Maternity Protection Convention (Revised), 1952 (No. 103)

The Minister of Social Administration of Austria requested from the International Labour Office certain information concerning the interpretation of the Maternity Protection Convention (Revised), 1952 (No. 103) (Articles 3 and 4).

With the usual reservation that the Constitution does not give him any special authority to interpret Conventions adopted by the International Labour Conference, the Director-General of the International Labour Office, by letter dated 14 May 1962, transmitted to the Minister of Social Administration of Austria the following memorandum prepared by the International Labour Office:

Memorandum by the International Labour Office

(Translation)

1. The Austrian Government has informed the Director-General of the International Labour Office that, when it considered the possibility of ratifying the Maternity Protection Convention (Revised), 1952 (No. 103), a question arose as to the exact manner in which certain provisions of the Convention are to be understood. In its request the Government makes particular reference to certain provisions of Austrian law and desires to know whether the provisions in question are compatible with the Convention.

2. In general, it is not for the International Labour Office to express an opinion as to whether or not the legislation of a State is in conformity with the provisions of the Convention; the Office must, subject to the usual reservation that the Constitution of the International Labour Organisation does not confer upon it any special competence to interpret the Conventions, confine itself to providing requesting governments with any indications which will clarify the meaning of particular provisions of the Convention, taking into account any elements emerging from the preparatory work leading up to the Convention. It is for the government concerned to assess the conformity of a country's national legislation and practice with the standards laid down in a particular international labour Convention,

---

[1] *Minimum Standards of Social Security*, Report V *(a)* (2), op. cit., p. 229.

subject, in the event of its ratifying the Convention, to the procedure established by the International Labour Organisation for the international examination of reports relating to the application of ratified Conventions.

3. The questions raised by the Austrian Government relate first to Article 4, paragraph 8, of the Convention, secondly to paragraphs 1 to 4 of Article 3, and thirdly to paragraphs 5 and 6 of Article 3. These three questions will be discussed in turn.

I. *Meaning of Article 4, Paragraph 8.*

4. Although the Government in its request explicitly refers only to paragraph 8 of Article 4 of the Convention, it is clear that this clause cannot be considered separately from the other paragraphs of that Article, which reads as follows:

Article 4

1. While absent from work on maternity leave in accordance with the provisions of Article 3, the woman shall be entitled to receive cash and medical benefits.

2. The rates of cash benefits shall be fixed by national laws or regulations so as to ensure benefits sufficient for the full and healthy maintenance of herself and her child in accordance with a suitable standard of living.

3. Medical benefits shall include pre-natal, confinement and post-natal care by qualified midwives or medical practitioners as well as hospitalisation care where necessary; freedom of choice of doctor and freedom of choice between a public and private hospital shall be respected.

4. The cash and medical benefits shall be provided either by means of compulsory social insurance or by means of public funds; in either case they shall be provided as a matter of right to all women who comply with the prescribed conditions.

5. Women who fail to qualify for benefits provided as a matter of right shall be entitled, subject to the means test required for social assistance, to adequate benefits out of social assistance funds.

6. Where cash benefits provided under compulsory social insurance are based on previous earnings, they shall be at a rate of not less than two-thirds of the woman's previous earnings taken into account for the purpose of computing benefits.

7. Any contribution due under a compulsory social insurance scheme providing maternity benefits and any tax based upon payrolls which is raised for the purpose of providing such benefits shall, whether paid both by the employer and the employees or by the employer, be paid in respect of the total number of men and women employed by the undertakings concerned, without distinction of sex.

8. In no case shall the employer be individually liable for the cost of such benefits due to women employed by him.

5. The Austrian Government's question in relation to Article 4, paragraph 8, is whether, with a view to preventing any discrimination in employment against women, the effect of this provision is to prohibit charging directly to the employer certain measures designed to protect the health of women during the periods preceding and following maternity leave, such as measures concerning the entitlement of a woman ordinarily employed on dangerous work to be transferred without loss of pay to another type of work that is not prejudicial to her condition.

