sciendo DOI: 10.2478/eustu-2022-0057

Breastfeeding as a (Non)Exclusive Right of Women in Labor Relations – the European Approach

Juraj Hamuľák*
Denisa Nevická**

Summary: The authors of presented article deal with the issue of breastfeeding in labor relations. The current Slovak legislation allows only women to take a breastfeeding break. The authors wonder whether the regulation in question is still efficient in the 21st century and does not cause problems rather than benefits in practice. In foreign legislation, it is standard that a man, the child's father, can under certain conditions take a breastfeeding break. The article analyzes Slovak legal norms and compares them with Spanish, Italian and Portuguese legal regulations as well as the chosen decision of the Court of Justice of the European Union regarding breastfeeding break. Methods of analysis, comparison and synthesis were used, which enabled the authors to form comprehensive conclusions as well as suggestions *de lege ferenda*. The authors' opinion is, that the legal regulation of breastfeeding break in Slovakia needs to be amended in order to provide a father with the breastfeeding break under certain circumstances.

Keywords: Breastfeeding, Labor Relations, Employee, Equal Treatment, Working Time

1. Introduction

In the Slovak Republic, only a minimum of professionals deal with the issue of the women's position in labor relations. Even fewer authors focus on those labor law issues, that are closely related to the principle of equal treatment between men and women. With regard to the adopted Directive of the European

* Associate Professor at The Comenius University in Bratislava – Faculty of Law, The Department of Labor Law and Social Security Law, Šafaríkovo sq. No. 6, 810 00 Bratislava, The Slovak Republic; email: juraj.hamulak@flaw.uniba.sk

** Assistant Professor at The Comenius University in Bratislava – Faculty of Law, The Department of Labor Law and Social Security Law, Šafaríkovo sq. No. 6, 810 00 Bratislava, The Slovak Republic, email: denisa.nevicka@flaw.uniba.sk

Parliament and of the Council no. 2019/1158 on the work-life balance of parents and caretakers (hereinafter also referred to as the "Work-Life Balance Directive"), which the Slovak Republic must transpose during summer 2022, we are convinced that gender issues and equality in the workplace should be increasingly reflected in professional discussions.

In the 21st century, we no longer consider it right for legal norms to be seen as male and female. We believe that we shall have only one set of universal rights. However, we must state that Act no. 311/2001 Coll. the Labor Code (hereinafter also referred to as the "Slovak Labor Code") is far from being such a universal legal regulation. A legal definition of the term "breastfeeding female worker" can be found in the introductory provisions. It is therefore clear that in Slovakia, from a labor point of view, a man cannot perform activities related to breastfeeding. The same applies in the case of a breastfeeding break, which, in accordance with Section 170 of the Labor Code, belongs only to the working mother. We consider the Slovak legal norms regarding breastfeeding break to be obsolete. We will try to justify our opinion by comparing Slovak regulations to those of Spain, Portugal and Italy and consequently propose our own adjustments to legal norms.

2. Breastfeeding in Labor Relations in Slovakia and in selected Countries of the European Union

In the conditions of the Slovak Republic, the employer is obliged to provide a breastfeeding break exclusively to the mother of the child. The Slovak Republic is a member of the European Union, and we therefore consider it important to analyze the provision of breastfeeding in a broader context[1], in accordance with the case law of the Court of Justice of the European Union and selected legislation[2] of the Member States.

2.1. Breastfeeding Break in the Slovak republic

Pursuant to the Section 40 of the Slovak Labor Code, an employee who has informed her employer in writing of her breastfeeding is considered to be a breastfeeding employee. According to Council Directive no. 92/85 / EEC on

[1] HAMUĽÁK, O. La carta de los derechos fundamentales de la Union Europea y los derechos sociales. *Estudios constitucionales,* 2018, vol.16, no.1, pp. 167–186.

