REPORT FOR THE HEARING
in Case C-179/88 *

I — Legal background

A — *Directive 76/207/EEC*

The purpose of Council Directive 76/207/EEC of 9 February 1976 (Official Journal 1976 L 39, p. 40; hereinafter referred to as 'the Directive') is, according to Article 1(1) thereof, to put into effect in the Member States the principle of equal treatment between men and women as regards access to employment, vocational training and promotion, and working conditions.

Article 2(1) of the Directive defines the principle of equal treatment as meaning that there shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status.

Article 2(3), however, provides that the Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

Article 5(1) of the Directive further provides that the principle of equal treatment, as defined, applies to working conditions, including the conditions governing dismissal.

Lastly, the first paragraph of Article 9(1) requires Member States to put in force the laws, regulations and administrative provisions necessary in order to comply with the Directive within 30 months of its notification, on 12 February 1976, with the result that the aforesaid measures should have been adopted by 12 August 1978.

B — *National law*

The Directive was implemented in Danish national law by Law No 161 of 12 April 1978 on equal treatment for men and women in respect of employment, etc. (Lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse m. v.; hereinafter referred to as 'the Law on Equal Treatment') and by Law No 162 of 12 April 1978 amending various provisions on equal treatment for men and women in respect of employment, etc. (Lov om ændring af forskellige bestemmelser om ligebehandling af mænd og kvinder med hensyn til bestæftigelse m. v.).

The Danish Law on Equal Treatment entered into force on 1 July 1978.

The provisions of that law which are relevant to the present case are Paragraph 1(1) and (2), Paragraph 4 and Paragraph 8, which provide as follows:

* Language of the case: Danish.

'*Paragraph 1*

1. In this law equal treatment of men and women means that there shall be no discrimination on grounds of sex. That applies to both direct and indirect discrimination, especially with reference to pregnancy or marital or family status.

2. This law shall be without prejudice to provisions concerning the protection of women, especially as regards pregnancy and confinement.

Paragraph 4

Every employer of men and women shall treat them equally as regards working conditions. That also applies to dismissal.

Paragraph 8

Any person whose rights are infringed by a breach of Paragraphs 2 to 5 hereof may claim compensation.'

II — Facts and written procedure

On 15 July 1982 Mrs Hertz was engaged as a part-time cashier and saleswoman with Aldi Marked.

In June 1983 she gave birth to a child, after a pregnancy involving complications during which she was on sick leave with the consent of her employer.

On the expiry of her maternity leave, which under the Danish Law on Maternity Leave runs from four weeks before the estimated date of confinement until 24 weeks after the birth, Mrs Hertz resumed work in late 1983 and did not take sick leave before June 1984.

Between June 1984 and June 1985 she was on sick leave for 100 working days.

By letter of 27 June 1985 Aldi Marked gave her the statutory four months' notice of dismissal. Her employer subsequently stated that the ground for the dismissal was Mrs Hertz's absences, and that it was normal practice to dismiss employees who were often ill.

It is common ground between the parties that Mrs Hertz's absences between June 1984 and June 1985 were due to complications arising from her confinement in June 1983.

By judgment of 14 August 1987 the Sø- og Handelsret (Maritime and Commercial Court) in Copenhagen dismissed the action brought by Mrs Hertz against her dismissal in which she had argued *inter alia* that the dismissal was contrary to Paragraphs 1 and 4 of the Law on Equal Treatment.

Mrs Hertz appealed against that judgment to the Højesteret (Supreme Court of Denmark), relying solely on the Law on Equal Treatment. The proceedings before the H jesteret concern the question whether the dismissal of Mrs Hertz by Aldi Marked infringes Paragraph 1(1) and Paragraph 4 of the Law on Equal Treatment, thereby enabling her to claim compensation under Paragraph 8 thereof for the dismissal.

The appellant maintains that her dismissal is in breach of the prohibition on indirect discrimination contained in the second sentence of Paragraph 1(1) of the law. She draws attention to a statement issued on 22 December 1986 by the Danish Council on Equality (Ligtstillingsråd) — a body set up by legislation in 1978 with a view a promoting social equality for men and women and issuing statements under the Law on Equal Treatment — in which the Council doubted whether dismissal on the grounds of absence on sick leave due to slackening of the pelvic ligaments caused by childbirth was compatible with (*inter alia*) the provisions of the Law on Equal Treatment.

