OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 6 May 2010 [1]

I — Introduction

1. This reference for a preliminary ruling provides the Court with an opportunity to set out its case-law on the principle of non-discrimination on grounds of sex.

2. Under Spanish law employed mothers are entitled to a reduction in their working day in the first nine months following the birth of their child. Although the law refers to time off work 'for the purpose of breastfeeding', that time off work is granted, pursuant to Spanish case-law, also to non-breastfeeding mothers. Even at this point it must therefore be observed that the terms 'time off work for breastfeeding' are misleading, since breastfeeding certainly is not a condition for being granted time off work. If a female worker does not claim the time off work for herself, the child's father may take the time off instead of the mother, provided that he too is an employee.

3. Mr Roca Álvarez applied to his employer for such time off work. His request was refused on the ground that the child's mother was self-employed and consequently was not personally entitled to time off work. Nor, therefore, did Mr Roca Álvarez have a derived entitlement: Spanish law does not recognise the existence of an independent entitlement for employed fathers to time off work. Mr Roca Álvarez regards this as discrimination on grounds of his sex.

II — Relevant legislation

A — *European Union law*

4. The EU law background to this case is defined by Council Directive 76/207/EEC 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. [2]

1 — Original language: German.

2 — OJ 1976 L 39, p. 40.

1. Directive 76/207

5. Article 1(1) of Directive 76/207 provides:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

6. The provisions of Article 2(1) and (3) of this directive state:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

7. Article 5(1) of the directive states:

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

2. Directive 96/34

8. In addition, reference should be made to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. [3]

9. That directive implements the framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations (UNICE, CEEP and the ETUC). The framework agreement is annexed to the directive.

3 — OJ 1996 L 145, p. 4.

10. Clause 2(1) of the framework agreement provides:

'This agreement grants, subject to clause 2(2), men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.'

B — *National law*

11. In Spain, the rules governing industrial relations are laid down in the Estatuto de los Trabajadores ('Workers' Statute'), as amended by Royal Legislative Decree 1/1995 of 24 March 1995. [4] Under Article 1 thereof, this law is to apply to persons who voluntarily offer their services in return for payment by another within an organisation and under the direction of a natural or legal person, known as the employer.

12. Article 1(3) of the Workers' Statute makes clear that any activity performed outside the scope of Article 1(1) is to be excluded from the application of the Workers' Statute.

13. Article 37(4) of the Workers' Statute in the version in force, according to the referring court, when the action was brought provides:

'Female workers shall be entitled to take one hour off work, which they may divide into two parts, in order to breastfeed a child under the age of nine months. The woman may, if she wishes, replace this entitlement with a half-hour reduction in her working day for the same purpose. This time off work may be taken by the mother or the father without distinction, provided that they are both employed.'

14. Article 37 of the Workers' Statute was amended by Basic Law 3/2007 of 22 March 2007. [5] Contrary to the previous version, the amended version in particular provides that, instead of claiming the hour off work, female workers may, if they wish, shorten their working day by half an hour or accumulate their entitlement into whole days off on the terms laid down in the collective negotiation or in the agreement which they reach with their employer in accordance with the terms agreed in the collective negotiation.

4 — BOE No 75 of 29 March 1995, p. 9654.

5 — BOE No 71 of 23 March 2007, p. 12611.

III — Facts and question referred

15. Mr Roca Álvarez ('the applicant') is employed by Sesa Start España ETT SA ('the employer').

16. On 7 March 2005 he applied to his employer for paid time off work as provided for under Article 37(4) of the Workers' Statute. The employer refused his request on the ground that the applicant's wife was self-employed, not employed. However, an essential condition for entitlement to the requested time off work was the employed status of the mother.

17. Mr Roca Álvarez brought an action challenging that refusal. The court adjudicating at first instance took the view that, in the light of the wording of the provision of the Workers' Statute beginning with 'Female workers …', the right to take time off work for the purpose of feeding an unweaned child was conferred exclusively on the mother. Moreover, the mother had to be employed because the Workers' Statute would otherwise be inapplicable. The court therefore refused to acknowledge that Mr Roca Álvarez was entitled to time off work on the ground that his wife was self-employed. Since the mother had no entitlement, the father had no derived entitlement either.