[2] KUSTRA-ROGATKA, A. The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 7–37.

the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (hereinafter referred to as "Directive on the Protection of Female Workers") it is enough to inform an employer about the condition to be considered as a breastfeeding employee. Within the meaning of the foregoing a stricter legal regulation of the Slovak Republic can be observed in comparison with the directive of the European Union. In Slovakia, only an employee who informs the employer in writing about her condition is considered a breastfeeding employee. According to the Directive on the Protection of Female Workers, it is sufficient for an employee to inform the employer about breastfeeding orally or implicitly, it does not have to be a written notice.[3] In addition, we can state from Slovak practice that employers are not inclined to receive written notifications in electronic form (especially because the Slovak Labor Code does not deal with the issue of electronic delivery) and require primarily a written (printed) document. It can therefore be stated that the very process of transferring information about breastfeeding to the employer in Slovakia is more complicated than would be necessary. The mere information that an employee is breastfeeding is important for the employer because breastfeeding employee is provided with higher protection as well as with a breastfeeding break. It is an institute regulated in the Section 170 of the Slovak Labor Code, according to which the employer is obliged to provide the mother who breastfeeds her child with special breaks at work. Breastfeeding breaks are paid, included in working time, and can be provided at the beginning or at the end of the working time. The mother of a child who performs work during the prescribed weekly working hours is entitled to two half-hour breaks for a child under the age of 6 months and one half-hour break for a child under the age of 12 months.[4]

We consider it necessary to emphasize that the child's father has no entitlement to special breaks in connection with the care of a newborn child and cannot even take a breastfeeding break. The only type of obstacle at work that a child's father is entitled to is an obstacle at work to transport the mother to and from the hospital after birth. In the Slovak Republic, the work-life balance directive has not yet been transposed and paternity leave of 10 days has not yet been introduced.[5] Likewise, the second parent of a child is not a legal term in the Slovak Republic and therefore we use the terms father of the child and mother of the child in the analysis.

---

[3] BARANCOVÁ, H. a kol. *Zákonník práce*. *Komentár*. Bratislava: C. H. Beck, 2019, pp. 1273–1275.

[4] FREEL, L., LIGASOVÁ, Z. Práca na úkor rodiny: nevyhnutnosť alebo možnosť? In *Naděje právní vědy.* Plzeň : Západočeská univerzita, 2017, pp. 98–108.

[5] KRIPPEL, M. Podmienky nároku na materské otca. In *Míľniky práva v stredoeurópskom priestore*. Bratislava: Právnická fakulta UK, 2019, pp. 323–334.

In terms of international law, the right to breastfeed is not clearly defined.[6] In the professional literature, however, breastfeeding is considered to be primarily breastfeeding directly by the mother of the child, breastfeeding with breast milk from a bottle or breastfeeding with artificial substitutes for breast milk from a bottle.[7] Based on the analysis of the Slovak Labor Code, it is clear that a breastfeeding break is provided in the Slovak Republic to every mother who informs her employer of her condition. Every mother, also meaning the mother who adopts the child and therefore cannot breastfeed the child herself biologically but must provide him/her with nutrition through artificial substitutes for breast milk. In addition to mothers who adopt a child, a breastfeeding break can be used by a mother who, for health or other reasons, breastfeeds the baby from a bottle. Statistics from the National Center for Health Information[8] from 2018 show that approximately 52% of children are breastfed until the age of 6 months by breastfeeding.[9] This means that about 48% are fed differently, which cannot be considered a negligible number. As indicated, the breastfeeding break is already used in practice by mothers who do not breastfeed the baby directly from the breast. The question therefore arises as to why the child's father cannot take a breastfeeding break if the child is nourished in other way than with breast milk directly from the mother's breast.

