Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 18 December 2014[1]

Case C-65/14

Charlotte Rosselle
v
Institut national d'assurance maladie-invalidité (INAMI)andUnion nationale des mutualités libres
(Request for a preliminary ruling

from the Tribunal du travail de Nivelles (Belgium))

(Social policy — Directive 92/85/EEC — Safety and health of pregnant workers and workers who have recently given birth or are breastfeeding — Maternity allowance during the maternity leave — Minimum contribution period of 120 working days over a period of 6 months — Interruption — Established public servant taking leave on personal grounds in order to start working as a salaried employee — Directive 2006/54/EC — Equal treatment of men and women at work)

1. Under Belgian law, a worker is only entitled to a maternity allowance if, during the six months preceding her maternity leave, she worked for at least 120 working days. Mrs Rosselle, who worked in Flanders, applied for that allowance. Although she had been working for several years, her application was refused because her working status had changed and she had not completed the required minimum contribution period since starting her new employment. The Tribunal du travail de Nivelles (Labour Court, Nivelles; 'the referring court') (Belgium) now seeks guidance from the Court on how to interpret the second subparagraph of Article 11(4) of the Maternity Directive,[2] which states that Member States may under no circumstances require for that purpose periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement (birth). The referring court also asks whether refusing to grant Mrs Rosselle a maternity allowance entails discrimination on grounds of sex and thus violates the Equal Treatment Directive.[3] The present reference therefore gives the Court an opportunity to clarify further how the protection afforded to the pregnant worker (or the worker who has recently given birth or is breastfeeding) relates to the protection which female workers enjoy against discrimination on grounds of sex in matters of employment and occupation.

1 — Original language: English.

2 — Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) ('the Maternity Directive'), as amended (at the material time in the main proceedings) by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (OJ 2007 L 165, p. 21).

3 — Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23) ('the Equal Treatment Directive').

Legislation

European Union law

2. The Maternity Directive is designed to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (Article 1(1)).

3. The ninth recital in the preamble to that directive states that the protection of the safety and health of such workers should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women.

4. Article 2 of the Maternity Directive defines a 'pregnant worker' as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'; and further defines a 'worker who has recently given birth' and a 'worker who is breastfeeding' as workers who are regarded as such under national legislation and/or national practice and who inform their employer of their condition, in accordance with that legislation and/or practice. [4]

5. Article 8 of the Maternity Directive, entitled 'Maternity leave', provides:

'1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

6. Article 11 concerns the employment rights of protected workers.

7. Pursuant to Article 11(2), both the rights connected with the employment contract of the protected workers on maternity leave and maintenance of a payment to, and/or entitlement to an adequate allowance for, those workers must be ensured. Article 11(3) states that such allowance is to be deemed adequate 'if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation'. [5] Pursuant to Article 11(4), Member States may make entitlement to pay or to that allowance 'conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation'; but such conditions 'may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement'.

8. The purpose of the Equal Treatment Directive, which is based on Article 141(3) of the EC Treaty (now Article 157(3) TFEU), is to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value (recital 4 in the preamble and Article 1).

4 — In this Opinion, I shall refer to those three categories of workers together as 'the protected workers'.

5 — Pursuant to the eighteenth recital of the Maternity Directive, the concept of an adequate allowance in the case of maternity leave 'must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness'.

9. Recital 23 in the preamble to that directive refers to the Court's case-law according to which unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex and makes it clear that the Equal Treatment Directive covers such treatment.

10. For the purposes of the Equal Treatment Directive, 'direct discrimination' exists 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation' (Article 2(1)(a)), and 'indirect discrimination' occurs 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary' (Article 2(1)(b)).

11. Pursuant to Article 2(2)(c), discrimination includes 'any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of [the Maternity Directive]'.

12. Article 5, which is in the second chapter of Title II of the Equal Treatment Directive ('Equal treatment in occupational social security schemes'), provides as follows:

'Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.'