18. The applicant appealed against that decision to the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia). That court took the view that the right asserted by the applicant could be conferred on him only if granting the right concerned exclusively to the mother would offend against the principle of equal treatment.

19. In those circumstances the Tribunal Superior de Justicia de Galicia decided to refer the following question to the Court for a preliminary ruling:

'Does a national law (specifically Article 37(4) of the Workers' Statute) which recognises only employed mothers, but not employed fathers, as holders of the right to paid time off work for the purpose of feeding an unweaned child – time off which consists in a half-hour reduction in the working day or an hour taken off work that may be divided into two parts, which is voluntary, paid for by the employer and may be taken until the child is nine months old – offend against the principle of equal treatment, which prohibits discrimination on grounds of sex and is enshrined in Article 13 EC, in Directive 76/207 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 and in Directive 2002/73 amending that directive?'

20. In the proceedings before the Court, the Spanish and Irish Governments and the Commission have submitted written observations.

IV — Legal assessment

21. By its question the referring court is seeking to ascertain whether national legislation which grants an independent entitlement to 'time off work for the purpose of feeding an unweaned child' only to female workers offends against the principle of equal treatment for men and women guaranteed by European Union law. In this regard the question referred cites Article 13 EC (now Article 19 TFEU) and Directives 76/207 and 2002/73. [6]

22. The legal assessment is set out below in the light of Directive 76/207 alone, as Directive 2002/73 cannot possibly apply, *ratione temporis*, to the present case. The period allowed for transposing Directive 2002/73 ended on 5 October 2005. However, the applicant's request for 'breastfeeding leave' was made as far back as 7 March 2005, thus before expiry of the deadline for transposition. The period for which breastfeeding leave had been requested also ended before the deadline for transposition; it was supposed to run from 4 January 2005 until 4 October 2005.

23. If, on the other hand, Spanish law were to take as the basis for deciding the main proceedings not the legal situation at the time the request was made, but rather a later point in time – such as, for example, the date of the decision of the court ruling at final instance – the period allowed for transposing the directive would have already expired. That would still make no difference to the legal assessment since Directive 2002/73 did not, after all, make any significant change to the provisions relevant here.

24. The referring court has not submitted a question concerning the directive as recast by Directive 2006/54, [7] which had to be transposed by 15 August 2008; besides, its applicability would have to be rejected *a fortiori* in terms of its temporal scope.

6 — Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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 (Text with EEA relevance), OJ 2002 L 269, pp. 15-20.

7 — 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.

A — *Directive 76/207*

25. The purpose of Directive 76/207 is to put into effect in the Member States the principle of equal treatment for men and women in a professional context. Accordingly, Article 2(1) of the directive prohibits discrimination on grounds of sex either directly or indirectly. Article 5(1) provides that application of the principle of equal treatment with regard to working conditions means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex. Therefore, first it must be examined below whether the provisions at issue in this dispute affect working conditions and bring about different treatment on grounds of sex.

1. Different treatment with regard to working conditions

26. Under Article 37(4) of the Workers' Statute, working time may be reduced in the first nine months following the birth of a child. This can take the form either of a half-hour reduction in the working day or of one hour taken off work that can be divided into two parts. The legislation at issue in these proceedings therefore concerns working hours and thus working conditions. It therefore falls within the scope of Article 5 of Directive 76/207.

27. Such legislation also leads to different treatment on grounds of sex.

28. According to its wording Article 37(4) of the Workers' Statute grants the right to a reduction in working time only to *female* workers; male workers, by contrast, are not independently entitled to a reduction in working time. They have at best a derived entitlement inasmuch as they, as fathers, may also exercise the right concerned only if the respective mothers have an independent right.

29. The different treatment therefore involves female workers having an *independent* entitlement to the reduction in working time, while male workers have an entitlement only inasmuch as it is *derived* from the child's mother. Accordingly, while a mother who is an employee always has a right to take time off work, a father who is an employee can take such time off work only if the child's mother is likewise an employee. However, if the mother is self-employed and consequently is not personally entitled to take such time off work, the father also has no such entitlement. On the other hand, the female employee has such an entitlement even if her child's father is self-employed.

30. In principle, men and women in the circumstances of this case too are in a comparable situation, as the principal purpose of the time off work at issue in this dispute is – as will be illustrated below – the taking care of a child. Since the provision in question confers the right expressly on female workers alone, a direct difference in treatment on grounds of sex consequently arises.

