSR stated that the situation was in conformity with the (R)ESC as articles 40º and 41º of the recently developed Labour Code clearly indicated that both parents are entitled to a leave of 120 or 150 days, without prejudice of a compulsory postnatal leave of six weeks. Nevertheless, the ECSR asked if this also applied to the public-sector, which it did (and still does), according to the Public-Sector Labour Law¹¹.

Finally, article 8§1 also states that during this maternity leave there needs to be a **right to maternity benefits**. According to this requirement, during their leave, women have the right to be paid in full either by the employer, by the social security or by a public funds system. This is important to promote natality and to prevent any negative connotation when it comes to having a child. When it comes to Portugal, there is a social security system that covers these benefits, which means that women only have to be covered by the general social security scheme to be entitled to 100% of the employee's reference remuneration during their leave. The way this remuneration is calculated takes into account the insured person's earnings during the six months preceding the second month before the one qualifying the pregnant woman for the benefit. There is no ceiling to this reference remuneration but there is a minimum threshold. The maternity benefit cannot be lower than 50% of the minimum wage, even if the reference remuneration is. Portugal never failed to comply with this requirement of Article 8§1, and 2011's Conclusions were no exception. Not surprisingly, the ECSR asked if the same regime applied to women employed in the public-sector. Once again it does. The same regime applies to public-sector workers that are covered by the general social security scheme¹². A very similar regime applies to workers that are not covered by this scheme¹³.

In a nutshell, the latest Conclusions of the ECSR (2011) regarding article 8§1 of the (R)ESC seem to indicate that Portugal is **in total conformity** with what is moulded in this paragraph.

¹⁰ <https://dre.pt/pesquisa/-/search/581976/details/maximized>

¹¹ Article 4º, no.1, point e) of the Public-Sector Labour Law.

¹² *Ditto*.

¹³ Decree-Law 89/2009, of 9 April.

Paragraph 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;*

Paragraph 2 is about protecting women from dismissals during their maternity leave. With a few exceptions¹⁴, every **dismissal of a pregnant woman should be considered unlawful** as it endangers a huge fundamental social right, which is the right to equal treatment and prohibition of discrimination (based on sex). In 2011, the ECSR decided to defer its Conclusions, postponing their judgement to the next time they're called to review the Portuguese situation regarding article 8§2 of the (R)ESC. This happened because there were some interpretation doubts when it comes to the Portuguese legal framework on this matter.

According to article 63° of the Labour Code, the dismissal of a woman during her maternity leave is dependent of a favourable opinion from CITE¹⁵, which is the competent authority in the area of equal opportunities between men and women. Should CITE's opinion be unfavourable, the only way for the employer to legally fire pregnant women is through a court decision recognizing the existence of a justified reason. Naturally, the burden of proof lies on the employer, and failure to ask for CITE's opinion makes the dismissal unlawful (article 381° of the Labour Code). If the dismissal is declared unlawful the employee has two options: reinstatement (which the employer cannot refuse) or compensation. Regarding this compensation, the ECSR asked if there was a monetary ceiling to it, and if that compensation included pecuniary and non-pecuniary damages. If non-pecuniary damages were not included in that compensation, the ECSR asked if there was a second compensation that covered these damages and if it was the same Court that assigned both of these redundancy payments. In Portugal, in case of illegal dismissals, there are two different compensations: one of them substitutes reintegration, and does, in fact, have a ceiling (which is 60 days per seniority year) and doesn't cover non-pecuniary

¹⁴ Listed in the Digest of the Case Law of the ECSR, pages 68 and 69 - <https://rm.coe.int/168049159f>.

¹⁵ <http://cite.gov.pt/>

damages; the other one, raised in the same Court, has no ceiling and covers both pecuniary and non-pecuniary damages (article 389º, no.1, point a) of the Labour Code). The ECSR also asked how long it took for the Court to recognize the right to these compensations. According to our research it takes about one year, unless the judicial process takes place in Lisbon, where Courts are completely clogged, and the average time is three years.