13. Article 14(1), which is in the third chapter of Title II of the Equal Treatment Directive ('Equal treatment as regards access to employment, vocational training and promotion and working conditions') provides in particular:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…'

14. The Equal Treatment Directive is expressly stated (see Article 28) to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, and to the provisions of, inter alia, the Maternity Directive. [6]

6 — See also recital 24.

Belgian law

15. Pursuant to Article 128 of the Law of 14 July 1994 on compulsory medical care and sickness benefit insurance ('the Law of 1994'), read in conjunction with Article 203 of the Royal Decree of 3 July 1996 implementing the Law of 1994 ('the Royal Decree'), payment of maternity allowance in Belgium is subject to two conditions. First, the worker must have worked, during the six months preceding the date on which she becomes entitled to the allowances,[7] for at least 120 working days. Second, she must provide evidence that the social security contributions in respect of allowances have actually been paid during that period.

16. The Royal Decree provides that persons who, in the period of 30 days following the date on which their voluntary resignation as a public servant takes effect, acquire the status of a person entitled to a maternity allowance, are exempted from the minimum contribution period provided that they were employed for a continuous period of at least six months as a public servant.[8] Likewise, the Law of 20 July 1991 on social and other provisions exempts public servants who have been dismissed from the minimum contribution period.

Factual background, procedure and question referred

17. Mrs Rosselle started work as a teacher in the Flemish Community in September 2003. She was appointed as an established public servant by the Flemish Community in September 2008.

18. On 1 September 2009, Mrs Rosselle obtained non-active status for personal reasons as a public servant[9] in order to teach in language immersion classes in the French Community,[10] where she worked as a salaried employee. At that time, she was already pregnant.

19. Mrs Rosselle's maternity leave started on 11 January 2010[11] and she gave birth on 2 February 2010. Mrs Rosselle applied to the Union nationale des mutualités libres ('the UNM'), which is the mutual sickness insurance fund to which she is affiliated, for a maternity allowance during her maternity leave.

20. On 23 February 2010, the UNM rejected that request on the ground that Mrs Rosselle had started to work as a salaried employee (rather than as an established public servant) on 1 September 2009. At the time when her maternity leave started, she had thus not completed the minimum contribution period required under national law. The decision further stated, in essence, that Belgian law only exempts dismissed public servants from that requirement (but not public servants in non-active status).

7 — That is to say, in principle, when her maternity leave starts.

8 — If they were employed for a period of less than six months in that capacity, that period is taken into consideration for the calculation of the minimum contribution period.

9 — Such status enables a public servant, on request, to stop working as a public servant temporarily on personal grounds. A public servant in non-active status has the right to return to his position as a public servant.

10 — The *classes d'immersion* enable pupils in the French Community — whose mother tongue is in principle French — to follow classes in another language (typically Dutch).

11 — It is common ground that Mrs Rosselle did not continue to receive wages from the French Community during her maternity leave.

21. Mrs Rosselle appealed against that decision to the referring court, which has requested a preliminary ruling on the following question:

'Do sections 1 and 2 of title III, chapter III, of the Royal Decree … implementing [the Law of 1994] infringe [the Maternity Directive] and [the Equal Treatment Directive] in failing to provide for an exemption from the minimum contribution period for a public servant assigned non-active status for personal reasons who is on maternity leave, whereas such an exemption is provided for a public servant who has resigned or has been dismissed?'

22. Written observations have been submitted by Mrs Rosselle, the UNM, the Belgian Government and the European Commission. No hearing was requested and none was held.

Assessment

Preliminary remarks

23. It is apparent from the order for reference that there is a legal vacuum in Belgium for public servants who give birth shortly after obtaining non-active status for personal reasons. In contrast with public servants who resign or are dismissed, public servants who start working as salaried employees after obtaining non-active status for personal reasons are entitled to maternity allowance only after completing a new minimum contribution period.

24. The central issue in the present reference is in essence whether such a change in working status may constitute a valid basis, under the second subparagraph of Article 11(4) of the Maternity Directive, for requiring a worker seeking to obtain maternity allowance to complete a new minimum contribution period, even where she has already been working uninterruptedly for several years. What is in issue here is thus not as such the minimum contribution period under Belgian law (120 working days over a period of six months), which is well below the maximum period laid down in the Maternity Directive, but rather the way in which that minimum contribution period is applied.

