

SPECIAL LABOUR LAW PROTECTION FOR FOSTER PARENTS AND THE CHILD IN THEIR CARE

ABSTRACT: The labour law implications of establishing foster care are reflected in the special protection granted to foster parents in employment. This protection is designed to ensure, with additional and intensive support from society, that a child without parental care, or a child under parental care who has developmental disabilities or behavioural disorders and is temporarily unable to live with their parents, can achieve optimal development in a family environment. The ultimate goal is the child's return to the biological family, preparation for independent living and work, or the adjustment of protective measures. On the other hand, for the foster parent who directly cares for the child based on the decision of the guardianship authority, it is necessary to facilitate the reconciliation of family responsibilities with obligations towards the employer. This entails occasional leave from work for child care, as well as leave for special child care, job protection, and protection within the framework of working time regulations. This paper is based on the application of legal-dogmatic and comparative-legal methods, and aims to reaffirm the special protection of foster parents in employment, with an overview of the most important aspects of its regulation at the international and national levels.

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1. Introduction

The labour law status of foster carers is determined by conflict of two seemingly opposing demands – the demand for providing more complete care for the child and the person caring for them, and the demand for preventing and eliminating discrimination based on family obligations. The demand for providing more complete care for the child and the person caring for them is completely in accord with the purpose and effect of foster care. Foster care is a measure of protection of a child without parental care, i.e. a child under parental care who has disabilities in psychophysical development or a behavioral disorder, and temporarily cannot live with his parents. By establishing foster care, based on the decision of the guardianship authority, a relationship is established between the child and the foster parent which, in its content and quality, corresponds to the relationship between the child and the parents - the foster parent takes immediate care of the child and has the duty to take care of his health, development, upbringing and education in order to enable him to live and work independently (Matijašević Obradović & Stefanović, 2017, p. 21).

Accordingly, it highlights the efforts being made to ensure, together with intensive and additional support from society, that a child without parental care, or a child under parental care with disabilities or behavioral issues, being temporarily prevented from living with their parents, gets the opportunity for optimal development in a family environment. This aims to support the child's return to their biological family, prepare them for independent life and work, or change protective measures (Regulation on Foster Care, 2022). At the same time, it enables the foster carer of the child, upon decision of the guardianship authority, to reconcile family and work life more easily. As opposed to this demand, there is a demand for preventing and eliminating discrimination based on family responsibilities, due to deeply rooted prejudices and stereotypes about the limiting impact on fulfilling work responsibilities, as well as the intention of certain employers to place foster parents in a disadvantaged position compared to other employees in order to avoid additional costs and difficulties in organizing work inherent in implementing foster care. Therefore, reconciling these seemingly opposing demands poses a challenge for labour

law, which must adequately address all these issues in order to support all roles that women and men hold in modern society, achieve equality in the workplace, improve dignified living and working conditions, ensure the wellbeing of the child, promote foster care, and so on.

2. Basic principles on special protection of foster parents in employment relationships

Special protection in employment relationships allows foster parents to affirm themselves as creative beings through their work, but also as individuals with all their needs. This is particularly important because the role they play in caring for the child, for whom they directly provide care based on the decision of the guardianship authority, causes a conflict between family responsibilities and responsibilities toward the employer. In fulfilling of this role, the foster carer faces numerous challenges, especially when the child they care for, as based on decision of the guardianship authority, shows indifference or lack of interest, or lacks interpersonal and social skills to adapt to family life, and is ignorant of the way a functional family operates, or has experienced difficulties giving a distorted image of their potential. Therefore, the foster carer is expected to accept the child as they are, guide them toward achieving optimal development, and understand their behavior in view of the difficulties they have faced. In the context of these expectations, the challenges of foster care should be seen, as well as the weight of the foster parent's responsibility in caring for the child (Stefanović & Stanković, 2021, p. 44).