31. It must be examined below whether that different treatment is permissible by virtue of one of the exceptions set out in the directive.

2. Provisions on the protection of women during pregnancy and maternity

32. Article 2(3) of the directive reserves to Member States the right to retain or introduce provisions which are intended to protect women 'as regards pregnancy and maternity'. That provision sets out an exception to the principle of equal treatment. That exception must be interpreted strictly [8] so that the general rule is not negated. [9]

33. According to case-law, Article 2(3) of the directive is intended to protect a woman's needs in two respects: first, it is intended to ensure the protection of a woman's biological condition during pregnancy and thereafter; secondly, it seeks to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth. [10]

34. However, the Spanish legislation at issue in this case does not constitute a difference in treatment permitted by Article 2(3) of the directive as, on closer examination, it is not a provision concerning the protection of women as regards pregnancy and maternity within the meaning of the directive.

35. A provision which grants *breastfeeding* workers specific benefits would without doubt protect women during maternity. Women alone are able to breastfeed their child and, moreover, breastfeeding is directly connected with their maternity. The Irish Government is therefore right to claim that

8 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 44.

9 — Cf. to that effect Case C-346/08 *Commission* v *United Kingdom* [2010] ECR I-3491, paragraph 39.

10 — Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 25, Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 32, Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 43, and Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 46. For the relationship between parent and child, see point 42 of this Opinion.

giving more favourable treatment to breastfeeding workers does not involve any prohibited discrimination of male workers.

36. Despite its description as a period allowed for breastfeeding, the primary focus of the Spanish arrangement allowing time off work is not the protection of breastfeeding mothers. As the referring court has explained, this legislation dating back to 1900 was originally intended to facilitate breastfeeding by the mother; in the meantime, however, it has become detached from that purpose. Nowadays breastfeeding is no longer a condition for granting the time off work. On the contrary, Spanish case-law applies that provision also when the child is bottlefed.

37. The referring court therefore correctly regards the purpose of the arrangement allowing time off work as the time purely devoted to the child. Moreover, the latest amendment to Article 37 of the Workers' Statute [11] makes it clear that the purpose of the time off work at issue in these proceedings has become completely detached not only from breastfeeding but also from the more general aspect of feeding. The amendment allows the hour taken off work each day to be aggregated into one coherent leave entitlement. In that case, however, there is absolutely no additional time available on the days worked for breastfeeding or feeding the child.

38. Moreover, under Spanish law fathers also may claim the time off work, provided that the mother is eligible to request the time off. This confirms the nature of the Spanish provision as a measure intended to ease the burden as regards taking care of a child and not as a measure intended to protect a woman's biological condition: on the one hand, bottlefeeding a child and taking care of a child are responsibilities that can generally be assumed by fathers in the same way; on the other hand, it is not clear what protecting a woman's biological condition is meant to entail if she personally does not claim a reduction in working time and continues to work full time but her husband enjoys the benefit of a reduction in working time.

39. The Court has pointed out on a number of occasions that the directive leaves Member States with a discretion as to the social measures which they adopt in order to guarantee the protection of women in connection with pregnancy and maternity. [12] That means that Member States enjoy broad discretion in determining the measures they consider necessary to guarantee such protection. Consequently, the measures may vary from one Member State to another.

11 — Although, according to the referring court, that amendment does not apply *ratione temporis* to the facts in this case, it can still be invoked for assessing the nature of the arrangement in question.

12 — *Hofmann* (cited in footnote 10), at paragraph 27.

40. By permitting fathers themselves to claim the time allowed off work where the mothers hold the corresponding entitlement, the Spanish legislation is clearly stating that the protection of mothers is not its primary objective. On the contrary, the legislation is focused on the child, whose need to be taken care of can be met by allowing either the mother or the father time off work.

41. In this respect the circumstances of this case differ from the situation in *Hofmann*. That case involved a provision of a Member State which granted to mothers *alone*, after the statutory protective period had expired, a period of maternity leave which the State encouraged them to take. Fathers could not take that leave under any circumstances. In that context the Court ruled that Directive 76/207 does not impose on Member States a requirement that they shall, as an alternative, allow such leave to be granted to fathers, since such maternity leave seeks to protect a woman in connection with the effects of pregnancy and motherhood.