25. The answer to that question is relevant not only in a situation such as that in the main proceedings. Unlike Mrs Rosselle, the worker concerned might not yet have completed the minimum contribution period at the time when she obtained non-active status for personal reasons and started to work as a salaried employee. In that context too it is essential to ascertain whether, in order to comply with the limit set in the second subparagraph of Article 11(4) of the Maternity Directive, the period of employment prior to that change has to be taken into consideration.

26. The referring court asks further whether there is discrimination as regards entitlement to a maternity allowance between public servants who, like Mrs Rosselle, give birth after obtaining non-active status for personal reasons and start working as a salaried employee, and public servants who give birth after being dismissed or after resigning. The written submissions also touch on the issue whether a person in the situation of Mrs Rosselle should be treated in the same way as a public servant who gives birth while keeping her status as an 'active' public servant. As I see it, though, what the referring court actually seeks to ascertain is whether denying Mrs Rosselle a maternity allowance entails discrimination on grounds of sex and is thus prohibited under the Equal Treatment Directive.

27. Lastly, although that question is not specifically raised in the order for reference, I should make clear at the outset that the rules contained in the second subparagraph of Article 11(4) of the Maternity Directive and in Article 14(1) of the Equal Treatment Directive have in my opinion vertical direct effect.

28. It is settled case-law that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals as against the Member State before the national court.[12] Article 11(4) of the Maternity Directive is unequivocal in prohibiting the Member States from making entitlement to a maternity allowance subject to periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement. While it is true that Member States retain competence to define minimum contribution periods for obtaining a maternity allowance, that competence cannot in any way undermine that prohibition.[13] Likewise, Article 14(1) of the Equal Treatment Directive prohibits generally and unequivocally all discrimination on grounds of sex in the areas that it covers.[14]

29. Moreover, one of the entities against which provisions of a directive capable of having direct effect may be enforced is a body which, whatever its legal form, has been made responsible, pursuant to a measure adopted by a public authority, for providing, subject to the control of that public authority, a service in the public interest and which, for those purposes, enjoys special powers as compared with the rules applicable to relations between individuals.[15]

30. It is for the referring court to verify whether the UNM fulfils those conditions.[16] The information available to the Court seems to indicate that that is likely to be the case, since the UNM is responsible for granting or refusing maternity allowances in Belgium. If that view is correct, Mrs Rosselle may rely upon Article 11(4) of the Maternity Directive and on Article 14(1) of the Equal Treatment Directive when claiming her allowance in the main proceedings.

Does Article 11(4) of the Maternity Directive preclude a rule such as that applied to Mrs Rosselle in the main proceedings?

31. Article 11(4) of the Maternity Directive makes it clear that Member States are free to make entitlement to pay or to a maternity allowance conditional upon the worker concerned fulfilling conditions of eligibility. Such conditions may however not provide for 'periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement'.

32. The referring court seeks guidance, in essence, on how the words 'periods of previous employment' should be interpreted. In answering that question, it is necessary to take into account the wording, the broad logic and the objectives of Article 11(4) of the Maternity Directive.

33. Article 11(4) contains no indication that changing employment or employment status may constitute a valid reason for requiring a worker to complete a new minimum contribution period. On the contrary, the reference to 'periods of employment' in the plural in most of the language versions in which Article 11(4) of the Maternity Directive was adopted in 1992 seems to indicate that such changes have no bearing on the ceiling laid down in that provision.[17]

12 — See, most recently, the judgment in *Napoli*, C-595/12, EU:C:2014:128, paragraph 46 and case-law cited.

13 — See by analogy (concerning the first three paragraphs of Article 11 of the Maternity Directive), the judgment in *Gassmayr*, C-194/08, EU:C:2010:386, paragraphs 44 to 46.

14 — See, by analogy, the judgment in *Napoli*, EU:C:2014:128, paragraph 48.

