Order of the First Senate of 28 March 2006 – 1 BvL 10/01

„Maternity protection period case”

HEADNOTE:

It is incompatible with Article 6.4 of the Basic Law (Grundgesetz – GG) if periods in which women interrupt their employment requiring the payment of social security contributions are not, because of the prohibitions of employment under maternity protection law, taken into account in the calculation of the qualifying period in statutory unemployment insurance.

Order of the First Senate of 28 March 2006
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in the proceedings for constitutional review as to whether the Third Book of the Code of Social Law (*Drittes Buch Sozialgesetzbuch – SGB III*) of 24 March 1997 (Federal Law Gazette (*Bundesgesetzblatt – BGBl*) I p. 594) was compatible with Article 3.1 and Article 6.4 of the Basic Law (*Grundgesetz – GG*) insofar as women who, because of statutory maternity protection, interrupted employment requiring the payment of social security contributions and received maternity pay were not compulsorily insured in this period, unlike persons receiving sickness benefit,

– Order of Discontinuance and Referral of the Federal Social Court (*Bundessozialgericht*) of 20 June 2001 – B 11 AL 20/01 R –.

RULING:

1. It was incompatible with Article 6.4 of the Basic Law that periods in which women interrupted their employment requiring the payment of social security contributions because of the prohibitions of employment under maternity protection law were not, under the law in force from 1 January 1998 to 31 December 2002, taken into account in the calculation of the qualifying period in statutory unemployment insurance.
2. By 31 March 2007, the legislature must pass provisions that comply with the constitutional requirements. If no provisions are passed within this period, then in proceedings in which there has been no final and non-appealable administrative or judicial decision and in which the grant of unemployment benefit depends on taking into account the period of prohibition of employment under maternity protection law in the calculation of the qualifying period under the law in force from 1 January 1998 until 31 December 2002, the following provision is to be applied with the necessary modifications: § 107 sentence 1 no. 5 letter b of the Employment Promotion Act (Arbeitsförderungsgesetz – AFG) in the version of the Budget Support Act 1984 (Act on Measures for the Relief of the Public Budgets and for the Stabilisation of the Financial Situation of the Pension Insurance Scheme and on the Prolongation of the Investment Assistance Levy, Gesetz über Maßnahmen zur Entlastung der öffentlichen Haushalte und zur Stabilisierung der Finanzentwicklung in der Rentenversicherung sowie über die Verlängerung der Investitionshilfeabgabe, Haushaltsbegleitgesetz 1984 – HBeglG 1984) in force on 31 December 1997.

Reasons:

A.

The subject of the proceedings is the question whether it was unconstitutional that under the employment promotion law in force between 1998 and 2002 periods in which mothers interrupted employment requiring the payment of social security con- 1

tributions because of the prohibitions under maternity protection law were not taken into account in the calculation of the qualifying period for receiving unemployment benefit.

I.

1. Maternity protection under the Act on the Protection of Working Mothers (*Gesetz zum Schutze der erwerbstätigen Mutter, Mutterschutzgesetz – MuSchG,* Maternity Protection Act) of 24 January 1952 (Federal Law Gazette I p. 69) in the version relevant in the present case, as promulgated on 17 January 1997 (Federal Law Gazette I p. 22), is intended to protect a mother who is employed and her child against dangers arising in the workplace, excessive demands and injury to health. In this statute, the legislature also fulfils its mandate of protection under Article 6.4 of the Basic Law (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 37, 121 (125-126); 109, 64 (85-86)). Women who enjoy the protection of the statute may not be employed for six weeks before and eight weeks after giving birth (§ 3.2, § 6.1 of the Maternity Protection Act). But they should not be obliged to forgo their income from employment in this period. For the period of prohibition of employment, they receive benefit in lieu of income in the form of maternity pay (§ 13 of the Maternity Protection Act) and a contribution to maternity pay from their employer linked to the amount of their pay (§ 14 of the Maternity Protection Act). 2

