

ISSN: 2582 - 2942



LEX FORTI

LEGAL JOURNAL

VOL- I ISSUE- V

JUNE 2020

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Challenges at workplace: Policies and implementations

Pragya Nawandar & Sneha Bhadauria

INTRODUCTION

The gap between male and female to survive independently is determined by the index in which India ranked 108 in 2018. The gap in workplace is portrayed by the sub index; economic participation and opportunity¹ and health and survival². The economic participation and opportunity is through indicators; participation gap, remuneration gap and advancement gap where gap between male and female are 26.1%³, 19%⁴ and 20%⁵ respectively. The health and survival is through indicators sex ratio at birth and healthy life expectancy. Sex Ratio of India is 107.48, i.e., 107.48 males per 100 females⁶ with 63 million missing women in 2018⁷ and healthy life expectancy is 70 years in females⁸. The wide gap between male and female in India is reflected in indices the legislature enactments and judicial decisions are to be scrutinised to find loopholes for improvement.

HEALTH AND SURVIVAL: POLICIES FOR MATERNAL BENEFITS AND CHILD CARE

INTERNATIONAL CONVENTION

The instruments of human rights all appreciate the institution of family and recognises its importance in developing health of a child physically and mentally. Family is the foundation unit of a society and should be preserved for the protection of child care and education. They expect special law in signatory states to protect dependence of child on mother. Maternity protection Convention⁹, CEDAW¹⁰, CRC¹¹, ICCPR¹², ICESCR¹³ and UDHR¹⁴ are some major international instruments recognising dignity of women making it the responsibility of each member to uplift the same

¹ India ranked 142 out of 149 countries; economic participation and opportunity index

² India ranked 147 out of 149 countries; health and survival index

³ PCA India, Census of India 2001

⁴ Monster survey index;

⁵ Gender diversity index on representation of women in top position 2018; lowest 5th rank overall

⁶ Sample Registration Survey-2017

⁷ Annual economic survey India 2018

⁸ National Health Profile 2019

⁹ ILO 2000

¹⁰ Article 1, 2(d), 2(e) and 11: Convention on the Elimination of All Forms of Discrimination against Women 1989

¹¹ Article 5; Convention on the Rights of the Child 1989

¹² Article 23 international covenant on civil and political rights, 1976

¹³ Article 10 international covenant on economic, social and cultural rights, 1976

¹⁴ Article 16 and 25 universal declaration on human rights, 1948

WHO CAN CLAIM?

The term woman applies to any female person without discrimination whatsoever and the term child applies to any child without discrimination whatsoever, to all employed women, including those in atypical forms of dependent work¹⁵.

The countries allow for duration of the entitlement to nursing breaks of between six and 23 months at the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace¹⁶. Often statutory provisions on nursing or childcare facilities apply if the company employs a minimum number of women and usually they assign the entire cost of provision to the employer, both factors creating potential disincentives to hiring workers with family responsibilities Breastfeeding contributes to the health of both mother and child and is particularly important in circumstances where unsafe water can pose a risk to the baby¹⁷

India has not ratified this convention to avoid the standards abidance to nursing policy and the standardizing the hours of feeding with clean environment allowed to every woman in a day. The problem with India is we do not have qualified and quantified doctors to be employed in every sector.

NATIONAL LAW

In India the pregnant women are provided benefits under maternity benefit act 2017 (amendment), Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, the Factories Act, 1948, the employee's state insurance act 1948 and shops and establishments act(state-wise) Esi And Mb Act

Both of these acts' objective is benefitting and remedying the employees. In the matter of defining the monetary benefits provides that, Under ESI; The qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government¹⁸. Maternity benefit act is such prescription by the central government which states every pregnant woman is entitled to paid maternity leave and a medical bonus. Medical bonus of minimum 1000/- rupees, if no pre-natal confinement or post-natal care is provided by the employer free of charge. It further shall increase such allowance by 250 rupees in every 3 years.¹⁹ the paid maternity leave she should be paid for days she absents her for the reason of pregnancy the minimum rate of wage fixed or revised under