15 — See the judgment in *Foster and Others*, C-188/89, EU:C:1990:313, paragraph 22. The English 'special powers' does not perhaps adequately convey the meaning of 'pouvoirs exorbitants' in French administrative law which lies behind the French in which that judgment was (naturally) drafted. In at least one subsequent case, the Court has instead used the phrase 'exceptional powers' (judgment in *Kuso*, C-614/11, EU:C:2013:544, paragraph 32). See also the judgment of the General Court in *GDF Suez* v *Commission*, T-370/09, EU:T:2012:333, paragraph 314.

16 — Likewise, it is for the referring court to verify whether the Institut national d'assurance maladie-invalidité (INAMI) (National Sickness and Invalidity Insurance Institution), which is also a defendant in the main proceedings, is among the entities against which provisions of a directive capable of having direct effect may be enforced.

17 — See the English, French, Italian, Greek, Portuguese and Spanish versions. The other language versions (Danish, Dutch and German) do not undermine that conclusion since they use a passive form and thus avoid using either a plural or a singular noun.

34. The reference to previous 'employment' in the second subparagraph of Article 11(4) is closely related to the categories of workers which the Maternity Directive seeks to protect. [18] The concept of 'worker' in that directive cannot be interpreted differently in each national legal system but has an EU meaning. [19] It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration. [20]

35. Provided the latter conditions are fulfilled, the nature of the legal relationship between employee and employer, whether involving public law status or a private law contract, cannot have any consequence on whether or not the person is to be regarded as a worker. [21]

36. On 1 September 2009 (the date on which she obtained non-active status for personal reasons), Mrs Rosselle had been a teacher for several years, first on a contractual basis (from September 2003) and then as an established public servant (from September 2008). She then began to work as a salaried employee for the French Community until 11 January 2010, when her maternity leave started. Against that background, it is in my view beyond doubt that, when she gave birth, Mrs Rosselle had been in employment for more than 12 months within the meaning of the second subparagraph of Article 11(4) of the Maternity Directive and that therefore the latter provision precludes a rule such as that in issue in the main proceedings.

37. That interpretation is consistent with the object and purpose of the second subparagraph of Article 11(4).

38. Under Article 8 of the Maternity Directive, Member States must take the necessary measures to ensure that workers are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or national practice. The maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. [22]

18 — The self-employed (as distinct from employed workers) enjoy protection under Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1).

19 — Judgment in *Kiiski*, C-116/06, EU:C:2007:536, paragraphs 24 and 25.

20 — Judgment in *Kiiski*, EU:C:2007:536, paragraph 25 and case-law cited.

21 — See, in relation to free movement of workers, the judgments in *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraph 20, and *Bettray*, 344/87, EU:C:1989:226, paragraph 16. That conclusion is confirmed, at least implicitly, by Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1), which formed the basis for adopting the Maternity Directive (see footnote 2 above). Article 2(1) of Directive 89/391 provides that that directive applies 'to all sectors of activity, *both public and private* (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.)' (emphasis added).

22 — See, in particular, the judgments in *Hofmann*, 184/83, EU:C:1984:273, paragraph 25, *Boyle and Others*, C-411/96, EU:C:1998:506, paragraph 41, and *CD*, C-167/12, EU:C:2014:169, paragraph 34.

39. The right to maternity leave would serve no purpose however if it were not accompanied by maintenance of payment or, at least, entitlement to an adequate allowance. [23] Consequently, although Article 11(2) and (3) of the Maternity Directive do not entail an obligation to maintain remuneration in full during the maternity leave, the EU legislature sought to ensure that a worker receives, during her maternity leave, an income at least equivalent to the sickness allowance provided for by national social security legislation in the event of an interruption in her activities on health grounds. [24] Respect for that minimum protection is subject to judicial review. [25]

40. A rule such as that in issue in the main proceedings is clearly at odds with those objectives. It makes it difficult for the worker to which it applies to take maternity leave (at least beyond the period of compulsory leave) if she is to maintain a sufficient income. Pursuing employment under those circumstances is not only liable adversely to affect the woman's biological condition during and after pregnancy but also to interfere with the special relationship with her child over the period which follows childbirth. Those most likely to be adversely affected are the most vulnerable categories of female workers (for instance low-pay workers living alone or with dependent children), who are unlikely to be able to afford to live without maternity allowance during their maternity leave.