Still on article 8§2 of the (R)ESC, the ECSR asked if the regime mentioned above applied to women employed in the public-sector, in particular to those with a fixed term employment contract. When it comes to parenthood, the regime enshrined in the Labour Code also applies to the Public-Sector by dint of a remissive norm in the Public-Sector Labour Law¹⁶. As for illegal dismissals of women employed in the public-sector with a fixed term contract the consequences are very similar¹⁷. If the term of the contract takes place after *res judicata*, reinstatement is a possibility. Regardless of this, there is always the possibility of choosing a compensation that cannot be lower than what the employee would have received if he fulfilled his contract. This compensation takes into account non-pecuniary damages.

In conclusion, and as mentioned above, the ECSR decided to **defer its Conclusions** regarding article 8§2 (R)ESC. This may be seen as a step backwards, since Portugal has complied with this paragraph since 1997.

¹⁶ Article 4º, no.1, point e) of the Public-Sector Labour Law.

¹⁷ Article 302º of the Public-Sector Labour Law.

Paragraph 3 – Time off for nursing mothers

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;*

Paragraph 3 concerns nursing mothers and the time required to carry out a major part of maternity, which is **breastfeeding**. It is crucial that there are certain **work breaks** to fulfil this purpose. Even when breastfeeding is no longer necessary there is still the need to feed the baby, but, since it doesn't depend on gender, the mother and the father can decide who takes these work breaks. This paragraph is probably the most consensual out of all five paragraphs of article 8. In all five Conclusions of the ECSR regarding article 8§3, which comprise almost 20 years, Portugal has always been in conformity. According to article 47° of the Labour Code, women are entitled to two different breaks per working day for as long as they breastfeed their baby. Each break can go up to one hour, unless we're talking about twins. In this case the breaks are extended by 30 minutes per twin. When it comes to part-time workers, they also benefit from this regime. The total duration of the break is proportional to their working hours¹⁸, but it shall not be less than 30 minutes. The ECSR had two questions. First, they asked if this regime also applied to the public-sector, which it does, according to the remissive norm mentioned when we analysed article 8§2. Finally, the ECSR asked if these breaks continue to be remunerated, and they are, according to article 65°, no. 2 of the Labour Code, that fictions these breaks as if they were working hours.

In brevi, the ECSR considered Portugal to be **in conformity** with article 8§3 of the (R)ESC.

¹⁸ For instance, six working hours per day amount to 45-minute breaks.

Conclusion

To end our essay, we would like to reiterate the importance of the Revised European Social Charter and its article 8. This sort of “Social Constitution of Europe” is quite positive to bring stability and equality when it comes to social rights in the Member States. Article 8 is really significant to fight gender discrimination at work. Regarding the Portuguese situation, the right of employed women to protection as defined in article 8 of the (R)ESC is an effective and applied right. Even though the European Committee of Social Rights decided to defer its Conclusions on paragraph 2 and always had questions regarding matters that were not correctly explained in the reports, we feel like Portugal’s compliance is not at stake. When it comes to Portugal and maternity there are still some adjustments to make but since they’re mostly minor adjustments we would say that **Portugal complies** with article 8 of the (R)ESC. The fact that no collective complaints regarding article 8 of the ESC have been found is also an indicator of this conformity.

The bittersweetness of knowing that this essay will soon become outdated, as new Conclusions regarding article 8 of the (R)ESC might be getting published in the near future, is compensated by knowing that there were no major changes in the Portuguese legislation when it comes to the right of employed women to protection (since 2011), and that we’ll have to research more on this matter.

Bibliography

KENNEY, Sally (1995) – “For whose protection? Reproductive hazards and exclusionary policies in the United States and Britain”. USA: The University of Michigan Press.

DE SCHUTTER, Olivier (2010) – “The Two Lives of the European Social Charter”, in *The European Social Charter: A Social Constitution of Europe* – vol. 7, Belgium: Bryulant Bruxelles.

Digest of the Case Law of the European Committee of Social Rights (2008) - <https://rm.coe.int/168049159f>