This situation imposes the need to choose between direct care for the child, as decided by the guardianship authority, and their employment, which is incompatible with their human needs – the need to give their best to care for the child, ensuring the child's health, development and upbringing (Grujić, Hadžović, Ivanišević & Tekić, 2009), and the need to provide material and social security for themselves and their immediate family through employment, by affirming themselves as creative beings and confirming their essential humanity (Jovanović, 2018. p. 167). Above all, it respects the need of the child, for whom the foster parent provides direct care based on the decision of the guardianship authority, and the conditions that support the optimal child development in the best way possible.¹ In this sense, it is considered one of the

¹ A child, in order to fully and harmoniously develop their personality, should be brought up in a family environment, in an atmosphere of love, happiness and understanding. If they are temporarily or permanently deprived of a family environment, or if they cannot remain in the family environment in their best interest, they are entitled to special protection and assistance

pillars of labour laws related to the protection of parenthood (Jovanović, 2018, p. 294) and its application, in line with the modern understanding of gender roles in child upbringing, excludes any differentiation among employees based on gender. Due to deeply rooted perceptions of the traditional role of women in society, the laws of many countries encourage men to participate more actively in child upbringing. For instance, the laws of Scandinavian countries allow for an increase in compensation during leave from work for childcare with a gender equality bonus, providing that both partners take leave for childcare. Furthermore, they stipulate that leave for men is non-transferable and paid if taken by them (Tanasijević, 2016, p. 62).

Its importance is evident also in preventing and eliminating discrimination based on family responsibilities. Without it, diverse situations in which certain employees find themselves would not be acknowledged, and it would only reinforce existing inequalities. Therefore, the differential treatment of employees resulting from its application is not seen as a violation, but rather as a premise of non-discrimination principle. However, true equality in the workplace can only be achieved if such preferential treatment is aligned with nature and scope of support and assistance provided and/or existing discrimination. In this light, it should be subject to periodic assessment to determine whether it is still justified and necessary (Petrović, 2009).

2.1. Leave from work for childcare

Fulfilling the purpose of foster care corresponds to the obligation of the foster parent to provide adequate care for the child, in their direct care as decided by the guardianship authority, in order to ensure optimal child development. For this reason, it is necessary to allow leave from work for childcare.

At international level, there is no special form of leave from work for childcare as foster leave. However, a foster carer may use parental or a similar form of leave from work for the child in their direct care, based on the decision of the guardianship authority, especially since the establishment of foster care creates a relationship between the foster carer and the child, that in terms of quality and content, corresponds to the relationship between a parent and a child. Accordingly, the International Labour Organization (ILO) states that employees

from the state by providing alternative care. (Convention on the Rights of the Child). According to the United Nations Guidelines for the Alternative Care of Children, the use of institutional care should be limited only to cases where particularly appropriate, necessary, and constructive for the child, and when in their best interest (UNICEF, 2010).

with family responsibilities should be allowed to return to work after taking leave due to those responsibilities (Convention No. 156/1981), i.e. the use of parental leave (Recommendation No.165/1981). Following the example of this organization, the Council of Europe requires member states to allow the use of optional leave from work for childcare (The Revised European Social Charter, 1996), while the European Union obliges its member states to provide parental or similarly related leave from work (Directive 2019/1158). These organizations respect differences in national situations and therefore, allow member states to regulate duration and use of parental and/or related leave from work more specifically, taking into account that international standards present a relative minimum in relation to the national ones. However, a summary of their legislation is not possible due to variations regarding available forms of this leave, as well as its duration and use. For example, in Italy, parental leave exists in the form of optional leave from work. In principle, it may be used by one or both foster carers simultaneously within the first 12 months of the child's placement in their family, and at most until the child reaches adulthood, not exceeding the duration of 10 months in total. In case of multiple foster care, leave must be used under the same conditions for each child. In Spain, parental leave lasts up to 16 weeks, and the right to use it is individual and non-transferable. In the first 6 weeks upon decision of establishing foster care, leave must be used in continuity, while the remaining 10 weeks may be used in continuity or with breaks – until 12 months from the date of the decision have passed. In agreement with the employer, the remaining 10 weeks can also be taken as part-time leave from work. However, if the child has developmental disabilities, parental leave can last one week longer per foster parent, and in case of multiple foster care 2 weeks longer – per child. Most countries guarantee a compensation during parental or related leave from work, either as a social insurance benefit or being partially paid by the employer (Parliament of Montenegro, 2024).