¹⁵ Convention No. 183, Article 1

¹⁶ Recommendation No. 191

¹⁷ WHO, 2012 reports

¹⁸ Section 50 ESI

¹⁹ Section 8 maternity benefit act, 2017

the Minimum Wages Act, 1948 (11 of 1948) or ten rupees per day, whichever is the highest. The availing of maternity benefits from ESI does not bar her to get benefits from MB act.²⁰

WHO CAN CLAIM MATERNITY BENEFIT?

The gift of giving birth to a person is given to female. The “woman” means a woman employed, whether directly or through any agency, for wages in any establishment. This does not disentitle the women working as independent contractor or free-lancer²¹, every establishment being a factory, mine or plantation including any such establishment belonging to government and to every establishment wherein persons are employed for the exhibition of equestrian, acrobatic and other performance.²² The word establishment has a wide meaning and it generally denotes a shop, a commercial organization or a public institution, provided they are not specifically exempted by the appropriate Government from the applicability of the act²³ To create schemes to extend social security to informal industry workers, such as artisans, weavers, construction workers, cigar rollers and persons working in fisheries.²⁴ The acts also applies to women who are adopting mothers and commissioning mothers.²⁵

In *Arulin Ajitha Rani v The Principal*²⁶ when the dispute arouse so as to applying this act for student, the Court denied relief and held that although the object of the Act is to promote welfare of the women in as many fields of work, interfering with the attendance rules of educational institutions is not within the powers of the judiciary in the absence of any policy decision by the government. The judiciary faced the same dilemma in *Jasmine V.G. v. Kannur University*²⁷, where the petitioner was not allowed to sit for an examination due to attendance shortage. The Court adopted a clearly regressive approach here by stating that pregnancy is not an unexpected medical condition, it is an option which if exercised by female students will hamper their own competence in the long run. The Court also held that the objective of the Act is to facilitate motherhood, and cannot encompass derogation of educational values.

All the acts provide for maternity leave ranging from 12 weeks to 26 weeks. The drafters subtly coerced the women by giving financial incentive of only 12 weeks for women conceiving more than two children.²⁸ The mother suffers as she does not get paid leave when she needs it the most,

²⁰ Consequent reading of maternity benefit act Section 5A with ESI Section 50

²¹ *Dr. Parul Misra W/O Arvind Shukla v State of U.P. Thru Prin. Secy*

²² Section 2 maternity benefit act 2017

²³ *Thomas Eapen Vs. Assistant Labour Officer*, 1993 LLR 800 (Ker)

²⁴ Unorganized Workers Social Security Act of 2008

²⁵ Amendment Section 2 (ba) maternity benefit act 2017

²⁶ 2009 AIR MAD 7

²⁷ 2016 SCC ONLINE KER 3221

²⁸ Section 5(3) maternity benefit act 2017

handling three kids with half allowances is discriminatory and violation of right to reproductive choice. Right to reproduction choice includes right to make decisions concerning reproduction free of discrimination, coercion and violence²⁹. Honoring Human Rights defines coercion to include forced abortion, sterilization, or contraceptive use; the denial of safe abortion; and more subtle activities, such as the imposition of psychological pressure and incentives that compromise voluntary choice.³⁰ The reduction of the said paid leave influences the right to freely decide child number and their spacing.