2. The periods of prohibition of employment under maternity protection law have been treated in varying ways in German social security law in the calculation of the qualifying period to acquire an entitlement to unemployment benefit (on the legal position until the year 1979 see BVerfGE 60, 68 (69-70)). In the time from 1979 to 1997, § 104.1 sentence 3 of the Employment Promotion Act as amended by the Act Introducing Maternity Leave (*Gesetz zur Einführung eines Mutterschaftsurlaubs – MuUrlG*) of 25 June 1979 (Federal Law Gazette I p. 797) treated receiving maternity pay as equivalent to an employment creating an obligation to pay social security contributions if an employment creating an obligation to pay social security contributions was interrupted by pregnancy or maternity. The mother was not required to pay a contribution to unemployment insurance. 3

3. In the period relevant in the present case, from 1998 to 2002, § 123 sentence 1 of the Third Book of the Code of Social Law as amended by the First Act to Amend the Third Book of the Code of Social Law and Other Statutes (*Erstes Gesetz zur Änderung des Dritten Buches Sozialgesetzbuch und anderer Gesetze*) of 16 December 1997 (Federal Law Gazette I p. 2970) provided in respect of the qualifying period: 4

Qualifying Period 5

The qualifying period has been satisfied by a person who, within the overall qualifying period, 6

1. for a minimum of twelve months, 7

2. in the case of those doing military service or community service as an alternative to military service (§ 25.2 sentence 2, § 26.1 nos. 2 and 3 and § 26.4) for a minimum of ten months or

3. in the case of a seasonal worker for a minimum of six months

was in an employment requiring the payment of social security contributions.

The dates and duration of the overall qualifying period in which the employment requiring the payment of social security contributions was required to have existed are laid down in § 124 of the Third Book of the Code of Social Law. The wording of the provision as amended on 16 December 1997, insofar as it is relevant here, was as follows:

Overall qualifying period

(1) The overall qualifying period is three years and begins on the date before all other conditions of an entitlement to unemployment benefit are fulfilled.

(2) The overall qualifying period does not extend into an earlier overall qualifying period in which the unemployed person had completed a qualifying period.

(3) The overall qualifying period does not include

1. periods in which the unemployed person, as a carer, cared for a ... relative ... for at least fourteen hours per week,

2. periods spent looking after and bringing up a child of the unemployed person that is under three years of age,

3. periods of self-employment,

4. periods in which the unemployed person received a maintenance allowance ... under this Book,

5. periods in which the unemployed person received a temporary allowance ... from a rehabilitation organisation.

In the cases in numbers 3 to 5, the overall qualifying period ends at the latest five years after it commences.

Under § 24.1 of the Third Book of the Code of Social Law, an employment requiring the payment of social security contributions in the meaning of § 123 exists for persons who are compulsorily insured as employees or for other reasons. Under § 25.1 of the Third Book of the Code of Social Law , those who receive pay for employment or are in vocational training are compulsorily insured. § 26 of the Third Book of the Code of Social Law contains the provisions on the other instances of compulsory insurance. The wording of the provision in the version relevant in the present case as amended on 16 December 1997, insofar as it is relevant here, is as follows:

Other compulsorily insured persons

(1) The following are compulsorily insured: 24

1. disabled young persons …, 25

2. persons who, by reason of statutory obligation, perform military service or community service as an alternative to military service for longer than three days ..., 26

3. persons during the period of military service in the „readiness to serve" stage ..., 27

4. prisoners… 28

(2) Persons are compulsorily insured in the period for which they 29

1. receive sickness benefit, disabled persons' sick pay or injury grant from a benefit agency, or a temporary allowance from an agency responsible for the provision of medical rehabilitation, if immediately before this benefit commenced they were compulsorily insured or receiving ongoing benefit in lieu of income under this Book. 30

2. receive daily sickness benefit from a private health insurance company, if immediately before this benefit commenced they were compulsorily insured or receiving ongoing benefit in lieu of income under this Book. 31

(3) and (4) … 32

Under these provisions, the receipt of maternity pay did not create a compulsorily insured status. It can be inferred from the legislative reasons that the provision in force until that date on treating periods of receipt of maternity pay as equivalent to employment requiring the payment of social security contributions was to cease because this equal treatment would not have complied with the principle of insurance, which was to be introduced consistently as a result of the reform (see *Bundestag* document (*Bundestagsdrucksache – BTDrucks*) 13/4941, pp. 143, 158). 33