In our country, the foster parent is entitled to leave from work, in order to directly care for the child based on decision of the guardianship authority, in accordance with the Labour Law (Labour Law, 2005). The law stipulates that a foster parent has the right to be absent from work for up to 8 months to care for the child in their direct care based on decision of the guardianship authority, or until the child turns 5 years old at the longest. In case the child is younger than 3 months old, the absence can be extended until the child turns 11 months. This is a paid leave, and it must be used continually from the moment the child is placed in the foster family,² in order to fulfil the purpose for which

² Leave from work starts on the day the child is placed in the foster family because that day marks the beginning of the child's care in that family. This further means that the foster parent,

it was granted (Albaneze & Novaković, 2018, p. 152). Immediately after the expiration of this leave or at any later time the foster parent has the right to take leave from work for the care of the child they directly care for, based on the decision of the guardianship authority, but under different conditions. Namely, this leave represents a form of unpaid leave from work during which the rights and obligations of the employment relationship are suspended, unless otherwise specified by law, general acts, or the employment contract. In principle, it may be used fully or partially, continuously or intermittently – until the child turns 3 years old. After this period, the foster carer has the right, but also the obligation to return to work within the next 15 days and thus activate their suspended employment status. Otherwise, they risk the termination of their employment contract by the employer (Urdarević, 2020, p. 16).

Our country also respects specific position of foster parents caring for a child with health impairments. When a child requires special care due to severe disability, and this need cannot be met under health insurance regulations, the foster parent is entitled to leave from work, as approved by a relevant health authority having assessed the health impairment of the child, with salary compensation or to work part-time and earn a salary in proportion to the time spent at work, with compensation for the remainder of the working hours until full time, as long as the child should require such care, and at most until the child turns 5 years of age. The decision on which foster parent will be the beneficiary of this right, and whether it will concern leave from work or part-time work, is made by the competent authority for the application of the Family Financial Support Law (Ivošević & Ivošević, 2021). On the other hand, a foster parent, in the role of a person caring for someone with a serious illness, has the right upon request, and based on the opinion of the relevant health authority, to work part-time, but not less than half working hours. The duration of working time is determined by the employer, based on the opinion of the relevant health authority, within a range that corresponds to the need of caring for a person with such an illness (Kulić & Perić, 2016, p. 2016).

2.2. Protection from termination of employment contract

Protection from termination of the employment contract is an important segment of special protection for foster carers in employment, not only because of deeply ingrained prejudices and stereotypes about the limiting

who provides care in the child's living space, is deprived of the opportunity to have a home environment for themselves, even though for them, moving into the child's living space represents an additional burden.

impact of family obligations on fulfilling responsibilities toward the employer, but also due to intention of some employers to avoid additional costs and organizational difficulties inherent in the special protection of foster carers in employment, by misusing the right to terminate the employment contract. Accordingly, the International Labour Organization first prohibited discriminatory termination of employment (Convention 111/1960), and afterwards established that employment cannot be terminated without a valid reason. Valid reasons to terminate employment will be considered the ones related to capabilities or behaviour of the employee, or the operational needs of the employer, in particular, reasons related to family responsibilities will not be considered valid (Convention 158/1982). The European Union goes a step further, requiring member states to prohibit not only terminating employment due to reasons of requesting or using parental leave or leave from work due to urgent and unavoidable family responsibilities but also less favourable treatment of employees who have requested or used such leave. If they have taken leave, they must have the opportunity to return to the same or equivalent workplace under conditions that are not less favourable for them, along with benefiting from any improvements in working conditions they would have been entitled to had they not taken leave (Directive 2019/1158). On this basis, and in line with national conditions and practices, most countries have paved the way for the protection of foster carers from employment termination. In countries where the concept of valid reasons for terminating employment contracts has been implemented, prohibition of employment termination due to family responsibilities is meaningful in preventing termination of employment contrary to the interests of society, and therefore, such termination is null and void by law. In countries where the concept of valid reasons for terminating employment contract has not been implemented, a foster carer can retain job security by referring to prohibition of discrimination based on family responsibilities in relation to employment termination. Some countries guarantee workers with family responsibilities special protection from employment termination, thus excluding the possibility of employers initiating the termination of employment for any reason during the so-called protected period (Balnožan, 2021).