6. Article 4 of the Convention states that, when a woman is absent from her work during the period provided for in the Convention, she shall be entitled during such absence to cash and medical benefits (paragraph 1), the minimum rate of the cash benefits being specified (paragraphs 2 and 6) and the nature of the medical benefits being laid down (paragraph 3).

7. A review of the preparatory work shows that the purpose of inserting paragraph 8 in Article 4 was to obviate the possibility that charges resulting directly from the grant of the cash and medical benefits provided for might cause employers to employ less female labour. This concern to prevent the protective measures prescribed in Article 4 from leading to discrimination is reflected not only in the prohibition in paragraph 8 but also in other

provisions of that Article, and particularly in paragraph 4 (financing of benefits by means of insurance or by means of public funds), paragraph 5 (provision for benefits, as a subsidiary measure, out of social assistance funds) and paragraph 7 (mode of levying contributions or taxes payable by the employer).

8. It would appear from the tenor of Article 4 as a whole and from the preparatory work that the scope of paragraph 8 of that Article is strictly limited to the cash benefits and medical benefits provided for, and in no way refers to other measures for the protection of women as contemplated by the Austrian Government.

9. This conclusion is fortified by reference to the English text of the Convention which under Article 17 is " equally authoritative ". In this text paragraph 8 of Article 4 is worded as follows:

> 8. In no case shall the employer be individually liable for the cost of such benefits due to women employed by him.

The use of the words " such benefits " shows that the provision in question relates only to the benefits provided for in the preceding paragraphs of Article 4.

10. Confirmation for this conclusion will be found in the text of the Maternity Protection Recommendation, 1952 (No. 95), which was adopted by the Conference at the same time as the Convention under review and which is intended to supplement it (see third paragraph of the preamble to the Recommendation). Paragraph 5 of this Recommendation makes provision for various measures to protect the health of women during the maternity period and contains, *inter alia*, the following subparagraph:

> (4) A woman ordinarily employed at work defined as prejudicial to health by the competent authority should be entitled without loss of wages to a transfer to another kind of work not harmful to her health.

In view of the fact that this Recommendation is intended to " supplement " the provisions of the Convention it hardly seems possible that it could contain provisions that were not compatible with those of the Convention itself. With respect to the present question it is submitted that the use in Paragraph 5, subparagraph (4), of the Recommendation of the expression " without loss of wages "—wages normally being always a direct charge on the employer (or the firm)—clearly shows that the application of paragraph 8 of Article 4 of the Convention to cases where women were transferred to other jobs as advocated in the Recommendation was not contemplated.

II. *Meaning of Article 3, Paragraphs 1 to 4.*

11. The Austrian Government's second question refers to the provisions of paragraphs 1 to 4 of Article 3 of the Convention, which read as follows:

> 1. A woman to whom this Convention applies shall on the production of a medical certificate stating the presumed date of her confinement be entitled to a period of maternity leave.
>
> 2. A period of maternity leave shall be at least 12 weeks and shall include a period of compulsory leave after confinement.
>
> 3. The period of compulsory leave after confinement shall be prescribed by national laws or regulations but shall in no case be less than six weeks; the remainder of the total period of maternity leave may be provided before the presumed date of confinement or following expiration of the compulsory leave period or partly before the presumed date of confinement and partly following the expiration of the compulsory leave period as may be prescribed by national laws or regulations.
>
> 4. The leave before the presumed date of confinement shall be extended by any period elapsing between the presumed date of confinement and the actual date of confinement and the period of compulsory leave to be taken after confinement shall not be reduced on that account.

12. In cases where the law provides for six weeks' leave after confinement and six weeks before the presumed date of confinement, the Government asks whether a woman who has left her work six weeks before that date and who is in fact confined earlier than was

expected must be able to extend her leave after confinement by such a period as will give her a total of 12 weeks' maternity leave.