4. The legal position was changed from 1 January 2003 as a result of the Act to Reform the Instruments of Labour Market Policy (*Gesetz zur Reform der arbeitsmarktpolitischen Instrumente, Job-AQTIV-Gesetz – „Job Aqtiv Act"*) of 10 December 2001 (Federal Law Gazette I p. 3443). Since that date, the receipt of maternity pay has given rise to a compulsorily insured status (§ 26.2 no. 1 of the Third Book of the Code of Social Law). Under § 345 no. 7 of the Third Book of the Code of Social Law , pay in the amount of the maternity pay is deemed to have been paid subject to compulsory insurance. Under § 347 no. 8 of the Third Book of the Code of Social Law , the contributions are paid by the benefit agency, normally the health insurance company. In this provision, the legislature intended to improve the unemployment insurance protection of mothers (see *Bundestag* document 14/6944, p. 30). 34

II.

The original proceedings were based on the following facts: 35

1. The plaintiff, who was born in 1968, was from 1 February 1991 to 30 September 1994 in employment requiring the payment of social security contributions as a pub- 36

lishers' representative. From 1 October 1994 to 31 January 1995 she was unemployed and received unemployment benefit. From 1 February 1995 to 31 December 1996, she again worked as a publishers' representative. In 1997 she was unemployed again and received unemployment benefit for a total of 312 working days. After this, from 1 January 1998 to 31 January 1999, she worked as a bookseller. In May 1998, she gave birth to a child. The protection periods under § 3.2 and § 6.1 of the Maternity Protection Act ran from 3 April until 12 July 1998 inclusive. During the protection periods, the plaintiff received maternity pay and contributions to maternity pay. From 13 July 1998 to 31 January 1999, she was again employed in a bookshop for 21.5 hours per week, and – in addition to child-raising benefit – she received pay.

2. On 1 February 1999, the plaintiff once more registered for employment and applied for contributory unemployment benefit to be granted. This application was refused by the Federal Institute for Employment (*Bundesanstalt für Arbeit*) of the time, which was the defendant in the original proceedings, in an order dated 3 February 1999. As far as can be seen, the plaintiff did not apply for means-tested unemployment benefit. Her objection was rejected. The Institute stated that, after exhausting the entitlement on 30 December 1997, the plaintiff did not establish a new future right to unemployment benefit. During the overall qualifying period that applied to the establishment of her entitlement, she had compulsorily insured status only for 295 days, and thus for less than the twelve months required under § 123 of the Third Book of the Code of Social Law to fulfil the qualifying period. In this calculation, the whole time of the protection periods, when she was receiving maternity pay, was not to be taken into account, for this period did not confer compulsorily insured status. For this reason, it could not contribute to completing the qualifying period. 37

3. The plaintiff took legal action to challenge the rejection of her application. The Social Court (*Sozialgericht*) and the Higher Social Court (*Landessozialgericht*) dismissed her action. The plaintiff appealed to the Federal Social Court (*Bundessozialgericht*), which stayed the proceedings and submitted to the Federal Constitutional Court (*Bundesverfassungsgericht*) the question as to whether the Third Book of the Code of Social Law is compatible with Article 3.1 and Article 6.4 of the Basic Law insofar as women who, because of statutory maternity protection, interrupted employment requiring the payment of social security contributions and received maternity pay were not compulsorily insured in the years from 1998 to 2002, unlike persons receiving sickness benefit. 38

a) The Federal Social Court stated that under law below the constitutional level, the plaintiff had no entitlement to unemployment benefit. During the relevant overall qualifying period, she had not had compulsorily insured status in the unemployment scheme for a minimum of twelve months. The plaintiff's employment requiring the payment of social security contributions had been interrupted by the periods of maternity protection. There were no other elements of compulsory insurance present; for the plaintiff received none of the benefits listed in § 26.2 of the Third Book of the Code of Social Law. There was nothing in this provision that could be interpreted in confor- 39

mity with the constitution in order to apply it to the receipt of maternity pay. In the Employment Promotion Reform Act (*Arbeitsförderungs-Reformgesetz*) of 1997, which introduced the Third Book of the Code of Social Law, periods in which maternity pay was received were deliberately no longer treated as establishing future rights, because no contributions had had to be paid for these periods. The wording of the Act was unequivocal and the intention of the legislature was clearly shown.