2.2. The Judgement in the Case C-104/09 Pedro Manuel Roca Alvarez v Sesa Start Espana ETT SA

The Court of Justice of the European Union in Case C-104/09 Pedro Manuel Roca Alvarez v Sesa Start Espana ETT SA (hereinafter referred to as "Alvarez v Espana") also addressed the issue of the father's right to a breastfeeding break. Mr. Alvarez, who worked for Sesa Start Espana ETT SA, applied for a breastfeeding break under the Spanish Labor Code. According to the Spanish Labor Code, mothers were entitled to a breastfeeding break until the end of the 9th month after the birth. Only those fathers of the children whose mothers were employed, were entitled to the breastfeeding break.[10] The employer refused to

[6] ŠIMÁČKOVÁ, K., HAVELKOVÁ, B., ŠPONDROVÁ, P. (eds.) *Mužské právo. Jsou právní pravidla neutrální?* Praha: Wolters Kluwer, 2020, pp.829–850.

[7] PALMER, G. *Politics of Breastfeeding: when breast are bad for bussines*. London: Pinter & Martin Ltd, 2009, pp. 30–35.

[8] MESARČÍK, M. Právne aspekty spoločného zdroja údajov v kontexte zefektívnenia správy zdravotníctva. In *Justičná revue*, 2018, pp. 733–743.

[9] Národné centrum zdravotníckych informácii SR. [online]. Available at: http://www.nczisk.sk/Statisticke_vystupy/Tematicke_statisticke_vystupy/Pages/default.aspx.

[10] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 11–13.

grant Mr. Alvarez a breastfeeding break, arguing that his child's mother was not employed but was a self-employed person. The Supreme Court of Galicia has therefore referred a question to the Court of Justice of the European Union for a preliminary ruling on whether the provision in question in the Spanish Labor Code complies with the principle of equal treatment.[11] The Court of Justice of the European Union has ruled that there is a difference in treatment between the mother and the father of the child under the Spanish Labor Code. It can be considered problematic that while the fact that the child's mother is employed is sufficient to provide her with a breastfeeding break, the employed father of the child will not be provided with the same, unless the mother of the child is also employed. The status of the child's parent was therefore assessed differently for the child's mother and for the child's father within the meaning of the Spanish Labor Code.[12] The Court of Justice of the European Union emphasizes that both parents have a comparable right to request a reduction in working hours in connection with caring for a newborn. In the decision, the court further stated that breastfeeding is increasingly moving away from its purely biological significance and that a child can breastfeed equally well with both the mother and the father, by breastfeeding from a bottle. Thus, a breastfeeding break cannot serve solely to create a bond between mother and child but should also serve the child's father to provide care for the child. It is not a question of protecting the specific relationship between the mother and the newborn child, if it is possible to provide the child's nutrition in a comparable quality by the child's father.[13] Furthermore, in the decision, the court also addressed the issue of differences in treatment between employees and self-employed persons. The court stated that the child's mother could not be penalized for choosing to be self-employed. If the breastfeeding break were not provided to the fathers of children whose mothers are not employed, this would mean a disproportionate burden on self-employed mothers, which is an undesirable phenomenon.[14]

This decision had a significant impact on the formation of legislation in Spain. It also influenced the decision-making activity of national courts in the public sector and ensured more equal conditions in the care of the newborn child. We consider not only Spain, but also Italy and Portugal to be countries whose legislation, with regard to breastfeeding breaks, make a significant contribution to equality in the care of the newborn child by both parents and thus enable mothers to participate in working life.

[11] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 14–18.
[12] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 2127.
[13] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 28–34.
[14] Case C – 104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010]. ECJ, paras 35–37.

2.3. The Legal Regulation of Breastfeeding Break in Spain, Portugal and Italy

According to a survey by the European Institute for Gender Equality, Spain has achieved 72.9 points in equality in employment relations. The European average is at the level of 72.0 points, while the Slovak Republic reached only 66.5 points. In Spain, the possibility for men and women to take an hour or two off work while performing family care responsibilities is relatively balanced. Of the respondents, 35% of men and about 33% of women use this option.[15] The decision in case Alvarez v Espana had a significant impact on the legislation on breastfeeding in Spain, which can now be taken by working fathers of children, regardless of whether the child's mother is working or not. Both parents can use the breastfeeding break up to the child's 9th month for a maximum of one hour a day or they can decide to shorten their working day by 30 minutes.[16] In addition to the private sector, the right to a father's breastfeeding break was confirmed by the Spanish Central Court for Disputes for the public sector as well, by a decision granting a breastfeeding break pursuant to Section 48 of the Spanish Public Service Statute to a police employee to the same extent as the mother of his child.[17] Spain has thus become one of the most liberal countries in the provision of a paid breastfeeding break, which is intended to ensure, in addition to the child's nutrition, also the relief of the mother in the performance of parental duties.