42. In that context the Court emphasised that the function of maternity leave was to protect the special relationship between a woman and her child over the period which follows childbirth, by preventing that relationship from being disturbed by the double burden which would result from the simultaneous pursuit of employment. [13] That protective aspect is regarded in part as outdated, since the necessary love and attention can also be provided by the child's father. [14] In any event, the mother's double burden should be preventable precisely because the father assumes responsibility for looking after the child. As regards the present case however, the significance that the protective aspect holds in European Union law does not need to be established definitively, since Spanish law – the father in many cases also being able to claim the time off work – itself states that it does not involve protecting the special relationship between mother and child.

43. Finally, the Spanish Government's argument – that an individual entitlement to the time off work at issue here should be conferred on women alone as only they are able to decide the manner in which to feed the child – remains to be addressed. This argument likewise is flawed specifically because the time taken off work at issue here deals only historically and in name with a 'period allowed for breastfeeding'; in Spanish legal practice, the arrangement has become completely detached from the issue of feeding a child. Of course, the question arises generally as to who should be granted the time off work if the parents cannot themselves agree on this point. It is by no means necessary though to

13 — See the judgments cited in footnote 10.

14 — See, for example, Langenfeld, in: Grabitz/Hilf, *Das Recht der Europäischen Union*, January 2008, Article 141, paragraph 101.

refuse the father an individual entitlement to the time off work from the outset in order to settle the dispute between them. On the contrary, it is for national law to reconcile the various interests concerned here in accordance with the principle of equal treatment.

46. It certainly is not apparent that an arrangement to take some time off work is framed in such a way by the Spanish legislation as to be capable of eliminating or even just reducing actual instances of inequality to the detriment of women. The opposite is in fact the case, inasmuch as legislation such as the Spanish legislation at issue might contribute to less favourable treatment for employed women.

3. Measures to promote equal opportunity

44. Finally, it remains to be examined whether legislation such as that in the main proceedings is permitted by Article 2(4) of Directive 76/207. Under that provision, the directive is to be without prejudice to measures to promote equal opportunity for men and women, in particular where they remove existing inequalities which affect women's opportunities.

45. According to settled case-law, that provision is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which exist in the reality of social life. [15]

47. Where there is an individual entitlement to the time off work at issue in this case only for female workers, male workers by contrast having only an entitlement derived from the child's mother, this perpetuates the traditional division of roles into the future [16] and even limits the possibility of employed fathers taking care of their children. The parents are at liberty to decide who will claim the time off work to take care of their children only if both of them are employed. If only the father is employed but the mother is self-employed, the father has no entitlement to time off work: In those circumstances, the additional time required to care for a child, which the Workers' Statute seeks to guarantee, must be set aside by the mother, who for that purpose

15 — Case C-450/93 *Kalanke* [1995] ECR I-3051, paragraph 18, Case C-409/95 *Marschall* [1997] ECR I-6363, paragraph 26, and Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 32.

16 — The Court has already referred to that risk in its judgment in *Lommers* (cited in footnote 15), at paragraph 41.

has to either restrict her self-employed activity and consequently accept financial disadvantages or bear a corresponding multiple burden. Nevertheless, the employed father certainly cannot ease that burden.

48. The referring court likewise adopted that line of reasoning, referring to what it has described as the 'boomerang effect' of the Spanish legislation: from the employer's point of view, even the manner in which the Spanish entitlement is framed provides a reason, when recruiting staff, for favouring male applicants over female applicants. On recruiting a woman, the employer already runs the risk of her potential pregnancy or maternity and her ensuing rights as an employee; additionally, she is entitled in any case to the time off work at issue in the dispute. On the other hand, when recruiting a male applicant the employer is exposed to a smaller risk, and not only *de facto*, that he will claim the time off work at all. What is more, in cases where the child's mother is self-employed, male workers have no entitlement whatsoever to the time off work at issue in this case.

49. Therefore, Article 2(4) likewise does not justify the present difference in treatment.

B — *Directive 96/34*

50. In its observations the Commission concluded that a provision such as that contested in this case also infringes the framework agreement on parental leave. It submits that the time off work granted for the purpose of looking after a child corresponds to parental leave within the meaning of the directive. Clause 2 of the framework agreement grants men and women workers an individual right to parental leave. It therefore argues that national legislation which, in the circumstances in issue, confers an individual right to take time off work only to women is contrary to clause 2.