13. It will be observed that the Convention lays down a number of mandatory rules concerning maternity leave. In the first place the total duration of the leave must be " at least 12 weeks ". In the second place the portion of this leave taken after confinement is compulsory and must in no case be lesss than six weeks.

14. As regards " the remainder of the total period of leave " the Convention makes it a matter for domestic legislation to determine whether this leave may be taken before the presumed date of confinement or following expiration of the compulsory post-natal leave period, or partly before the first-mentioned date and partly after the second. National laws and regulations may thus decide that the time at which the " remainder of the total period of leave " may be taken must be six weeks before the presumed date of confinement as established by a medical certificate. However, where the confinement in fact takes place before the presumed date the provisions of Article 3, paragraph 2, specifying that " the period of leave shall be at least 12 weeks " must not be disregarded. Accordingly a woman who went on leave six weeks before the presumed date of confinement and who did not have these six weeks owing to the fact that the confinement took place earlier than was expected should nevertheless be entitled under the Convention to a total period of leave of " at least 12 weeks".

15. The above conclusion would appear to be borne out by the preparatory work.[1] The text of Article 3 is the result of an amendment adopted by the Committee on Maternity Protection at the 35th Session of the Conference, primarily at the instance of the Worker members, whose spokesman expressed himself on the subject as follows:

> The aim of the amendment . . . is to avoid any confusion and to establish clearly and without any possible ambiguity that the woman has the right to 12 weeks' maternity leave, of which one part must be taken after confinement. The Worker members are not opposed to a period of compulsory leave before confinement but they wish Article 3 to be as flexible as possible. . . .[2]

16. It appears to follow from the above that in cases where confinement takes place earlier than expected, the woman should nevertheless be allowed to have 12 complete weeks' leave, under the conditions specified in the Convention. It would seem, however, that this requirement may be deemed to have been satisfied in cases where a possibility is provided in laws or regulations (as appears to be the case in Austria) for the maternity leave proper to be extended at the woman's request when the conditions in which such an extension may be secured and the benefits payable during the further period, coupled with the benefits payable during the maternity leave period proper, correspond in the aggregate to the provisions of the Convention.

III. *Meaning of Article 3, Paragraphs 5 and 6.*

17. The last point raised by the Austrian Government concerns the last two paragraphs of Article 3, which read as follows:

> 5. In case of illness medically certified arising out of pregnancy, national laws or regulations shall provide for additional leave before confinement, the maximum duration of which may be fixed by the competent authority.
>
> 6. In case of illness medically certified arising out of confinement, the woman shall be entitled to an extension of the leave after confinement, the maximum duration of which may be fixed by the competent authority.

18. In this connection the Government asks whether, in the event of illness arising out of pregnancy and occurring before the beginning of the pre-natal maternity leave or in the event of illness arising out of confinement and occurring after the end of the post-natal leave, it is sufficient to extend the maternity leave by a period equal to the length of the illness in

---

[1] See I.L.O.: *Revision of the Maternity Protection Convention, 1919 (No. 3)*, Report VII, International Labour Conference, 35th Session, Geneva, 1952 (Geneva, 1952).

[2] International Labour Conference, 35th Session, 1952, Committee on Maternity Protection, Sixth Sitting, Minutes No. 6, p. 7.

question, or whether, in addition to sick leave proper, an additional period of maternity leave must be granted.

19. A review of the preparatory work [1] shows that these provisions were inserted into the Convention as the result of various suggestions and especially the recommendations of the World Health Organisation.[2] On this subject the report prepared by the Office states that the draft Article appended to the report was designed to make " provision for [supplementary] sick leave in the event of sickness and other complications arising out of pregnancy and confinement ".

20. It may safely be said, therefore, that when one of the illnesses under consideration occurs outside the period of maternity leave, the above-mentioned provisions of the Convention do not call for an " extension " of the maternity leave proper so much as the award of an appropriate period of sick leave.

---

[1] ... Conv... 1919 (No. 3), op. cit.