NATURE OF CLAIMS

Duration : The maternity leave can be from 8 weeks to 26 weeks considering the amendment in maternity benefit act.³¹, The petitioner challenged a clause in her Appointment, which states that the individual should serve in Government for a period of not less than three years, excluding any period spent on training, leave or higher education and the individual should also abide by the condition that after joining duty, he/she will not be permitted to undergo Post-Graduate degree course within the period of two years excluding the period of leave. It is held in the aforesaid judgement that maternity leave cannot be denied and the period of maternity leave should not be kept apart or executed from service and maternity leave has to be excluded from the period of service is "null and void".³²

Creche and feeding breaks: the creches can be available only if the establishment has more than 50 employers with nursing breaks 4 times till the child is of 15 months.³³ The Government did not attempt to formulate any programmes to operationalise crèches, specially emphasised investment for the holistic development of young children and gave priority to early childhood care and development amongst child development services. The policy also stressed the importance of establishing day care centres for preschool education to enable young girls engaged in taking care of siblings to attend school and women from poor families to earn additional income. It thus tried to break the patriarchal notion of keeping the girl child at home as care giver of siblings and considered crèches as an alternative to enable the girl child to attend school.³⁴ Here again, the fact

²⁹ 1994 Population Report, "In every society there are many social and economic incentives and disincentives that affect individual decisions about child-bearing and family size. Over the past century, many Governments have experimented with such schemes, including specific incentives and disincentives, in order to lower or raise fertility."

³⁰ Honoring Human Rights in Population Policies: From Declaration to Action in POPULATION POLICES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 89,94 (Gita Sen, et al., eds., 1994)

³¹ Section 5 (3) maternity benefit act 2017

³² DR U. ISHWARYA V DIRECTOR OF MEDICAL EDUCATION

³³ Section 11 A maternity benefit act 2017

³⁴ National Policy for Education, 1986

that these provisions did not have legislative authority resulted in long delays in implementation. It was only after the adoption of the National Plan of Action for Children, 2005, which reiterated the 1986 Policy in relation to crèches, that the Rajiv Gandhi National Crèche Scheme for Children of Working Mothers (RGNC) was formulated in 2006. The World Health Organization recommends exclusive breastfeeding for babies until the age of six months and continued breastfeeding, with appropriate complementary foods, for children of up to 2 years of age. Breastfeeding contributes to the health of both mother and child and is particularly important in circumstances where unsafe water can pose a risk to the baby. Supporting breastfeeding at work is an integral part of the set of maternity protection measures and international labour standards set out rights and guidance for assisting mothers to continue breastfeeding on their return to work.³⁵

The benefits are received in three forms :

- i. Cash benefits by the government: this is provided generally to workers of unorganised sector with very low income who can not afford the hygienic washroom for personal care.
- ii. Employer liability: the paid leave is taken care by the employer wholly in formal sectors
- iii. Social Security systems: where half the money is paid by the employer and remaining half by the employee.

CASE STUDY

TATA INITIATION FORMAL IT SECTOR

Tata lead Under Tata LEAD, two years ago the Tata Group had announced increasing the number of female employees to 230,000 in 2020 from 115,000 in 2014. Currently, the number of women in the group is more than 145,000 that constitutes 24% of total employees.³⁶ In TCS around india the human resource department takes special care of instances involving women, it being a formal organisation implements every governmental policy. Generally, employers find hiring women a burden because of the number of leaves increases due to the family responsibilities and the provision of paid leaves. But, unlike general thinking TCS has a strength of more than 100,000 women employees, making it one of the highest employers of women in the world. About 11% of

³⁵ ILO Maternity Protection Convention, 2000 (No. 183) and its accompanying Recommendation (No. 191)

³⁶ economictimes.indiatimes.com/articleshow/52084422.cms?from=mdr&utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

the women hold leadership positions, paving the way for many more to take up the mantle and make this company stronger and more gender diverse.

In India, also, the majority of workers are in informal work and in the agricultural sector, and are beyond the reach of formal benefits programmes, while social assistance schemes impose age, number of births and poverty restrictions that severely restrict the coverage of the schemes; as a result, it is estimated that less than 1 per cent of women workers are eligible for maternity benefits.