b) The provisions on compulsory insurance in the unemployment benefit scheme infringed the requirement of equality before the law under Article 3.1 of the Basic Law in conjunction with the right of mothers to protection and care under Article 6.4 of the Basic Law, because they had the consequence that women receiving maternity pay could not acquire rights to unemployment benefit subject to the same insurance-law conditions as persons receiving the benefits set out in § 26.2 of the Third Book of the Code of Social Law , in particular persons receiving sickness benefit. By reason of the requirement of protection contained in Article 6.4 of the Basic Law, which requires that every mother has a right to the protection and care of the community, the legislative discretion of the legislature was restricted. Just as in the case of illness, a woman who was pregnant or had recently given birth was prevented in the period of the prohibition of employments from continuing her previous employment. For this reason, just as in the case of persons receiving sickness benefit, a future right in unemployment insurance could not be built up or continue to be built up by gainful employment in the period when benefits were being received. The similarity to sickness benefits was shown particularly clearly by the fact that the maternity pay and the contribution to maternity pay replaced the lost pay and to this extent put a mother in the same position as employees who were prevented by illness from continuing their gainful employment and who received sickness benefit because of their loss of pay. 40

No significant difference between the persons who receive sickness benefit and other social security benefits, listed in § 26.2 of the Third Book of the Code of Social Law, on the one hand and the persons receiving maternity pay on the other hand can be seen in the fact that the former remained compulsorily insured despite the loss of the pay. Since the position of the two was comparable, it was not appropriate that persons receiving maternity pay could not fulfil periods creating a future right if, as a result of pregnancy or maternity, an employment requiring the payment of social security contributions had been interrupted. If, when a person received benefits for incapacity for work resulting from illness, that person acquired future rights in unemployment insurance, then by reason of the requirements of protection in Article 6.4 of the Basic Law, this should apply a fortiori to interruptions of employment for maternity protection periods. 41

The constitutionally required equal treatment could not be rejected with the argument that compulsory insurance of women receiving maternity pay possibly entailed a financial burden on public funds or the employer. In view of the equal treatment requirement and the protection requirement of Article 6.4 of the Basic Law, there could be no question of the necessary funds not being raised by the community. Apart from 42

this, the legislature also had at its disposal other means of removing the unequal treatment. For example, it could limit itself to declaring periods in which maternity pay was received subject to compulsory insurance but exempt from contributions, or simply treating such periods as equivalent to periods of compulsory insurance. In the past, this approach had been tried and found satisfactory. The fact that under Article 6.4 of the Basic Law the legislature was not obliged to compensate every financial burden on mothers was no longer significant in conjunction with Article 3.1 of the Basic Law, since the legislature introduced compulsory insurance and compulsory payment of contributions under § 26.2 of the Third Book of the Code of Social Law for persons receiving sickness benefit. For this reason, the unequal treatment challenged by the plaintiff could not be justified on the basis of contribution-benefit balance either.

Even if women receiving maternity pay in a three-year overall qualifying period had other possibilities of fulfilling the qualification period of twelve months, consideration should nevertheless be given to the fact that, by reason of § 124.2 of the Third Book of the Code of Social Law , the overall qualifying period was not always available in full. This circumstance should be taken into account, particularly in view of the mobility of young employees and the present unemployment rate. In addition, the receipt of child-raising benefit, which normally immediately followed the maternity protection periods, did not directly create future rights either; it too led only to an extension of the overall qualifying period. The absence of compulsory insurance during the period of receipt of maternity pay had effects not only on the very entitlement to unemployment benefit in principle, but also on the amount of the benefit. 43

III.

Opinions on the submission were submitted by the Federal Ministry of Economics and Labour in the name of the Federal Government, the Federal Social Court, the Deutscher Juristinnenbund (German Women Lawyers' Association) and the plaintiff in the original proceedings. 44

1. The Federal Ministry regards the submission as unfounded. It submits that there is no infringement of the requirement of equality before the law under Article 3.1 of the Basic Law in conjunction with mothers' rights to protection and care under Article 6.4 of the Basic Law. If it is to be possible to finance unemployment insurance, then in principle it is necessary that the only groups of persons covered by it are those who belong to the community of insured who pay contributions to the promotion of employment measures until the occurrence of the event insured against and therefore have been among those bearing the costs of insuring against the risk of unemployment up to that date. 45

