JUDGMENT OF THE COURT (Sixth Chamber)
30 April 1998 *

In Case C-136/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the French Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS)

and

Évelyne Thibault

on the interpretation 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 (OJ 1976 L 39, p. 40),

THE COURT (Sixth Chamber),

composed of: H. Ragnemalm, President of the Chamber, R. Schintgen, G. F. Mancini, J. L. Murray (Rapporteur) and G. Hirsch, Judges,

* Language of the case: French.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Department of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in that department, acting as Agents,

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent,

— the Commission of the European Communities, by Marie Wolfcarius, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, represented by Anne de Bourgoing, the United Kingdom Government, represented by John E. Collins and David Pannick QC, and the Commission, represented by Marie Wolfcarius, at the hearing on 5 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 9 January 1997,

gives the following

Judgment

1 By order of 28 March 1995, received at the Court on 28 April 1995, the French Cour de Cassation (Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation 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 (OJ 1976 L 39, p. 40, hereinafter 'the Directive').

2 That question was raised in proceedings between the Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (CNAVTS) (National Old-Age Insurance Fund for Employees) and Mrs Thibault concerning the refusal by the CNAVTS to undertake an assessment of Mrs Thibault's performance for 1983.

3 Article 1(1) of the Directive states that its purpose 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. That principle is known as 'the principle of equal treatment'. Article 2(1) of the Directive defines that principle as meaning that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. Article 2(3) provides that the Directive is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

4 According to Article 2(4), the Directive is to be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).

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

6 Under Article L 123-1(c) of the French Code du Travail (Labour Code):

'Subject to the special provisions of this code and save where the sex of the worker is an essential condition for the performance of the duties attached to a post or an occupation:

...

(c) no measure may be adopted on grounds of sex, particularly in regard to remuneration, training, assignment, qualification, classification, promotion or transfer.'

7 In France, under Article 45 of the Convention Collective Nationale du Travail du Personnel des Organismes de Sécurité Sociale (collective national labour agreement for the staff of social security institutions, hereinafter 'the collective agreement'), pregnant employees who have completed a minimum period of work with an institution are entitled to 16 weeks' maternity leave on full pay, and that period may be

extended to 28 weeks. Under Article 46 of the collective agreement, an employee may, on the expiry of her maternity leave, claim 'leave of three months on half pay or leave of one-and-a-half months on full pay'.

8 Under Article L 122-26-2 of the Code du Travail 'the period of maternity leave is to be treated as a period of actual work for the purpose of determining a worker's rights by virtue of length of service.'

9 Article 3 of the supplement of 13 November 1975 to the collective agreement provides that account must be taken as 'professional experience' for the purpose of classifying posts not only of actual attendance at work but also of certain absences such as annual leave, movable holidays and special leave, short-term leave, time spent as a trade-union official and various other absences not exceeding five working days in each six-month period. Article 3*bis*, added to the collective agreement by a supplement of 15 December 1983, provides that maternity leave must be taken into account as 'professional experience' on the same basis as the absences listed in Article 3.

10 Articles 29 to 31 of the collective agreement lay down the procedure for career advancement of employees, which may amount to a maximum of 40% of their salary. Thus, under Article 29 of the collective agreement, upon the expiry of the second year after their entry into service employees are granted yearly, by way of advancement based solely on length of service, a supplement of 2% of their salary. After the third year and subject to a maximum of 24%, advancement under the collective agreement may rise from 2% to 4%, the additional 2% being based on the assessment made each year by the employee's superiors of their work and conduct. Between 24% and 40%, advancement under the collective agreement is achieved at the rate of 2% per year.

11 Chapter XIII of the CNAVTS standard service regulations amplifies Articles 29 to 31 of the collective agreement. As regards the discretionary advancement of 2%, it provides that any employee who has been present at work for at least six months of the year must be the subject of an assessment of performance by his superiors.

12 Mrs Thibault was recruited by the CNAVTS in 1973 as an *agent technique* (skilled clerical worker) and was promoted to *rédacteur juridique* (official responsible for legal drafting) in 1983. In that year, Mrs Thibault was absent on account of sickness from 4 to 13 February, from 3 to 16 March and from 16 May to 12 June. She then took maternity leave from 13 June to 1 October 1983, under Article 45 of the collective agreement, followed by maternity leave on half pay from 3 October to 16 November 1983 under Article 46 of the collective agreement.

13 On the basis of Chapter XIII of the standard service regulations, the CNAVTS refused to carry out an assessment of performance for Mrs Thibault for 1983. In its view, because of her absences, Mrs Thibault did not meet the conditions laid down by that provision, namely six months' presence at work.

14 It is clear from the documents before the Court that, in 1983, Mrs Thibault was at work for a period of about five months. If she had not taken maternity leave between 13 June and 1 October 1983, she could have relied on the six months' attendance necessary for an assessment of performance under Chapter XIII.

15 Mrs Thibault then brought the matter before the Conseil de Prud'hommes (Labour Tribunal), Paris, claiming that the failure to assess her performance, because of her absence on maternity leave, constituted discrimination and that she had as a result lost an opportunity for promotion. By judgment of 17 December 1985, Mrs Thibault's claim was upheld and her employer was ordered to compensate her for the loss she had suffered. The CNAVTS appealed against that decision.