41. For these reasons, I do not accept the Belgian Government's argument that Mrs Rosselle did not contribute *specifically* to the social security scheme for *salaried employees* for at least six months. [26] That argument presupposes distinguishing between various employment statuses. As the main proceedings illustrate, accepting it would render the limit imposed on Member States by the second subparagraph of Article 11(4) of the Maternity Directive inoperative.

42. I should add that the outcome would be different if Mrs Rosselle had obtained non-active status for personal reasons on 1 September 2009 *without* starting new employment. As I have pointed out, the Maternity Directive is intended to protect women who are in an employment relationship. Consequently, the minimum protection afforded by the second subparagraph of Article 11(4) presupposes that the woman seeking to obtain the maternity allowance is a 'worker' at the time when she claims such benefit. [27] That provision is of course concerned only with minimum protection. Nothing prevents a Member State from providing that a break in employment (possibly, up to some maximum period of time) does not affect entitlement to a maternity allowance. [28]

23 — Seventeenth recital in the preamble to the Maternity Directive. See also the judgment in *Boyle and Others*, EU:C:1998:506, paragraph 30. Even before the date by which Member States had to implement the Maternity Directive, the Court had held that, in light of the principle of equal treatment between men and women, '[t]he amount [of the maternity allowance] could not … be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth' (judgment in *Gillespie and Others*, C-342/93, EU:C:1996:46, paragraph 20).

24 — Judgments in *Boyle and Others*, EU:C:1998:506, paragraph 36, and *Terveys- ja sosiaalialan neuvottelujärjestö TSN*, C-512/11 and C-513/11, EU:C:2014:73, paragraph 36.

25 — Judgment in *Gassmayr*, EU:C:2010:386, paragraph 51.

26 — The information available to the Court indicates that Mrs Rosselle contributed to the social security scheme in the public sector until 1 September 2009.

27 — This is confirmed by the introductory words in Article 11 ('[i]n order to guarantee *workers* …') as well as the first subparagraph in paragraph 4 of that provision ('… may make entitlement to pay or the allowance … conditional upon *the worker concerned* fulfilling the conditions of eligibility for such benefits') (emphasis added). There may however be situations where a woman should be regarded as a 'pregnant worker' within the meaning of the Maternity Directive although she is not actually performing services for and under the direction of her employer. In *Kiiski*, for example, the Court held that a worker does not lose that status as a result of her enjoying childcare leave (EU:C:2007:536, paragraphs 27 to 33).

28 — See, by analogy, the judgments in *Jiménez Melgar*, C-438/99, EU:C:2001:509, paragraph 37, and *Terveys- ja sosiaalialan neuvottelujärjestö TSN*, EU:C:2014:73, paragraph 37.

Does the Equal Treatment Directive preclude a rule such as that applied to Mrs Rosselle in the main proceedings?

43. As a rule, 'direct discrimination' within the meaning of Article 2(1)(a) of the Equal Treatment Directive presupposes that the person concerned demonstrates that he or she is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation and that such treatment relates to employment and occupation. Article 2(2)(c) of that directive makes it clear that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of the Maternity Directive constitutes discrimination on grounds of sex. [29]

44. As I have said, the second subparagraph of Article 11(4) of the Maternity Directive precludes a rule such as that in issue in the main proceedings. [30] It is therefore strictly speaking not necessary to ascertain whether that rule entails less favourable treatment related to pregnancy or maternity leave in one of the fields covered by the Equal Treatment Directive. For the sake of completeness, I shall nevertheless also examine that question.

45. Article 5 of the Equal Treatment Directive does not seem relevant in the context of the present reference. That provision concerns equal treatment in occupational social security schemes and prohibits, in particular, discrimination based on sex as regards the scope of such schemes and the conditions of access to them, the obligation to contribute and the calculation of contributions, and the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits. While it is true that the main proceedings concern entitlement to maternity allowance, which is a social security benefit, that benefit by its very nature only concerns women.