The law of unemployment insurance, according to the Federal Ministry, departs considerably from this basic principle even in the interest of the social protection of employees when it requires only that the qualifying period should be completed within the overall qualifying period. Between 1 January 1998 and 31 December 2002, the 46

overall qualifying period, which as a general rule is three years, was extended by periods spent raising a child under three years of age. A more extensive protection, exempt from contributions, in unemployment insurance of women receiving maternity pay would have contradicted the solidarity principle and additionally burdened the employees and their employers, who would have to provide the funds for unemployment benefit and other benefits under employment promotion law. The right of every mother to the protection and care of the community is not to be fulfilled at the cost of the mutually supportive community of the insured. As a general rule, the protection of unemployment insurance, according to the Federal Ministry, can be claimed only by the persons who made contributions to the promotion of employment measures. The financing must therefore come from other sources. Potential sources are the persons concerned themselves, the community of taxpayers or the risk-sharing community of contributors to statutory health insurance.

The differing treatment of women receiving maternity pay and persons receiving sickness benefit, according to the Federal Ministry, is factually justified. In principle, sickness benefit is paid without a time limit, but in the case of incapacity for work for the same illness for a maximum of seventy-eight weeks in any period of three years. Sickness benefit may therefore be received for a long period of time. Consequently there is a considerable risk that persons receiving sickness benefit are not able to complete the qualifying period by way of the periods of employment requiring the payment of social security contributions within the overall qualifying period. In order to prevent these persons having to rely on social assistance payments, the legislature therefore decided to define periods when sickness benefit is received as periods of compulsory insurance. In contrast, during the period of maternity protection, women are subject to compulsory insurance for the promotion of employment measures only for a relatively short time. In addition, the periods after the woman gave birth in the period of time relevant in the present case led to an extension of the overall qualifying period. Finally, sets of circumstances which depend specifically on the times when maternity pay is received are relatively rare. In the usual case, the persons affected can fulfil the twelve-month qualifying period by immediately previous periods of employment requiring the payment of social security contributions; because of the short periods in which maternity pay is received, these periods do not fall outside the three-year overall qualifying period. 47

2. On inquiry, the Federal Social Court stated that no further proceedings were pending or had been pending on the problem area to which the order for referral related. However, it did refer to the case Decisions of the Federal Social Court (*Entscheidungen des Bundessozialgerichts* – BSGE) 91, 226, in which it was held that Article 6.4 of the Basic Law required an exception from the unconditional applicability of the four-year preclusive period of § 147.2 of the Third Book of the Code of Social Law for the narrowly defined special case where during the period of prohibition of employment under maternity protection law the preclusive period ended and as a result an entitlement to unemployment benefit that had previously already been granted was 48

extinguished.

3. The German Women Lawyers' Association is of the opinion that the legal provisions to be reviewed are unconstitutional. In the opinion of the Association, the view of the Federal Social Court is correct. However, it is necessary to go even further. Provisions which attach disadvantages under social security law to maternity protection periods in existing employment relationships are unconstitutional, independently of the provisions relating to sickness benefit. The principle of equality before the law, in the light of the duty of care under Article 6.4 of the Basic Law, requires maternity protection periods before and after the birth of a child to be treated in employment promotion law in the same way as if the employment had been continued. The proper group of persons for comparison with the women who because they give birth to a child may temporarily not work, according to the Association, are not persons who are ill for a long period of time who receive sickness benefit, but employees who receive pay, or in the case of temporary incapacity to work receive continued remuneration in case of sickness within the first six weeks of their incapacity to work. In the opinion of the Association, an individual woman may not be allowed to suffer a disadvantage because she is unable to earn any pay during the protection periods under the Maternity Protection Act. This is shown by the fact that the benefits during the protection periods correspond to the pay previously earned. The compensation for disadvantages by way of an extension of the overall qualifying period has proved to be insufficient. 49

In addition, there is an infringement of Article 3.2 and 3.3 of the Basic Law. Maternity protection periods necessarily affect only women. Article 3.2 of the Basic Law imposes on the legislature an obligation to pass provisions that put women during the prohibition of employment in the same position as if there were no prohibition of employment. In granting maternity pay and the employer's contribution to maternity pay, the legislature has not yet completely fulfilled this obligation. For the social security system entitlements linked to income from employment, the Association submits, are also part of the financial situation of the employee. For this reason, the legislature must ensure that no disadvantages occur as a result of the maternity protection periods, in the branches of social security as elsewhere. 50