In addition to Spain, neighboring Portugal also provides a relatively generous right to both parents in caring for a newborn child. Pursuant to the Section 47 of Act no. 7/09 the Labor Code, the child's mother is entitled to a paid one-hour break at work twice a day. If the mother does not breastfeed the baby directly from the breast but breastfeeds from the bottle, both the mother and the baby's father are entitled to a breastfeeding break until the child is one year old. This applies provided that the employer has not set up a crèche or other facility for newborns directly at the workplace. The right to a breastfeeding break may be exercised by one of the parents or they may share the right to a breastfeeding break by mutual agreement.[18] Portugal, like Spain, ranked high in the gender

[15] European Institute for Gender Equality. [online]. Available at: https://eige.europa.eu/publications/gender-equality-index-2019-spain.

[16] International Labor Organization. [online]. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf

[17] The Local. [online]. Available at: https://www.thelocal.es/20130410/spanish-fathers-score-breastfeeding-leave

[18] International Labor Organization. [online]. Available at: https://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=3&p_year=2009&p_start=1&p_increment=10&p_sc_id=2000&p_countries=PT&p_countries=KI&p_print=Y

equality index, reaching 72.5 points in the equality of labor relations. An interesting statistic is that part-time work in Portugal is not the domain of women and is performed by both men (8%) and women (13%). 23% of women and 28% of men surveyed use the opportunity to take a break from work to provide care for family matters.[19]

Unlike Spain and Portugal, Italy did not achieve an above-average score in the gender equality index. Gender equality in labor relations is only at the level of 63.1 points. As many as 33% of women work shorter working hours, compared to 9% of men, and only 19% of women and 22% of men use the opportunity to take a break during work to care for a child.[20] The practice therefore reflects completely different numbers than could be expected from the legislation. Pursuant to the Section 39 of Decree no. 151/2001, a woman has the right to take two hours of paid breaks at work during the first year of a child's age for the purpose of breastfeeding. During these breaks, she may leave the company's headquarters. Pursuant to Section 40 of the said Decree, the father of the child may also take a breastfeeding break to the same extent, provided that:
(a) the child is entrusted to the sole care of the father;
(b) the mother decides not to take breast-feeding breaks;
(c) the mother of the child is unemployed;
(d) (d) the mother of the child is seriously ill or deceased.[21]

The father's right to take a breastfeeding break in Italy thus derives from the mother's decision to take or not to take a breastfeeding break. The law does not directly allow the mother and father of the child to agree on the division of the breastfeeding break at their own discretion.

2.4. Comparison and Reflections de lege ferenda

Based on the analysis of the chosen legal regulations, it can be clearly stated that, apart from the Slovak Republic, all selected countries of the European Union provide the father of the child with the opportunity to use a breastfeeding break in some form. We believe that the ruling of the Court of Justice of the European Union in the case Alvarez v Espana has had a significant impact on the legislation

[19] European Institute for Gender Equality. [online]. Available at: https://eige.europa.eu/gender-equality-index/2019/domain/work/PT.

[20] European Institute for Gender Equality. [online]. Available at: https://eige.europa.eu/gender-equality-index/2019/domain/work/IT

[21] International Labor Organization. [online]. Available at: https://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=3&p_year=2011&p_start=1&p_increment=10&p_sc_id=2000&p_countries=IT&p_print=Y#:~:text=In%20the%20Legislative%20Decree%20No,part%2Dtime%20contract%20after%20maternity

of the southern states of the European Union and should also influence the development of the right to breastfeeding break in other countries.