The Labour Law of the Republic of Serbia stipulates that taking leave from work for childcare or special childcare leave cannot be a justified reason for termination of employment contract on the part of employer, therefore the employer cannot condition the establishment of an employment relationship by requiring a statement of termination of the employment contract from the candidate employee, especially since such a statement can be activated

at any time to avoid the application of legal provisions on the protection of maternity and parenthood (Kovačević, 2016). In the case of introducing economic, technological or organizational changes in the work process, the criteria for determining employee redundancy cannot be based on leave from work for childcare or special childcare. However, a foster carer may be one of the employees whose work is no longer needed due to introduction of these changes in the work process, and, ultimately, may be one of the employees whose employment contract can be terminated in case they refuse to conclude an Annex to the employment contract in order to secure another job as part of new employment measures. If there arises a need to perform tasks that the employee executed prior to expiration of 30 days from the day of the employment contract termination, they will have priority over other candidates when concluding an employment contract (Brković & Urdarević, 2020).

During leave from work for childcare or special childcare, a foster carer is additionally protected from termination of the employment contract. Namely, if the employer initiates termination of the employment contract during leave for childcare or special childcare, an additional protective mechanism will be activated, resulting in the nullity of the termination decision, on condition that the employee has notified the employer of the circumstances related to taking this leave by providing a certificate from the competent authority before the termination of the employment contract or within 30 days of the employment termination.“ Therefore, after the right to leave from work for childcare and special childcare has expired, there are no obstacles for the employer to terminate the employment contract if the conditions prescribed by law have been met” (Ministry of Labour, Employment, Veterans and Social Affairs, 2025); if the employee has established a fixed-term employment relationship, the term of the contract is extended until the expiration of leave for childcare or special childcare. This way, employers cannot take advantage of objectively justified reasons for establishing a fixed-term employment contract to avoid the application of legal norms on the protection of maternity and parenthood (Kovačević, 2016).

2.3. Protection within the Framework of Working Hours

Special protection for foster carers in employment also implies prevention of night work, overtime work, and flextime, particularly because such work can, by its nature, intensify the conflict between family responsibilities and responsibilities to the employer. The International Labour Organization points

this fact out, suggesting that special attention should be paid to general measures for improving working conditions and quality of work life, especially those aimed at: progressive shortening of day working hours and reducing overtime work; introducing more flexible arrangements concerning work schedules, rest times and holidays, while at the same time considering the level of development and social needs of countries and different activity sectors. When feasible and appropriate, while organizing shift work and assigning night work, attention should be paid to the needs of employees with family responsibilities (Recommendation No. 165/1981). On the other hand, the European Union obliges member states to take necessary measures so that employees with children under the age of 8 are entitled to flexible working conditions, as well as the right to return to their original work schedule upon expiration date of the agreed period, or if justified by objective circumstances, before the expiration date of the agreed period. Member states are also required to take necessary measures so as to enable the employer to address any request of the employee in a reasonable timeframe and provide an explanation why the request has been rejected or use of flexible working conditions postponed. However, member states are allowed to set reasonable limits on the duration of flexible working conditions, and condition the right to flexible working hours on the duration of the employment contract or duration of the employment contract with the same employer, which cannot exceed 6 months. If the worker has concluded consecutive fixed-term employment contracts with the same employer, the total duration of these contracts must be taken into account when calculating the reference period (Directive 2019/1158).

In our country, foster carers have the right to protection within the framework of working hours, in accordance with the Labour Law. This law stipulates that a foster carer is entitled to protection until the child, as based on a decision by the guardianship authority, has reached a certain age, specifically—until the child turns 3 years old or, in case of caring for a child with severe disabilities, until the child becomes an adult. A foster carer may work at night, overtime, and in the system of flexible working hours with their written consent. This consent may be revoked in writing when the carer deems it to be in the best interest of the child they are directly caring for, based on a decision by the guardianship authority.³ The reason for this law lies in the fact that a younger child needs adult care more in comparison to an

³ The written form of consent for night work, overtime work, and work under the flexible working hours system not only forces the foster carer to think carefully before starting such work but also makes it easier to prove that they have agreed to it. For these reasons, they should also revoke the given consent in writing.