The respondent contended that, in the first place, the prohibition on discrimination on grounds of sex does not apply in a case such as the present one, where the dismissal is due to absence on sick leave occurring more than a year after the confinement, regardless of whether or not that absence was attributable to complications connected with the confinement. In that connection the respondent referred to Circular No 155 of the Ministry of Finance of 3 October 1984 on maternity leave, etc, the content of which was reproduced in a letter of the Ministry of Labour dated 20 September 1985, mentioned in the aforesaid statement of 22 December 1986 by the Danish Council on Equality. The circular states that, for the purpose of deciding whether or not to dismiss on grounds of sickness, any absence after the end of the statutory maternity leave is normally included in the number of days of illness when the employee is certified sick either because of pregnancy and confinement or any other illness.

Aldi Marked goes on to argue that the question as to the protection afforded to women in connection with pregnancy and confinement is regulated by the Law on Maternity Leave, Paragraph 3 of which deals exhaustively with the question of dismissal on the ground of pregnancy or confinement, and which must be regarded as a special protection for women for the purposes of Article 2(3) of Council Directive 76/207 allowing Member States to determine the extent of such protection.

The Højesteret concluded that the case raised questions regarding the interpretation of Council Directive 76/207 which might affect the interpretation of the Danish implementing law; accordingly, by decision of 30 June 1988, it referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'(1) Do the provisions of Article 5(1), in conjunction with Article 2(1), 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 encompass dismissal as a consequence

of absence due to illness which is attributable to pregnancy or confinement?

(2) If the answer is affirmative, is protection against dismissal due to illness caused by pregnancy or confinement unlimited in time?'

The decision ordering the reference was lodged at the Court Registry on 4 July 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the Handels- og Kontorfunktionærernes Forbund i Danmark (Union of Commercial and Clerical Employees, Denmark — hereinafter referred to as 'the Union'), acting for Mrs Birthe Vibeke Hertz, the appellant in the main proceedings, represented by L. S. Andersen, Advokat, Århus, the Dansk Arbejdsgiverforening (Danish Employers' Association — hereinafter referred to as 'the Association'), acting for Aldi Marked K/S, the respondent in the main proceedings, represented by J. P. Buhl, Advokat, Copenhagen, the United Kingdom, represented by J. A. Gensmantel, of the Treasury Solicitor's Department, acting as Agent, the Italian Government, represented by P. G. Ferri, avvocato dello Stato, and the Commission of the European Communities, represented by I. Langermann, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 7 June 1989 to open the oral procedure without any preparatory inquiry. However, the Court requested the parties to answer a question and sent the Danish Government a request pursuant to the Protocol on the Statute of the Court of Justice of the European Communities, asking it to forward to the Court the statement issued on 22 December 1986 by the Council on Equality and the letter of the Ministry of Labour dated 20 September 1985, mentioned in that statement.

III — Summary of the written observations submitted to the Court

First question

The appellant in the main proceedings, the Union, together with the Italian Government and the Commission, and also — with certain provisos — the United Kingdom, advocate an affirmative answer to the first question. On the other hand, the respondent in the main proceedings, the Association, proposes a negative answer.

(a) The *Union* submits that an illness linked to pregnancy should not lead to dismissal on account of the absences thereby caused, otherwise such dismissal will be contrary to Articles 2 and 5 of Directive 76/207 and to the relevant implementing provisions of the Danish Law on Equal Treatment, namely Paragraph 1(1) and Paragraph 4.

The Union refers to a statement issued on 20 September 1985 by the Danish Council on Equality, in which it announced, first, that it disagreed with the view of the Ministry of Labour to the effect that the protection conferred by the provisions of the Law on Equal Treatment against dismissal due to an illness which has developed during or in connection with pregnancy or confinement ceases to exist on

expiry of the period of statutory maternity leave and, secondly, that the prohibition on dismissal on grounds of illness due to pregnancy operates a priori irrespective of the length of the illness, since the principle of equal treatment cannot be subject to temporal limits imposed by the vagaries of the relevant provisions in each Member State.

The Union points out that the protection which Article 2(1) of the Directive seeks to achieve has the same scope as the protection provided by Paragraph 1(1) of the Law on Equal Treatment, except that the latter provision includes an express reference to pregnancy, which it brackets together with marital and family status.

The Union maintains that the above reference does no more than define the specific need for protection in connection with pregnancy — a need revealed by Article 2(3) of Directive 76/207.

(b) The *Association* argues that Article 5(1) of Directive 76/207, in conjunction with Article 2(1) thereof, does not cover dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.