EDUCATIONAL SECTOR GOVERNMENT COLLEGES

The leaves available to the women employees are: Casual leave, Medical leave, Duty leave, Maternity leave, Child care leave, Study leave, Earn leave and Privilege leave are the paid leaves available to women working in the educational field. But apart from the leaves the other essential arrangements like the crèches and nurses are not available. The monetary leaves are compiled but other essential provisions are not paid any heed.

FARM WORKER INFORMAL SECTOR

Exposures that generally are believed to pose a risk of fetal anomaly, miscarriage, or other adverse pregnancy outcomes include: heavy metals, all classes of pesticides and certain herbicides, specific solvents, ionizing radiation, and certain chemotherapeutic agents. Patients who work with chemicals should do so with adequate ventilation and protective gear, such as gloves and masks. Even if it is unknown whether a specific chemical poses risks to pregnancy or lactation, if a patient is bothered by it, an accommodation can be requested or she can deny doing such work.

The Indira Gandhi Matritva Sahyog Yojana (IGMSY) provides a cash transfer programme in 52 pilot districts reaching out to nearly 1.4 million pregnant and lactating mothers. A daily benefit (US\$ 1.68 for six weeks) for all women aged 19 and over aims at providing partial compensation for wage loss. On the fulfilment of certain conditions relating to maternal and child health care practices, including breastfeeding, all eligible women also receive a cash incentive of nearly US\$ 100 in three instalments from the end of the second trimester of pregnancy until the child reaches 6 months, both as partial wage compensation and as an incentive to promote self-caring behaviour.³⁷

The Employees' State Insurance a self-financing social security and health insurance scheme for workers provides for maternity benefits to women in lower-income jobs. It is applicable to employees earning Rs 15,000 or less per month, with the employer contributing 4.75 percent and

³⁷ Conditional maternity benefit scheme, launched in 2010

the employee contributing 1.75 percent. Just 31 per cent provide benefits through social security systems. The labour welfare cess has been given to state governments to ensure the welfare of workers. There were complaints from women that they were getting fired from their jobs due to the increased duration of maternity leave. The government has now decided that out of the 14 extra weeks, half of the amount of salary paid to the pregnant woman would be refunded to the employer from the funds of the labour welfare cess.³⁸

In India, due to lack of awareness about such provisions and to raise awareness of the benefits of breastfeeding among domestic workers from the slum community of Mumbai and their employers. It succeeded in both identifying the obstacles that these workers faced in combining work and breastfeeding and creating an enabling environment for this practice and informing about their rights they can deny working in hazardous work environment.³⁹

In earlier centuries, predominantly, in agrarian society, the role of woman was limited to taking care of children, household and family. Social conditions of modern family underwent transformation due to industrialisation and urbanisation. As a result, the social and legal concept related to the society also got changed. Motherhood then has become a contentious issue in the modern society, particularly, in economic frontier, as the competing market interests override notions of culture and social justice like gender equity. Identity of a woman is often tangled within the patriarchal structure of a commercially or profit motivated enterprise which dare to see mothering or family responsibility remain subordinate to their interest. Complexity of working environment as above is designed by an architecture without adhering to rules of gender equality; often overwhelmingly to suit men.⁴⁰

HARASSMENT

CASE: VISHAKHA VS STATE OF RAJASTHAN⁴¹

Bhanwari Devi who was a social activist/worker in one of the Rajasthan's village. She worked under a social development program at rural level which was about to stop child marriage in a village and this social program was administered/ initiated by the Rajasthan's state government. Bhanwari Devi endeavored to stop the marriage of the Ramkaran Gujjars (thakurs) daughter, who was merely less than one year old i.e. she was an infant only. As a part of her duty, Bhanwari Devi tried to terminate the marriage of her infant daughter. Even of her vain-full efforts to stop

³⁸ The ministry of labour and employment with WCD

³⁹ Association for Consumers Action on Safety and Health; dharavi project

⁴⁰ Mini.K.T. Vs. Senior Divisional Manager (Disciplinary Authority), Life Insurance Corporation of India, Divisional Office