The provision to be passed by the legislature must achieve complete financial compensation for the disadvantages of the prohibition of employment during the maternity protection periods. For this purpose, there should be provision for retroactive statutory equal treatment of the maternity protection periods and the normal contribution periods. Insofar as this may potentially breach the strict insurance principle because a retroactive obligation to insure is scarcely conceivable, this is not an argument against such a solution. For in any event the principle of insurance is only one systematic decision in social security law, and not the sole such decision. It is always supplemented by elements of social compensation. 51

4. The plaintiff in the original proceedings concurs with the opinion of the Federal 52

Social Court.

B.

It was incompatible with Article of the Basic Law that periods in which women interrupted their employment requiring the payment of social security contributions because of the prohibitions of employment under maternity protection law were not, under the law in force from 1 January 1998 to 31 December 2002, taken into account in the calculation of the qualifying period in statutory unemployment insurance. 53

I.

1. Article 6.4 of the Basic Law contains a binding mandate that the legislature should allow every mother to enjoy the protection and care of the community. In principle it also commits the legislature to make compensation for financial burdens on the mother that are related to her pregnancy and maternity. To this extent, Article 6.4 of the Basic Law protects mothers in a way comparable to the protection of marriage and family by Article 6.1 of the Basic Law (see BVerfGE 60, 68 (74)). This also applies to the area of social security (see Federal Constitutional Court, *Neue Juristische Wochenschrift – NJW* 2005, p. 2443 (2447) on the building up of pension expectancies in the professional pension scheme for lawyers) and in particular to social security insurance (see BVerfGE 60, 68 (74) with further references). 54

2. The mandate of protection of Article 6.4 of the Basic Law admittedly does not mean that the legislature is required to make compensation for every financial burden connected with maternity (see BVerfGE 60, 68 (74)). In exactly the same way as in the case of Article 6.1 of the Basic Law, the legislature is not obliged to comply with the requirement of promotion of employment measures notwithstanding other concerns (see BVerfGE 82, 60 (81); BVerfG, Order of the Third Chamber of the Second Senate of 2 April 1996, *Neue Zeitschrift für Verwaltungsrecht – NVwZ* 1997, p. 54 (55)). But if, as in § 3.2 and § 6.1 of the Maternity Protection Act, the legislature forbids the woman for a certain period of time before and after the birth of a child to continue or resume her employment requiring the payment of social security contributions, it is required to make compensation as far as possible for the disadvantages under social law arising from this prohibition. This includes protection by social security law in the case of unemployment. 55

The mother who is affected by the prohibition of employment is prevented from building up or continuing to build up a future right in statutory unemployment insurance under § 123 of the Third Book of the Code of Social Law by continuing or resuming her employment requiring the payment of social security contributions. This consequence of the prohibitions of employment under maternity protection law may not be permitted to disadvantage the woman as against other employees who are not affected by such prohibitions. In principle, the legislature has the freedom to decide how it will design the support of mothers imposed on it by Article 6.4 of the Basic Law, but this freedom is in this respect qualified and restricted, by reason of its own legisla- 56

tive acts in protecting mothers-to-be and children by prohibitions of employment. Measured against Article 6.4 of the Basic Law, the protection intended by the prohibitions of employment remains incomplete if it is not accompanied by measures which make compensation as far as possible for the consequent unfavourable treatment of the mother, who is prevented during the maternity protection period from fulfilling the qualifying period (see also BVerfGE 60, 68 (77)).

Article 6.4 of the Basic Law puts the principle of the social welfare state into specific terms for the special area of maternity protection (see BVerfGE 32, 273 (279)), and it is therefore incompatible with Article 6.4 that the periods of prohibition of employment were not taken into account in the calculation of the qualifying period in statutory unemployment insurance during the period relevant in the present case, between 1998 and 2002, and therefore contrary to the law in force before and after this period (see above under A I 2 and 4). In the case where the mother was unemployed, the legislature, in a way that no longer complied with the mandate of protection of Article 6.4 of the Basic Law, made it more difficult for her to obtain unemployment benefit. Moreover, this was also in contradiction to the treatment under social security law of persons who similarly involuntarily interrupt their employment because of illness and receive sickness benefit; under § 26.2 no. 1 of the Third Book of the Code of Social Law, these persons are compulsorily insured and are able to build up or continue to build up a future right while they are receiving benefits. 57

a) The need to take into account the period of prohibition of employment before the birth of the child in the calculation of the qualifying period does not cease to apply by reason of the fact that the mother may in principle waive the protection given to her and her child under § 3.2 of the Maternity Protection Act and continue her employment requiring the payment of social security contributions until the birth. 58

