



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	Austria
<b>Title:</b>	New case law concerning maternity leave benefit
<b>Date:</b>	05 March 2018
<b>Expert:</b>	Martina Thomasberger
<b>Context</b>	
<b>Issue at stake:</b>	Maternity leave, social benefits
<b>Ground of discrimination:</b>	Sex
<b>Sources:</b>	Supreme Court
<b>Field:</b>	Maternity leave, statutory security
<b>Applicable law:</b>	Maternity Protection Act ( <i>Mutterschutzgesetz, MSchG</i> ) and General Social Security Act ( <i>Allgemeines Sozialversicherungsgesetz, ASVG</i> ), Articles 2, 8 and 11 n°2 (b) Directive 92/85

### Content

**Case law:** On 14 November 2017, the Supreme Court has clarified the rules for the calculation of statutory maternity benefit for employees.

In compliance with to Art 11 n° 2 (b) of Directive 92/85, member states have to ensure that pregnant workers receive either a continuation of their pay or an entitlement to an adequate allowance during the statutory maternity leave period according to Art 8. For pregnant workers and employees Austria has implemented the obligations of the Directive in paragraphs 3 and 5 Maternity Protection Act (*Mutterschutzgesetz, MSchG*)<sup>1</sup> and in the regulations about statutory health insurance (paragraphs 120 n° 3 and 162 General Social Security Act [*Allgemeines Sozialversicherungsgesetz, ASVG*]).<sup>2</sup> The calculation rules for the statutory maternity leave benefit ("*Wochengeld*") ensure that workers receive an average of their net earnings of the last thirteen weeks before the start of the maternity leave.

According to paragraph 8 of the Maternity Protection Act, pregnant workers are precluded from working overtime under any circumstances, even in cases of employment contracts which contain clauses with all-in overtime compensations.<sup>3</sup> Paragraph 14 of the Maternity

---

<sup>1</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196032/NOR40196032.pdf>,  
<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40057689/NOR40057689.pdf>, accessed 20 February 2018.

<sup>2</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196105/NOR40196105.pdf>,  
<https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40196109/NOR40196109.pdf>, accessed 20 February 2018.

<sup>3</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR12099214/NOR12099214.pdf>, accessed 20 February 2018.

Protection Act,<sup>4</sup> as well as established case law, state that employers do not have to compensate pregnant workers for the loss of regularly occurring overtime pay or of all-in overtime compensations because of maternity protection rules.

These regulations result in maternity leave benefits that are usually calculated without taking overtime wage elements into account.

Recently the Supreme Court had to decide whether a claimant, who lost her ability to work overtime and the corresponding part of her wages as soon as she notified the employer of her pregnancy, was entitled to a maternity leave benefit that took an overtime pay element into account that she had been receiving in the months preceding her pregnancy.<sup>5</sup>

The Supreme Court issued a verdict in favour of the claimant. The judges on the panel stated that paragraph 8 of the Maternity Protection Act, which precludes overtime work during pregnancy, has to be considered as a subset of the employment prohibitions for pregnant workers. Calculation rules for the statutory maternity benefit have to take into account the wage development caused by these maternity protection rules, because their legal goal is to grant a compensation that reflects the average earnings before the pregnancy. The observational period relevant for calculating the amount of the maternity leave benefit has to exclude wage periods without overtime pay elements and should be extended to the last relevant working period during which the employer still had to pay regular overtime wages to the claimant.

**Analysis:** Prior to this verdict, the common administrative practice was to calculate the statutory maternity benefit verbatim to the general rule, which states that the benefit has to equal the average wages during the last thirteen weeks before maternity leave. The statutory health insurance authorities, which are in charge of the administration of maternity benefits, will now have to adapt their determination and calculation rules according to the new case law.

The scope of this new case law entails a definite financial improvement only for maternity benefit recipients. In its case law, the Supreme Court is limited to deciding on the legal questions of a specific claim. Therefore, this decision does not address the question whether a claimant could be entitled to overtime pay elements during pregnancy. The Supreme Court panel does not imply that this verdict could entail a revision of the existing case law that gives employers the right to reduce wages of pregnant workers in cases of legal discontinuation of regular overtime work.

### Internet Link

OGH vom 14.11.2017, 10 ObS 115/17k,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20171114\\_OGH0002\\_010OBS00115\\_17K0000\\_000/JJT\\_20171114\\_OGH0002\\_010OBS00115\\_17K0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20171114_OGH0002_010OBS00115_17K0000_000/JJT_20171114_OGH0002_010OBS00115_17K0000_000.pdf), accessed Feb 20 2018

---

<sup>4</sup> <https://www.ris.bka.gv.at/Dokumente/Bundesnormen/NOR40178135/NOR40178135.pdf>, accessed 20 February 2018.

<sup>5</sup> OGH vom 14.11.2017, 10 ObS 115/17k,  
[https://www.ris.bka.gv.at/Dokumente/Justiz/JJT\\_20171114\\_OGH0002\\_010OBS00115\\_17K0000\\_000/JJT\\_20171114\\_OGH0002\\_010OBS00115\\_17K0000\\_000.pdf](https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20171114_OGH0002_010OBS00115_17K0000_000/JJT_20171114_OGH0002_010OBS00115_17K0000_000.pdf), accessed 20 February 2018.