46. The Commission submits, however, that the rule in issue in the main proceedings discourages female established public servants from taking leave on personal grounds in order to start working as salaried employee during the six months preceding the start of their maternity leave. It thus entails discrimination on grounds of sex as regards access to employment, prohibited by Article 14 of the Equal Treatment Directive.

47. In order to address that argument, it is necessary to ascertain whether and to what extent a worker such as Mrs Rosselle is in a situation comparable to that of a male worker.

48. It is settled case-law that women taking maternity leave 'are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work'. [31] Likewise, the situation of a woman on maternity leave is not comparable to that of a worker on sick leave. [32] For that reason, a woman is not necessarily entitled to receive full pay during her maternity leave, provided that the amount payable is not so low as to undermine the purpose of maternity leave, that is to say protecting women before and after giving birth. [33]

29 — The ninth recital in the preamble to the Maternity Directive and recital 23 in the preamble to the Equal Treatment Directive shed light on the close nexus that exists between those two instruments. Whereas the former states, inter alia, that measures protecting safety and health of pregnant workers should not treat women on the labour market unfavourably, the latter makes it clear that any such unfavourable treatment constitutes direct discrimination on grounds of sex.

30 — See, in particular, point 36 above.

31 — See the judgments in *Gillespie and Others*, EU:C:1996:46, paragraph 17, *Abdoulaye and Others*, C-218/98, EU:C:1999:424, paragraph 20, *Alabaster*, C-147/02, EU:C:2004:192, paragraph 46, and *Parviainen*, C-471/08, EU:C:2010:391, paragraph 40.

32 — Judgments in *Boyle and Others*, EU:C:1998:506, paragraph 40, and *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 29. In *McKenna*, C-191/03, EU:C:2005:513, paragraph 56, the Court held that the condition of pregnancy is not comparable to a pathological illness and that the disorders and complications linked to pregnancy and causing incapacity for work form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition.

33 — Judgment in *Gillespie and Others*, EU:C:1996:46, paragraph 20.

49. Furthermore, although Article 11(3) of the Maternity Directive provides that the maternity allowance should be at least equivalent to that which the worker concerned would receive in the event of absence due to her state of health, the eighteenth recital in the preamble to that directive makes it clear that this is merely a technical point of reference which does not suggest an analogy between pregnancy and illness. Thus, the situation of a worker such as Mrs Rosselle during her pregnancy and maternity leave is not comparable with that of a man temporarily absent from work because of his state of health. Unlike the Belgian Government, I therefore regard it as immaterial, when considering the possibility of direct discrimination, that in Belgium access to a maternity allowance and access to a sickness allowance (including by a male worker) are both contingent on the same minimum contribution period, applied in a similar way.

50. Nevertheless, as the Commission correctly submits, the 'special position' of a worker taking maternity leave is without prejudice to the prohibition of discrimination against a female worker *simply as a worker*. Treating a worker unfavourably in relation to pregnancy is capable of affecting only women: it therefore constitutes direct discrimination on grounds of sex.[34]

51. Thus, for example, in *Gillespie and Others*, the Court made clear that the principle of non-discrimination 'requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay [namely the pay which serves as a reference for calculating the maternity allowance] and the end of maternity leave'. To deny such an increase to a woman on maternity leave 'would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise'.[35]

52. Likewise, the Court held in *Thibault*[36] that Council Directive 76/207/EEC[37] was intended to bring about substantive, rather than formal, equality. Consequently, 'a woman who is accorded unfavourable treatment regarding her working conditions, in that she is deprived of the right to an annual assessment of her performance and, therefore, of the opportunity of qualifying for promotion as a result of absence on account of maternity leave, is discriminated against on grounds of her pregnancy and her maternity leave' and '[s]uch conduct constitutes discrimination based directly on grounds of sex […]'.[38] The Court has repeated on several occasions that a limitation imposed on a woman's opportunities for being promoted as a result of her pregnancy constitutes discrimination on grounds of sex.[39]