⁴¹ AIR 1997 SC 3011

the marriage, it happened, but Bhanwari devi was not excused or pardoned for her's this fault. She was exposed to or put forward to social punishment or boycott. September 1992, she was been gang raped by Ramkaran Gujjar and his five friends in front of her husband. The Trail Court made the discharge of the accused people for not being guilty. The High Court in his judgement propounded that –“ it was a case of gang rape which was conducted out of revengeful situation. All these statement and judgement, aroused women and NGO'S to file pitition (PIL) in Supreme Court of India. Sexual harassment is also termed as “Eve Teasing” in India, and it can be determined from the following acts like- passing of indicative or typical comments or jokes, uninvited touching, making appeals for sex, sexually blunt pictures or text messages or emails, discredit person because of sex. Accordingly, Sexual Harassment violates the fundamental right of the women of gender equality which is codified under Article 14 of Indian Constitution and also the fundamental right to life and to live a dignified life is violated/infringed under Article 21 of constitution of India. Even though there has been no provision for sexual harassment at workplace under Indian Constitution.

Furthermore, cases of sexual harassment within offices have risen rapidly since 2014.⁴² Safety for women remains a barrier that discourages women from seeking work opportunities away from home.

In addition to requiring an employer to set up an IC and ensure redressal of grievances of workplace harassment in a time bound manner, the POSH Act casts certain other obligations upon an employer which includes:

- a. Promoting a gender sensitive workplace and removing the underlying factors that contribute towards creating a hostile working environment against women;
- b. provide a safe working environment;
- c. formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace;
- d. display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the IC;
- e. declare the names and contact details of all members of the IC;
- f. organize workshops and awareness programmes at regular intervals for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the IC;
- g. provide necessary facilities to the IC for dealing with the complaint and conducting an inquiry;

⁴²Report; National Crime Records Bureau 2014

- h. cause to initiate action, under the Indian Penal Code, 1860 (“IPC”) or any other law in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;
- i. provide assistance to the aggrieved woman if she so chooses to file a complaint in relation to the offence under the IPC or any other law for the time being in force;
- j. treat sexual harassment as a misconduct under the service rules and initiate action for misconduct;
- k. prepare an annual report with details on the number of cases filed and their disposal and submit the same to the District Officer;
- l. monitor the timely submission of reports by the IC.

UNEQUAL PROMOTIONS AND OTHER GENDER BASED DISCRIMINATION

The ILO Committee of Experts considers that protective measures applicable to women’s employment which are based on stereotypes regarding women’s professional abilities and role in society, violate the principle of equality of opportunity and treatment between men and women in employment and occupation. Provisions relating to the protection of persons working under hazardous or difficult conditions should be aimed at protecting the health and safety of both men and women at work, while taking account of gender differences with regard to specific risks to their health.⁴³

There is no provision on paternity leave in Indian labour law for private sector workers. The civil servants (Central Government) however are entitled to paternity leave. A male civil servant (including an apprentice, probationer) with less than two surviving children, may be granted Paternity Leave for a period of 15 days before or up to six months from the date of delivery of the child. If paternity leave is not taken within 6 months of the birth of child, it is treated as lapsed⁴⁴. Workers on paternity leave are paid their leave salary equal to the pay drawn immediately before proceeding on leave. The paternity Leave may be combined with leave of any other kind. The paternity leave cannot be debited against the leave account. Paternity Leave cannot normally be refused under any circumstances. Similar provisions are applicable on the adoption of a child under the age of one year. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any

⁴³ . General Survey on the fundamental Conventions concerning rights at work, 2012, Paragraph 840