According to the Association those provisions do no more than lay down a higher principle of equal treatment. Accordingly, that principle may be pleaded on any dismissal, but the mere observation that there is a link between the dismissal and a pregnancy or confinement is insufficient to prove its infringement. The rules applicable to such circumstances must be formulated in the light of that principle in the national context, since the Directive does not endeavour to regulate their precise wording; one of its characteristics is that it gives no positive guidance as to how the principle of equal treatment is to be given effect, as its preparatory documentation and Article 2(3) show.

The Association goes on to contend that, even on the view that the relevant provisions of the Directive do require the Member States to introduce legislative rules protecting women in connection with pregnancy or maternity, the scope of such provisions could not be extended to the situation envisaged in the first question.

According to the Association the existence of Article 2(3) of the Directive demonstrates that, although the Directive is intended to provide an opportunity for the introduction of special rules, it avoids giving any guidelines as to their exact form.

In its view, the explanation for that state of affairs is to be found in an observation made by the Commission and the Economic and Social Committee in the preparatory documentation for Directive 76/207, namely that only a change in the general attitude of employers towards female workers will enable the higher principle of equal treatment to be implemented in the best possible conditions, and that the application of special protective rules based on Article 2(3) may constitute a critical obstacle to positive and desirable developments in that attitude.

The Association concludes that since, on the adoption of the Directive, the interest in affording the best possible protection for pregnant women was not balanced against the interest in inducing a change in the attitude of employers towards female workers — so crucial to equality of treatment — the introduction and drafting of positive protective measures striking that balance was left by the Directive within the domain of the national legislature.

The scope of Article 5(1), in combination with Article 2(1), cannot therefore be extended to a dismissal arising from absences due to an illness attributable to pregnancy until both interests have been scrupulously weighed up.

In the case of absences occurring before the expiry of the maternity leave, the legislation governing maternity leave in every Member State has weighed up those interests.

Where, in the case of absences subsequent to that period, those interests have not been separately weighed up, the Directive cannot have the effect of extending the application of national protective rules to cover such absences, otherwise the positive change which employers' attitudes towards female workers are undergoing will be slowed down.

The Association therefore takes the view that it is by leaving to national law the task of arranging protection against dismissal due to absences attributable to an illness caused by pregnancy or confinement that the best possible conditions will be achieved for the implementation of the principle of equal treatment.

(c) The *Italian Government* argues that, if the employer's right to dismiss an employee on account of the frequent absences due to illness also operated in cases where the female worker had fallen ill as a result of pregnancy or confinement, then that female worker would lose her post because of an event conditioned by a factor — maternity — which is an inherent part of womanhood.

In its view, that consideration cannot be overridden by the argument that the protection given to the female worker as regards maternity cannot entail more than the application of the national provisions adopted pursuant to Article 2(3) of the Directive, which govern absences from work during the pre- and post-natal period by allowing leave of varying duration, according to the Member State.

The laws of the Member States deal with maternity by making rules referring to the physiological process of pregnancy and confinement; they seek to achieve a social aim — the protection of motherhood — which is not identifiable with the promotion of equal treatment between men and women, and they even disregard that principle in the case of statutory maternity leave.

The Italian Government therefore takes the view that Article 5 of the Directive must necessarily apply to a rule regarding dismissal whose operation is likely to involve discrimination against women. In

this instance, the latent discrimination in the dismissal due to the worker's illness seems to lie in the fact that the female worker runs a greater risk of losing her post, since she may be dismissed on account of pathological factors connected with maternity and affecting only women.

(d) According to the *United Kingdom*, Article 5(1), read in conjunction with Article 2(1), requires that a woman absent from work because of an illness due to pregnancy or confinement shall be treated no less favourably than a man absent from work because of illness.

It follows that, if an employer dismisses a woman in those circumstances whereas he would not have dismissed a man who had been absent on sick leave for 100 working days during a year, the woman will have been wronged in breach of the principle of equal treatment.

The United Kingdom argues that, although the scope of Directive 76/207 goes no further, Article 2(3) of that directive allows Member States to have provisions which specifically benefit women as regards pregnancy or confinement. Article 2(3) therefore allows Member States to have provisions to the effect that an employer may not dismiss a women as a consequence of absence due to illness which is caused by pregnancy or confinement. If, however, a Member State has no such provisions, then the Directive does not compel it to adopt them.

(e) After setting out some remarks about the structure of the Directive, and in particular Article 2(3) thereof, which it considers to have no bearing on the present case, the *Commission* asserts that the central question is whether there is evidence of direct or indirect discrimination on grounds of sex for the purposes of Article 2(1) of the Directive; in answering that question, it claims that Mrs Hertz's absence from work may reasonably be regarded as due to illness rather than to pregnancy or maternity.