34 — See, for example, in relation to dismissal on account of pregnancy, or for a reason essentially based on that state, the judgments in *Handels- og Kontorfunktionærernes Forbund*, C-179/88, EU:C:1990:384, paragraph 13, *Brown*, C-394/96, EU:C:1998:331, paragraphs 16, 24 and 25, and *Mayr*, C-506/06, EU:C:2008:119, paragraphs 46 and 50. In relation to a refusal to appoint a pregnant woman, see the judgment in *Dekker*, C-177/88, EU:C:1990:383, paragraph 12. In relation to conditions for altering the duration of childcare leave in the context of a new pregnancy, see the judgment in *Kiiski*, EU:C:2007:536, paragraph 55.

35 — EU:C:1996:46, paragraph 22. See also the judgment in *Alabaster*, EU:C:2004:192, paragraphs 47 and 48. The Court similarly decided in *Lewen*, C-333/97, EU:C:1999:512, that to exclude periods for the protection of mothers from the periods worked for the purpose of awarding a bonus retroactively as pay for work performed would discriminate against a female worker simply as a worker: had she not been pregnant, those periods would have had to be counted as periods worked (C-333/97, EU:C:1999:512, paragraph 42).

36 — C-136/95, EU:C:1998:178, paragraph 32.

37 — Of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40). That directive was repealed and replaced by the Equal Treatment Directive.

38 — Judgment in *Thibault*, EU:C:1998:178, paragraph 32.

39 — See, inter alia, the judgments in *Sass*, C-284/02, EU:C:2004:722, paragraphs 30, 31 and 58, and *Napoli*, EU:C:2014:128, paragraphs 31 to 33.

53. As I see it, it can be inferred from Article 14(1)(a) of the Equal Treatment Directive that this reasoning applies to career development in general. Pursuant to that provision, there can be no discrimination between men and women in relation to their 'conditions for *access to* employment, to self-employment or to occupation … whatever the branch of activity and at all levels of the professional hierarchy, including promotion'.[40] Accordingly, women should be able to embrace new career opportunities on equal terms with men.

54. A rule such as that applied in the main proceedings is likely to discourage female established public servants from taking non-active status for personal reasons in order to start working as a salaried employee during the six months preceding the start of their maternity leave. Under that rule, accepting the new job as a salaried employee terminates the period of prior employment, resets the clock to zero and forms the starting point of a new minimum contribution period. The consequence may be — as here — that the worker loses her entitlement to a maternity allowance during her maternity leave.

55. There are, potentially, not only immediate detrimental effects for the worker concerned, such as being obliged to stay in a job that does not fully reflect her qualifications or being deprived of the more attractive salary and better work-life balance which she might enjoy in a new job.[41] Her career may also be blighted in the longer term. It may be (for instance) that teaching in language immersion classes in the French Community increases one's chances of subsequent promotion by the Flemish Community; or that such experience is highly valued by private employers involved in vocational training or teaching of foreign languages.

56. For those reasons, I agree with the Commission that the rule in issue in the main proceedings entails less favourable treatment of female workers in relation to access to employment and hence constitutes direct discrimination on grounds of sex within the meaning of Article 14(1)(a) of the Equal Treatment Directive.

Conclusion

57. For all the above reasons, I suggest that the Court should rule as follows in answer to the question raised by the Tribunal du travail de Nivelles:

Both the second subparagraph of Article 11(4) of Directive 92/85/EEC (the Maternity Directive), as amended, and Article 14(1)(a) of Directive 2006/54/EC (the Equal Treatment Directive) preclude a Member State from refusing to grant a worker a maternity allowance on the basis that, having obtained non-active status for personal reasons as a public servant in order to start working as a salaried employee, her employment status has changed and she has not accomplished the minimum contribution period required under national law since starting her new employment, if that worker had already been in employment for more than 12 months immediately prior to the presumed date of confinement.

40 — Article 14(1)(a) (emphasis added).

41 — Again, the most vulnerable categories of female workers are probably most exposed to such harmful consequences. See point 40 above.