The legislature did not create the special provision in § 3.2 of the Maternity Protection Act in order to give pregnant women the possibility of remaining gainfully employed for financial reasons in the period in question and in this way of avoiding the disadvantage under social security law in the present case. On the contrary, in the combination of maternity pay and employer's contribution to maternity pay it intended to protect mothers during the prohibition of employment, even before they gave birth, in such a way that there was no incentive for them to work in order to secure their livelihood while taking the risk of dangers to their health (see BVerfGE 109, 64 (86)). This circumstance made it easier for the legislature to decide, in the interest of the mother-to-be, whose protection is the particular aim of Article 6.4 of the Basic Law (see BVerfGE 32, 273 (277); 52, 357 (365)), not to introduce an absolute prohibition of employment (see the written report of the Committee on Labour of the German *Bundestag* of 23 June 1965, *Bundestag* document IV/3652, p. 3; Viethen/Wascher, in: Zmarzlik/Zipperer/Viethen/Vieß, *Mutterschutzgesetz, Mutterschaftsleistungen,* 9th edition 2006, *§ 3 MuSchG*, marginal no. 40). The special provision is based on the experience that it can be psychologically preferable for a pregnant woman to take her mind off other matters with her previous work to which she is accustomed, as long as 59

her health permits (see Decisions of the Federal Labour Court (*Entscheidungen des Bundesarbeitsgerichts* – BAGE) 102, 218 (224)).Under the special provision, as a general rule the prohibition of employment is to continue in effect; this also serves to protect the unborn child.

The detailed drafting of the special provision reflects this. Thus, under § 3.2 half-sentence 2 of the Maternity Protection Act, a woman may at any time notify her employer that she revokes her declaration that she will continue in employment. She may not, even by contract, waive this right of revocation, which may be exercised without stating reasons (see Viethen/Wascher, loc. cit., *§ 3 MuSchG,* marginal no. 42; Buchner, in: Buchner/Becker, *Mutterschutzgesetz und Bundeserziehungsgeldgesetz,* 7th edition 2003, *§ 3*, marginal no. 45). The declaration of the woman that she will be prepared to work during the protection period is, according to unanimous opinion, subject to strict requirements, for going to work during the protection period is relatively dangerous in many cases (see Viethen/Wascher, loc. cit., *§ 3 MuSchG,* marginal no. 39). § 3.2 of the Maternity Protection Act requires an express declaration for this purpose. In addition, the prohibition of employment may be varied only by the woman. The employer must comply with it of its own accord as soon as it is aware of the pregnancy. The prohibition of employment is mandatory for the employer (see Viethen/Wascher, loc. cit., § 3 *MuSchG,* marginal no. 31). 60

b) The three-year overall qualifying period of § 124.1 of the Third Book of the Code of Social Law , during which the qualifying period for the entitlement to benefits must be completed, does not compensate for the disadvantage under social security law described in a manner that complies with the requirements of Article 6.4 of the Basic Law. It must be conceded in favour of the legislature that the extension of the overall qualifying period from two to three years, which was introduced by § 104.3 half-sentence 1 of the Employment Promotion Act of 25 June 1969 (Federal Law Gazette I p. 582) and retained in the Third Book of the Code of Social Law, made it easier to complete the qualifying period; with this justification, the legislature removed the „privilege given to the time of maternity” in employment promotion law (see written report by the Committee on Labour of the German *Bundestag* of 6 May 1969, *Bundestag* document V/4110, p. 18). The extension was suitable above all to benefit insured persons whose employment was particularly often interrupted (see BVerfGE 60, 68 (75, 76)). In this respect, as a general provision, it also benefited the mothers who had interrupted their gainful employment for some time as a result of the prohibitions of employment (see BVerfGE 60, 68 (76)). But the facts on which the original proceedings are based show that in the case of a far from untypical alternation of employment, maternity protection and unemployment, it was not sufficiently suitable to make social security provision for the case of unemployment in a way satisfying the mandate of protection of Article 6.4 of the Basic Law. The three-year overall qualifying period did not give the plaintiff an advantage, because a previous overall qualifying period, by reason of § 124.2 of the Third Book of the Code of Social Law , prevented an extension of the overall qualifying period that was decisive for her repeated entitlement to 61

unemployment benefit.