51. In its question the referring court has not referred to Directive 96/34. Admittedly, it points in the grounds of the reference for a preliminary ruling to the fact that Spanish law does not recognise the existence of uniform parental leave but complies with the directive by virtue of various arrangements, including the contested arrangement governing time off work. However, the order for reference contains no further information on the matter. Thus, there are, for instance, no details about the other Spanish legislative arrangements on parental leave. In the light of those circumstances it is not possible to assess whether Directive 96/34 has been infringed.

Since, however, an infringement of Directive 76/207 has already been established, there is no need to discuss whether Directive 96/34 has also been infringed.

C — *Interim conclusion*

52. National legislation such as that at issue in this case is not consistent with Directive 76/207.

D — *Consequences for the dispute in the main proceedings*

53. The consequences of that finding for the dispute in the main proceedings which has arisen in a private employment relationship are a matter for the referring court to decide.

54. However it should be recalled in that regard that, according to settled case-law, a directive may not of itself impose obligations on an individual and cannot therefore be relied upon as such against that individual. [17]

55. On the other hand the Court held in two relatively recent decisions that it is for the national courts hearing disputes between individuals to set aside any provision of national law that is contrary to the principle of non-discrimination in respect of age. [18] It remains to be seen whether the Court will extend such horizontal direct effect to other general legal principles such as the principle of non-discrimination in respect of sex. Above all, prior to any further development of that kind, it would be necessary to discuss the dogmatic foundations of that contested horizontal direct effect and its limits. [19]

17 — Case 152/84 *Marshall* [1986] ECR 723, paragraph 48, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraphs 108 and 109, Case C-80/06 *Carp* [2007] ECR I-4473, paragraph 20, and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 46.

18 — Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 77, and judgment in *Kücükdeveci* (cited in footnote 17), at paragraph 51. See to this effect also my Opinion of today's date in Case C-499/08 *Andersen* [2010], point 22 et seq.

19 — Cf. in that regard, for instance, the Opinion of Advocate General Tizzano in Case C-144/04 *Mangold* [2005] ECR I-9981, at points 83, 84 and 100, the Opinion of Advocate General Mazák in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, points 133 to 138, and the Opinion of Advocate General Sharpston in Case C-427/06 *Bartsch* [2008] ECR I-7245, points 79 to 93, with further references respectively.

56. Since, however, the referring court has submitted no question in this regard to the Court, discussing such an issue at this point would be a step too far.

57. Moreover, priority must always be given to an interpretation of national law that is in conformity with the directive concerned. National courts are required to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it. [20] The fact that on interpreting national law in accordance with a directive detriment to an individual may result does not militate against such interpretation. [21] Thus it is recognised that the obligation to interpret national law in accordance with directives applies also as regards horizontal legal relationships in which a burden is necessarily imposed on a private individual. [22]

58. In this case there is much to suggest that the referring court could achieve an outcome consistent with the directive by way of interpretation. After all, the provision at issue in this case has already been interpreted broadly in the past, has become detached from the practice of breastfeeding in the light of social development and has in some cases even granted an entitlement to fathers. The referring court has not even mentioned that it would have difficulty achieving the outcome suggested here by means of an interpretation of Spanish law.

20 — Judgments in *Pfeiffer and Others* (cited in footnote 17), at paragraph 115 et seq., Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 111, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 101, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 200.

21 — Cf. my Opinion in Case C-321/05 *Kofoed* [2007] ECR I-5795, at point 65 and the case-law cited therein.

22 — Cf. Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraphs 6 and 8, and the judgment in *Faccini Dori* (cited in footnote 17), at paragraphs 20, 25 and 26.

V — Conclusion

59. In the light of the foregoing considerations, I suggest that the question referred should be answered as follows:

National legislation which recognises only employed mothers, but not employed fathers, as holders of an individual right to paid time off work for the purpose of taking care of a child – time off which consists in a half-hour reduction in the working day or an hour taken off work that may be divided into two parts – offends against the principle of equal treatment within the meaning of Council Directive 76/207/EEC 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.