Based on medical research[22], the authors are convinced that breastfeeding a baby is the most appropriate way to feed a baby, but it is necessary to state that not all mothers can feed their baby in this way. As we have already mentioned, almost 48% of children under the age of 6 months in the Slovak Republic are nourished differently than with breast milk directly from the mother's breast. Medical experts report that a mother's inability to breastfeed her baby can contribute to deepening or maintaining depressive symptoms.[23] Therefore, we believe that mothers who cannot breastfeed their babies in the natural way should not be subjected to sanctions by labor law. The World Health Organization has adopted the Code of Marketing of Breast-milk Substitutes, which has also been transposed into Commission Directive No. 2006/141 / EC on infant formulas and follow – on formulas. Those standards specify exactly what a formula must meet in order to be presented as infant formula and to be administered as a substitute for breast milk. Labor law standards should therefore not determine what is the most appropriate way to feed a child, but should reflect the different conditions and needs of parents – employees and adjust the right to a breastfeeding break in such a way, as to take into account different life situations.[24] At the same time, we are of the opinion that the child's father, like the child's mother, should be able to take a breastfeeding break if the child is nourished differently than from the mother's breast. Otherwise, in our opinion, it would be a difference in treatment without a legal reason.

De lege ferenda, we consider it necessary to amend the legislation on breastfeeding in the Slovak Republic. Based on the analysis of selected legal regulations and their comparison, we cannot state that any of the analyzed legal regulations would be an ideal model. We do not consider the Italian model to be suitable, as it does not distinguish between breastfeeding and bottle breastfeeding and at the same time deduces father's right to a breastfeeding break from the mother's.[25] We consider legislation in Spain and Portugal to be the more appropriate. Spain allows both parents to take the breastfeeding break regardless of the method of breastfeeding to the same extent, therefore we do not consider this to be an ideal

[22] CESAR, G. V. Breastfeeding in the 21st century: epidemiology, mechanisms, and lifelong effect. In *The Lancet. Series: Breastfeeding*. 2016, pp. 475-490.

[23] IZÁKOVÁ, Ľ. Duševné zdravie počas tehotenstva a po pôrode. In *Psychiatrická prax*, 2015, p. 20.

[24] NOVÁKOVÁ, M. Pracovné podmienky vysokoškolských učiteliek. In *Bratislava Legal Forum: Equality and inequality before the law in relation to weaker subjects of law*. Bratislava: Právnická fakulta UK, 2015, pp. 204–208.

[25] HAMUĽÁK, J., NEVICKÁ, D. Švédsky model rodičovskej dovolenky – cesta k rovnoprávnosti? In *Právny štát – medzi vedou a umením*. Bratislava: Wolters Kluwer, 2018, pp. 124–127.

model. The Portuguese legislation distinguishes between breastfeeding and bottle breastfeeding, which we consider to be the right way of classifying breastfeeding. However, leaving the division of the breastfeeding break to the parents' agreement is not the fair solution from our point of view, as it can benefit one parent over another. Based on the performed analysis and comparison, we therefore consider best solution to distinguish between breastfeeding by the mother and breastfeeding from a bottle. Assuming that the baby is breastfed directly by the mother from the breast, it is in our opinion legally correct that only the mother should be able to take a breastfeeding break. In this case, the breastfeeding break should not serve as a substitute institute for insufficient legal regulation of other breaks at work or personal leave of the child's father.