Observing that the dismissal of Mrs Hertz is based on a house rule whereby employees who have frequently been ill are to be dismissed, the Commission takes that view that such a rule does not fall within the ambit of the prohibition under the Directive of any direct discrimination on grounds of sex, because it is based on a criterion which applies to both sexes without distinction, namely the frequency of absences due to illness.

With regard to the prohibition under the Directive of any indirect discrimination on grounds of sex, the Commission, referring to the judgments in Case 96/80 *Jenkins* v *Kingsgate Ltd* [1981] ECR 911 and Case 170/84 *Bilka-Kaufhaus* v *Weber von Hartz* [1986] ECR 1607, maintains that there are three steps in determining whether there is such discrimination:

(1) the provision, rule or practice at issue must be ascertained;

(2) consideration must be given to whether the rule affects a greater number of women than men — the onus of establishing that presumption lying with the person dismissed;

(3) if the presumption is established, consideration must be given to whether the employer is able to show that the rule in question may none the less be explained by factors unrelated to any discrimination on grounds of sex, and whether the methods adopted by the employer meet a genuine need on the part of the undertaking and are suitable and necessary for achieving its aims.

For the benefit of the national court, which has sole jurisdiction in determining according to those guidelines whether the present case shows evidence of indirect discrimination, the Commission further states that the rule at issue in the main proceedings is the rule requiring dismissal when the employee is often ill — in this case, ill for 100 working days a year.

It also submits, in connection with the second rule regarding indirect discrimination, that there is nothing to suggest that women are more often absent from work on account of illness than men, or vice versa, unless pregnancy is treated as an illness, and it states that it has no evidence to show that dismissal after a stated number of days of absence affects a greater number of women than men.

In the Commission's opinion the best comparison in a case such as the one before the H jesteret, in which the illness in question affects only women because it is due to pregnancy and confinement, would be a comparison between illnesses — including those due to pregnancy and confinement — affecting only women, on the one hand, and those affecting only men, on the other.

If the national court holds the second criterion to be satisfied, the Commission claims that the Association will then have to provide evidence showing that the rule applied is objectively justified, and this evidence will deal with the employer's ability to keep his undertaking running when workers suffer protracted illness.

Second question: possibility of temporal limits on protection against dismissal on account of illness caused by pregnancy

(a) The *Union* argues that protection against dismissal due to illness caused by pregnancy is unlimited in time.

The need to protect a female employee against dismissal after the end of maternity leave is, if the complications following childbirth are still present, just as important as the need to protect her during pregnancy and confinement, especially as the tendency of employers to retain the substitute employee when the maternity period is extended increases the need to protect the childbearing employee.

Moreover, there is no evidence, whether in the preparatory documents for the Law on Equal Treatment, in the law itself or in the Directive, to show that the protection should apply only until the maternity leave expires.

Although conceding that it may at first sight seem unacceptable to impose such a burden on the employer, the Union points out that the finding by the national court as to the legitimacy of a dismissal following an illness due to pregnancy or confinement serves to determine the size of the compensation to which a dismissed employee is entitled.

According to the Union, the fact that Article 8 of the Law on Equal Treatment uses 'may' shows that, in reaching that finding, the court will also take account of the inconvenience caused to the employer by those absences, and may if necessary decide not to award compensation to the employee.

It further submits that the fact that Mrs Hertz's health recovered during the currency of the notice of dismissal, and that she is capable of resuming her employment if need be, might also have a bearing on that finding.

(b) The *Association* contends that the points which it set out in the context of the first question argue even more strongly in favour of a negative answer to the second.

It points out that an affirmative answer to the two questions referred to the Court would ultimately have the effect of exposing employers recruiting female workers to the risk of a wholly unforeseeable situation, which would seriously jeopardize the positive developments in their attitudes to female workers, when the Commission has acknowledged that such developments constitute the most important factor in the process of achieving equal treatment.

(c) According to the *Italian Government* the question of possible temporal limits on the prohibition of dismissal relates to the period following the confinement, since illness linked with maternity may sometimes be diagnosed and treated at a later stage. In that event, it maintains, the need to protect the worker against discrimination must be modified in accordance with the general principle of legal certainty as to the obligations borne by the employer in matters of employment.