c) In these and in other sets of circumstances, it was also of no use for the person affected that some of the periods of prohibitions of employment under maternity protection law were at the same time periods of child raising, which under § 124.3 sentence 1 no. 2 of the Third Book of the Code of Social Law indirectly additionally extended the overall qualifying period of § 124.1 of the Third Book of the Code of Social Law. The legislature later also realised this. In the legislative reasons for the Act to Reform the Instruments of Labour Market Policy, it is stated that the entitlement to benefit in lieu of income, under the previous law, was dependent on a multiplicity of rigid time limits, which in particular largely disregarded the concerns of mothers. As a result, coincidences in the chronological sequence of qualifying period, maternity protection and child-raising period were decisive for the entitlement to benefits and thus for the promotion of integration into employment (see *Bundestag* document 14/6944, p. 26). 62

II.

Since the law which the Court has been asked to review was unconstitutional because of its violation of Article 6.4 of the Basic Law alone, it is not necessary to review it against the standard of Article 3.1 of the Basic Law. The prohibition of gender-specific discrimination in Article 3.2 of the Basic Law, incidentally, is incapable of leading to any other result in the present case than the duty under Article 6.4 of the Basic Law to make compensation for disadvantages of maternity. 63

B.

I.

The subject of the judicial referral is not the review of the constitutionality of a particular legal provision, but the failure of the legislature to make a provision in the period from 1 January 1998 to 31 December 2002. As a result of this, the only possible conclusion is a declaration of incompatibility. 64

The legislature must pass a constitutional provision by 31 March 2007. If no provisions are passed within this period, then in proceedings in which there has been no final and non-appealable administrative or judicial decision and in which the grant of unemployment benefit depends on taking into account the periods of prohibition of employment under maternity protection law in the calculation of the qualifying period under the law in force from 1 January 1998 to 31 December 2002, the following provision is to be applied with the necessary modifications: § 107 sentence 1 no 5 letter b of the Employment Promotion Act in the version in force on 31 December 1997 of the Act on Measures for the Relief of the Public Budgets and for the Stabilisation of the Financial Situation of the Pension Insurance Scheme and on the Prolongation of the Investment Assistance Levy (*Gesetz über Maßnahmen zur Entlastung der öffentlichen Haushalte und zur Stabilisierung der Finanzentwicklung in der Rentenver-* 65

sicherung sowie über die Verlängerung der Investitionshilfeabgabe, Haushaltsbegleitgesetz 1984, Budget Support Act) of 22 December 1983 (Federal Law Gazette I p. 1532).

II.

Judicial and administrative proceedings in which there has been no final and non-appealable judicial or administrative decision and in which the grant of unemployment benefit sought cannot be granted because periods in which women had interrupted their employment requiring the payment of social security contributions because of the prohibitions of employment under maternity protection law were not taken into account under the law in force from 1 January 1998 to 31 December 2002 in the calculation of the qualifying period in statutory unemployment insurance will remain suspended or are to be suspended in order to give the persons affected the possibility of deriving benefit from the provision to be passed by the legislature. Administrative decisions that have already attained administrative finality are unaffected by the present decision for the period before they were pronounced. However, the legislature is at liberty to extend the effect of this decision also to decisions that have already attained administrative finality; the legislature is not constitutionally obliged to do this (see BVerfGE 104, 126 (150)). 66

Judges: Papier, Haas, Hömig, Steiner, Hohmann-Dennhardt, Hoffmann-Riem, Bryde, Gaier

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 28. März 2006 - 1 BvL 10/01

Zitiervorschlag BVerfG, Beschluss des Ersten Senats vom 28. März 2006 - 1 BvL 10/01 - Rn. (1 - 66), http://www.bverfg.de/e/ls20060328_1bvl001001en.html

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