However, if it is not possible for the mother (whether for health or other reasons) to breastfeed the child, we consider it necessary to regulate the possibility of drawing a breastfeeding break for the child's father. We are of the opinion that if the child's mother or father informs the employer that the child is being breastfed in another way, they should be entitled to a certain paid period of time, which the mother and father can use independently to breastfeed the baby from the bottle. If the legislature were to make the drawing of the father's breastfeeding break entitlement to the mother's right, we are of the opinion that at least part of it should be non-transferable and intended exclusively for the child's father. Such a tool would also help to establish mothers in the labor market and reduce the difference in treatment in the selection of jobseekers. An employer could not automatically assume that only a woman-mother would take breastfeeding breaks but would have to assume that a similar situation could occur with a man-father. Equal treatment in the granting of the right to a breastfeeding break while bottle breastfeeding would ultimately contribute to improving the position of mothers in the labor market, which is a long-term goal of the European Union translated into the Work-Life Balance Directive.[26]

3. Conclusion

Biologically, the right to breastfeed is considered to be the exclusive right of women. However, the law should reflect various standards of living. On the basis of an analysis of selected legal regulations, their mutual comparison as well as an analysis of the decision of the Court of Justice of the European Union, we must state that in the 21st century labor law should reflect the real and current

[26] FREEL, L., LIGASOVÁ, Z. Práca na úkor rodiny: nevyhnutnosť alebo možnosť? In *Naděje právní vědy.* Plzeň: Západočeská univerzita, 2017, pp. 98–108.

needs of the labor market. Based on statistical data as well as an analysis of the legislation of Spain, Portugal and Italy, we are convinced that it is necessary to amend the Labor Code of the Slovak Republic and introduce the possibility of taking a breastfeeding break for the father of the child, provided that the child is breastfed from a bottle. In addition, the introduction of this break in the form of a certain non-transferable period of time can contribute to the equality of women and men as subjects of employment relationships. It would help to destigmatize women as those who exclusively care for children which subsequently makes them an undesirable burden for employers. If this does not happen, mothers' access to the labor market will continue to be disproportionally difficult, and at the same time, the legal entitlements of employed fathers to equal care will be (mostly) absent.

References

BARANCOVÁ, H. a kol. *Zákonník práce*. *Komentár*. Bratislava: C. H. Beck, 2019, 1520 s.

CESAR, G. V. Breastfeeding in the 21st century: epidemiology, mechanisms, and lifelong effect. In *The Lancet. Series: Breastfeeding*. 2016, pp. 475–490.

FREEL, L., LIGASOVÁ, Z. Práca na úkor rodiny: nevyhnutnosť alebo možnosť? In *Naděje právní vědy.* Plzeň : Západočeská univerzita*,* 2017, pp. 98–108.

HAMUĽÁK, J., NEVICKÁ, D. Švédsky model rodičovskej dovolenky – cesta k rovnoprávnosti? In *Právny štát – medzi vedou a umením*. Bratislava: Wolters Kluwer, 2018, pp. 124–127.

HAMUĽÁK, O. La carta de los derechos fundamentales de la Union Europea y los derechos sociales. *Estudios constitucionales,* 2018, vol.16, no.1, pp. 167–186.

IZÁKOVÁ, Ľ. Duševné zdravie počas tehotenstva a po pôrode. In *Psychiatrická prax*; 2015, p. 20.

KRIPPEL, M. Podmienky nároku na materské otca. In *Míľniky práva v stredoeurópskom priestore*. Bratislava: právnická fakulta UK, 2019, pp. 323–334.

KUSTRA-ROGATKA, A. The Kelsenian Model of Constitutional Review in Times of European Integration – Reconsidering the Basic Features. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 7–37.

MESARČÍK, M. Právne aspekty spoločného zdroja údajov v kontexte zefektívnenia správy zdravotníctva. In *Justičná revue*, 2018, pp. 733–743.

NOVÁKOVÁ, M. Pracovné podmienky vysokoškolských učiteliek. In *Bratislava Legal Forum: Equality and inequality before the law in relation to weaker subjects of law*. Bratislava: Právnická fakulta UK, 2015, pp. 204–208.

PALMER, G. *Politics of Breastfeeding: when breast are bad for bussines*. London: Pinter & Martin Ltd, 2009, pp. 3035.

ŠIMÁČKOVÁ, K., HAVELKOVÁ, B., ŠPONDROVÁ, P. (eds.) *Mužské právo. Jsou právní pravidla neutrální?* Praha: Wolters Kluwer, 2020, 1076 p.