older child, whereas a healthy child will need less adult care than a severely disabled child. Another reason is that the foster carer cannot be deprived of the opportunity to earn additional income from night and overtime work at the rate set by the employer's general act and the employment contract, which amounts to at least 26% of the base rate, provided that the carer can ensure alternative care for the child during the time they would otherwise spend working. Protection from overtime work also implies preventing on-call duty for employees in healthcare institutions, since on-call duty in such institutions is considered a special form of overtime work. It would be desirable to prevent both on-call duty and on-demand work, considering that these forms of overtime work in healthcare institutions have been introduced into the general system of employment under the guise of flexible working arrangements (Albaneze & Novaković, 2018), without assessing the impact they may have on fulfilling family responsibilities. It would also be desirable to prevent performing any kind of work after the contractual working hours, especially since employers tend to ask part-time employees to work beyond the agreed working hours in the amount not exceeding full-time work, thereby avoiding the payment of increased earnings for overtime work (thus achieving greater profit) (Kovačević, 2008, p. 244).

Comparative law recognizes minor differences regarding quality and scope of protection for foster carers within the framework of working hours. Some countries limit the actual scope of this protection to prevent overtime and night work, while other countries provide it to foster carers of healthy older children and/or children with developmental disabilities. These differences also exist in neighboring countries—in the Federation of Bosnia and Herzegovina, a person who, based on the decision of the competent authority, cares for and raises a child up to the age of 6 is allowed to work overtime and under the system of flexible working hours with their written consent, and to work at night with their written consent—until the child reaches 2 years of age (Labour Law of the FBiH, 2016), while in Montenegro, a foster carer of a child with developmental disabilities can work overtime and at night based on their written consent (Labour Law, 2019).

3. Conclusion

In recent decades, there has been an increasing number of children placed in foster families, under the influence of the social protection system reform. With this in mind, it is essential to reaffirm the importance of special

protection for foster carers in employment, and make the issues related to its implementation visible so that they can be addressed in an adequate manner. In most countries, there is no legal guarantee for this protection, and in countries where it has been normatively confirmed, it has been marginalized due to a low level of awareness of its importance, the intention of employers to avoid additional costs and difficulties in organizing work inherent to its application, etc. Therefore, in the upcoming period, more proactive measures should be taken to ensure that this protection gets normatively confirmed in the countries where it has not yet been implemented, and in those where it exists, it should be consistently applied—through organizing forums and campaigns to raise awareness of its significance, publicizing good and bad practices, providing financial incentives to employers, etc. Additionally, the scope of its application should be expanded to include all individuals who need it. This is especially important since it is guaranteed for individuals working in the form of an employment relationship, while those performing work outside the employment relationship are denied this protection solely because they are not working under an employment contract.

Conflict of Interest

The author declares no conflict of interest.

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POSEBNA ZAŠTITA NA RADU HRANITELJA I DETETA O KOJEM SE STARA

APSTRAKT: Radnopravne refleksije zasnivanja hraniteljstva nalaze svoj pravni izraz u posebnoj zaštiti hranitelja u radnom odnosu. Ta zaštita je osmišljena sa ciljem da se, uz dodatnu i intenzivnu podršku i pomoć društva, detetu bez roditeljskog staranja, odnosno detetu pod roditeljskim staranjem koje ima smetnje u psihofizičkom razvoju ili poremećaj u

ponašanju, a privremeno ne može da živi sa roditeljima, obezbedi optimalan razvoj u porodičnom okruženju. Krajnji cilj pomenutog je povratak deteta u biološku porodicu, osposobljavanje za samostalan život i rad ili promena mere zaštite. Sa druge strane, hranitelju koji o detetu neposredno brine, na osnovu odluke organa starateljstva, potrebno je omogućiti lakše usklađivanje porodičnih obaveza i obaveza prema poslodavcu. To implicira i povremeno odsustvovanje sa rada radi nege deteta, kao i odsustvo sa rada radi posebne nege deteta, zaštitu zaposlenja i zaštitu u okviru instituta radnog vremena. Ovaj rad temelji se na primeni pravno-dogmatskog i uporedno-pravnog metoda, a ima za cilj reafirmaciju posebne zaštite hranitelja u radnom odnosu, uz prikaz najznačajnijih aspekta njenog regulisanja na međunarodnom i nacionalnom nivou.

Ključne reči: *hraniteljstvo, porodične obaveze, odsustvo sa rada radi nege i posebne nege deteta, zaštita zaposlenja, zaštita u okviru instituta radnog vremena.*

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