Accordingly, protection should not be unlimited but should be restricted to a period following the confinement, provided that it is sufficient for the detection and treatment of the illnesses in question — for which purpose the so-called 'maternity leave' cannot be considered an adequate period.

(d) The *United Kingdom* argues that a Member State which has provisions to the effect that an employer may not dismiss a woman as a consequence of absence due to illness attributable to pregnancy or confinement, as permitted by Article 2(3) of the Directive, may if it thinks fit limit in time the protection given against dismissal.

(e) For its part the *Commission* submits that the points which it has set out in the context of the first question indicate that the answer to the question whether there is indirect discrimination on grounds of sex depends on the actual circumstances, including the duration of the sickness prior to dismissal, the basis of comparison, the question

whether the rule in practice affects many more women than men, and the availability of any objective justification.

That being so, the Commission takes the view that a broad answer cannot be given to the second question because it will depend on the actual circumstances of the particular case.

Consequently, the Commission proposes the following answer:

'It is for the national court to determine whether the application by an undertaking of a rule providing for dismissal following an extended absence due to illness affects a far higher number of women than men. If so, there will be indirect discrimination on grounds of sex, contrary to the Directive, unless the undertaking can prove that the rule can be explained by objectively justified factors unrelated to any discrimination on grounds of sex inasmuch as it meets a genuine need on the part of the undertaking and is a priori necessary for the achievement of its aims.'

IV — Replies to the questions put by the Court

The Union was requested to explain whether a ground for dismissal such as the ground cited by Aldi Marked in respect of Mrs Hertz, namely the frequency of her absences due to illness, is contained in any statutory provisions, or whether it reflects a common practice acknowledged over the years by the rulings of the labour courts. The Union replied as follows:

(i) While she was employed by Aldi Marked, Mrs Hertz was governed by the Danish Law on Salaried Employees, Paragraph 5(1) of which provides that 'if an employee is unable, on account of illness, to perform his duties, the resultant non-attendance shall be considered excused by a legitimate incapacity on his part . . . '.

That provision therefore lays down the principle that illness constitutes a legitimate incapacity;

(ii) Paragraph 5(2) contains a derogation whereby 'the individual contract of employment may, however, include the written stipulation that the employee may be dismissed with one month's notice, his employment terminating at the end of a month, if he has been in receipt of a sickness allowance for a total of 120 days during any period of 12 consecutive months. The dismissal is not valid unless it is directly linked to the expiry of the 120 days of sick leave, provided always that the employee is still ill; on the other hand, the validity is not affected by the employee's return to work after the dismissal';

(iii) In this case, no agreement on a shorter term of notice in the event of dismissal following 120 days of illness, of the kind permitted under Paragraph 5(2), had been concluded.

The Union further submits that there is no consistent case-law established over the years as to the justifiability of dismissing an employee on account of frequent absences due to illness.

It adds that, although academic writers seem indeed to agree that dismissal on the grounds of protracted illness, or frequent absences due to illness, may be considered justified by the position of the undertaking and may not give rise to a claim in damages for improper dismissal, it is not possible to determine with certainty the point at which that situation arises. The 120-day rule may serve as a guideline, but the legitimacy of a dismissal depends on other circumstances as well, including whether the undertaking is public or private, the size of its staff, the burden it bears through being deprived of the employee in question, the employee's seniority in the undertaking, whether his recovery is uncertain or can be forecast accurately, and so on.

In reply to the same question the Association gave the following reply.

Danish law is governed by the principle that the contract of service concluded between an employer and an employee can be freely terminated. That principle is set out in Paragraph 2 of the Law on Salaried Employees, according to which:

'1. It is not possible to terminate a contract of service concluded between an employer and an employee until a period of notice, complying with the provisions below, has expired.

2. Termination by the employer shall be preceded by

(1) ...

(2) at least three months' notice, such that the employee shall terminate his service at the end of a month, provided that he has more than six months' seniority in the undertaking.

3. The length of the notice set out in Paragraph 2(2) shall be increased by one month for every three years of employment, but shall not exceed six months.'

In the present case Mrs Hertz, who had been employed for three years at the time of dismissal, was dismissed with the four months' notice to which she was entitled under Paragraph 2. She was paid during the period of notice.

The Association further submits that it is clear from Paragraph 5(1) of the Law on Salaried Employees, quoted above, that an employer may not in principle terminate the contract of employment by dismissal on the grounds of the employee's illness. However, a derogation from that rule is contained in Paragraph 5(2) of that law, quoted above.