⁴⁴ Rule 43-A & 43-AA of Central Civil Services (Leave) Rules, 1972

children.⁴⁵ The burden of child care when undertaken by both the genders can solve this problem otherwise one will be left behind just focusing on the family responsibilities and household problems. This is the sole reason by employers do not consider hiring women. Women's careers are most vulnerable in the period soon after maternity — almost 48% of women drop out at this stage. Under maternity benefit act section 12 it is unlawful to dismiss or discharge the woman from job or to send any notice of dismissal to her during the period of pregnancy provided she committed some gross misconduct leading to her dismissal.⁴⁶ gross misconduct by itself merits dismissal. If there is a finding that there has been a gross misconduct, then there is no scope for applying the principle of victimisation, because upon that finding the employer and/or the enquiring officer was entitled to come to the conclusion that the workman concerned should be dismissed. In such situation, the concerned woman employee may not be in a position to challenge an order of termination of service on grounds of arbitrariness⁴⁷. The word gross misconduct has been misused in Neera Mathur case⁴⁸ a woman who was on probation was dismissed from her employment when she was on her medical leave. The ground of termination given by the employer was that she deliberately tried to hide the fact that she was pregnant at the time of filling up of declaration form prior to being appointed. The Court not only directed the LIC to reinstate her but also held that collection of personal data relating to pregnancy, menstrual periods are violation of the right to the privacy of the woman. The Court further observed that such personal data is collected to deny women the benefit of medical leave to which she is duly entitled to. The violation by employer on dismissing the employee during pregnancy would lead to penal consequences like imprisonment of 3 months to 1 year or fine of rs 2000 to 5000. The loophole in this aspect is that the job security is provided only during the pregnancy, the hardships which a woman face after pregnancy is also the responsibility of the firm to provide no hinderance in the way of her motherhood and personhood. There is no aspect which protects her from arbitrary dismissal after child birth. Female participation rates declined from 34.1 per cent in 1999-00 to 27.2 per cent in 2011-12, and 23.3 per cent in 2017-18. 53 percent of the 19.16 million drop had occurred solely within the younger cohort, among the age group of 15 to 24 years old Among the rest of the population, 32 percent of this drop occurred within the age group of 25-34 years, and about 15.6 percent in the age group of 35 years and above.⁴⁹ This shows that females tend to leave the jobs during and after pregnancy more than at the age of retirement.

⁴⁵ ICCPR art 24 (3)

⁴⁶ Section 12 maternity benefit

⁴⁷ National Tobacco Co. of India Ltd. and Ors vs Fourth Industrial Tribunal and Ors

⁴⁸ 1992 AIR SC 392

⁴⁹ NSSO DATA: number of females leave jobs ag-wise

CONCLUSION

The basic problem in India in respect of harassment, unequal payment, lack of wilful implementation of maternity and childcare policies and unequal promotions is deep rooted in the Indian history. The men in the society never considered women capable enough to work, she was always expected to be dependent on the male members in the society but with the change in times, women stopped conceiving such notions in their heads. They came out demanding education and jobs in which they are found to be more efficient than men. The problem erupts because of the society and their mindset which is not being developed at the same pace as that of the women. They expect women to prioritise household responsibilities and men to work and bring money. The feminist jurisprudence talks about equalising the work responsibility and the household responsibility between men and women, women consider it their sole responsibility to take care of the children by sacrificing their jobs and further there being no provision of paternal leave makes it an obligation on her. The career of women becomes stagnant after pregnancy as responsibilities increase after that and unequal division of such responsibilities leaves the career in doldrums. With policies brought by the government and their proper implementation, unless the women will not manage and bring a proportion in life everything will go in vain. Further the problem is women not a rebel they presume various repercussions and prefer remaining silent. The major problem being unawareness about their rights, the employer can be punished by jail and monetary penalty for not providing paid maternal leave. There are provisions of work from home and feeding breaks which should be utilised by them. The judiciary has considered some cases regarding these provisions and the decision has been in favour of women. But, if India ratifies the convention of ILO on maternity benefits it will have an international obligation to abide by the rules and regulations stated thereby and the implementation process will be successful.