On that last point the Association feels itself bound to correct the statements made by the

Union regarding the facts of the case. Pursuant to Paragraph 5(2), the contract of employment between Mrs Hertz and Aldi Marked made provision for dismissal with a shorter period of notice in the event of illness. The Association refers to the extract from the employment contract of 1 July 1982, of which it forwards a copy.

The Association points out that it is generally accepted both by academic writers and by Danish case-law that the 120 days to which Paragraph 5(2) refers do not correspond to 120 working days but include Sundays and public holidays. In the event, Mrs Hertz had been absent owing to illness for 100 working days during the period from June 1984 to June 1985.

Notwithstanding the presence of the stipulation pursuant to Paragraph 5(2), Aldi Marked terminated the employment contract with four months' notice, as required by Paragraph 2 of the Law on Salaried Employees, rather than one month's notice pursuant to Paragraph 5(2). Aldi Marked did not therefore terminate the employment contract on account of some fault on Mrs Hertz's part but merely ended it with the usual period of notice, since its practice was to dismiss employees whose absences due to illness were comparable to those of Mrs Hertz at the time of her dismissal.

The Association further submits that, although the employment contract is ended by dismissal accompanied by a notice running for a period as laid down by the Law on Salaried Employees, the employee is entitled, in certain cases set out in Paragraph 2(b) thereof, to receive special compensation in addition to the wages owed at the time when the employment ends.

Paragraph 2(b) provides as follows:

'1. If the dismissal of an employee who has reached the age of 18 years and who has been employed in the undertaking without interruption for at least one year prior to dismissal cannot be regarded as justified by the position of the undertaking or by that of the employee, the employer shall pay compensation. The award is determined according to the seniority of the employee and the other circumstances of the case, but cannot exceed the wages received by the employee for a period equal to half the length of the notice of dismissal to which he is entitled pursuant to Paragraph 2(2) and (3). Nevertheless, if the employee has reached the age of 30 years at the time of dismissal, the compensation may amount to a maximum of three months' wages.

2. . . .

3. . . .'

According to the Association, if an employer has not based himself on objective criteria when dismissing an employee, compensation may be granted to the employee in accordance with Paragraph 2(b), but the dismissal cannot be declared void under Danish law.

It points out that it was largely those provisions of Paragraph 2 which Mrs Hertz cited in support of her application for compensation to the Sø- og Handelsret.

Paragraph 2(b) does not, however, set out the cases in which a dismissal will not be considered justified by the position of the undertaking or that of the employee.

In the present case, it is common ground between the parties that the sole reason for the dismissal was Mrs Hertz's absences due to illness, and that the dismissal was not therefore attributable to any other substantial cause. The Association states that neither Danish legislation nor Danish case-law published to date has committed itself over the question left unresolved by Paragraph 2(b), namely whether dismissal due to frequent absences on account of illness may be considered justified by the position of the undertaking or the employee. Academic writers, on the other hand, agree that such absences may justify the dismissal of an employee; such a dismissal will not therefore be penalized by an award of compensation under Paragraph 2(b). According to them, a dismissal in accordance with Paragraph 5(2), quoted above, will never have the effect of requiring the employer to pay compensation under Paragraph 2(b).

The Association takes the view that the foregoing must be set against the fact that the dismissal in question was not governed by Paragraph 5(2), involving one month's notice, but was subject to four months' notice in accordance with Paragraph 2. It contends that the inescapable conclusion is therefore that Danish legislation embodies the principle that the decision to dismiss may be freely taken. The employer is not required to give any particular ground for dismissal. If, as here, a ground for dismissal such as the frequent absences due to illness is cited in support of that decision, the only legal effect of doing so relates to the question whether, pursuant to Paragraph 2(b) of the Law on Salaried Employees, the employee is entitled to compensation on the ground that the dismissal notified to him is not justified by the position of the undertaking or the employee. Nevertheless, the laws express no firm view as to whether such dismissal could be considered justified by the position of the undertaking or the employee, and consequently they could not ground a claim under Paragraph 2(b).

Similarly, the published case-law of Danish courts is uncommitted on the theory expounded by academic writers, that a dismissal on the ground of frequent absences due to illness cannot confer a right to claim compensation under Paragraph 2(b). As far as unpublished case-law is concerned, there is the unanimous judgment of the Sø- og Handelsret in the present case, according to which Mrs Hertz was not entitled to such compensation following dismissal. Since the question of the award of compensation under paragraph 2(b) was not raised before the Højesteret, that aspect of the judgment is not the subject of appeal.

G. Slynn
Judge-Rapporteur