16 On 9 February 1989 the Cour de Cassation set that judgment aside on the ground that Article 31 of the collective agreement does not provide for inclusion as of right on the list of CNAVTS employees eligible for advancement and referred the case to the Conseil de Prud'hommes, Melun.

17 By judgment of 24 January 1990, the Conseil de Prud'hommes, Melun, held that the fact that Mrs Thibault's performance had not been assessed deprived her of an opportunity for promotion. It considered that her absence on account of maternity leave should have been treated as actual attendance at work and that failure to take account of that absence constituted discrimination prohibited by Article L 123-1(c) of the Code du Travail. The Conseil de Prud'hommes accordingly held that Mrs Thibault should have had her performance assessed for 1983 and that she had missed an opportunity for promotion. The CNAVTS was therefore ordered to award her back-pay for 1984.

18 The CNAVTS appealed against that judgment, contending that Article 31 of the collective agreement does not provide for automatic inclusion on the list for 'advancement on merit' of employees who meet the conditions laid down, that the period of 'professional experience' prescribed by the collective agreement should be severed from the period of actual attendance at work to be taken into account in order for an employee to be eligible for an assessment of performance and that failure to assess Mrs Thibault's performance was not based on grounds of sex, the principle of equality at work being applicable only to rights potentially available to employees of both sexes, in accordance with Article L 123-1(c) of the Code du Travail.

19 Since Article L 123-1(c) of the Code du Travail transposes the Directive into French law, the Cour de Cassation decided to stay proceedings pending a preliminary ruling from the Court of Justice as to

'whether Articles 1(1), 2(1), 5(1) and, if relevant, 2(4) of Council Directive 76/207/EEC of 9 February 1976 must be interpreted as meaning that a woman may not be deprived of the right to an assessment of performance, and consequently to the possibility of an advancement in career, on the ground that she was absent from work by reason of maternity leave.'

20 According to the French Government, the discrimination suffered by Mrs Thibault derives not from the national legislation but from the interpretation thereof by the CNAVTS. It considers that Article 3 of the supplement to the collective agreement of 13 November 1975 and Article 3*bis* of the supplement of 15 December 1983, although concerned with classification of the posts of staff of social security institutions and not the arrangements for assessment of performance referred to in Article 31 of the collective agreement, incontestably reflect the concern of the social partners not to discriminate against women on maternity leave.

21 On this point it should be recalled that, in accordance with the allocation of functions between the Court of Justice and the national courts which underlies Article 177 of the EEC Treaty, it is for the national court to establish the facts giving rise to the dispute, to interpret national legal provisions and to rule on their application to the particular case (see, to that effect, Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 12, and Case 296/84 *Sinatra* v *Fonds National de Retraite des Ouvriers Mineurs* [1986] ECR 1047, paragraph 11).

22 However, as the French Government has stated, it is for the national court, within the limits of its discretion under national law, to interpret and apply the law adopted to implement a directive in accordance with the requirements of Community law (see Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 28).

23 Nevertheless, it must be emphasised that the national court has asked the Court of Justice to interpret specific provisions of Community law in circumstances such as those of the case before it. Accordingly, the observations of the French Government regarding Article 3 of the supplement of 13 November 1975 and Article 3*bis* of the supplement of 15 December 1983 are irrelevant.

24 It must be borne in mind that the directive allows national provisions which guarantee women specific rights on account of pregnancy and maternity, such as maternity leave (see Case C-179/88 *Handels-og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 15).

25 Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of the Directive recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see, in particular, Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, paragraph 25, Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 21, and Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, paragraph 20).

26 The conferral of such rights, recognised by the Directive, is intended to ensure implementation of the principle of equal treatment for men and women regarding both access to employment (Article 3(1)) and working conditions (Article 5(1)). Therefore, the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, not formal, equality.

27 The right of any employee to have their performance assessed each year and, consequently, to qualify for promotion, forms an integral part of the conditions of their contract of employment within the meaning of Article 5(1) of the Directive.

28 It is therefore in the light of Article 5(1) of the Directive, in conjunction with Article 2(3), that rules such as those at issue in this case must be examined to determine whether they guarantee men and women the same conditions without discrimination on grounds of sex.

29 The principle of non-discrimination requires that a woman who continues to be bound to her employer by her contract of employment during maternity leave should not be deprived of the benefit of working conditions which apply to both men and women and are the result of that employment relationship. In circum-

stances such as those of this case, to deny a female employee the right to have her performance assessed annually would discriminate against her merely in her capacity as a worker because, if she had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been assessed for the year in question and could therefore have qualified for promotion.

30 It is true, as the United Kingdom Government was right to point out, that the Court has recognised that the Member States have a discretion as to the social measures they adopt in order to guarantee, within the framework laid down by the directive, protection of women in connection with pregnancy and maternity and as to the nature of the protection measures and the detailed arrangements for their implementation (see *inter alia Hofmann*, cited above, paragraph 27).

31 Nevertheless, such discretion, which must be exercised within the bounds of the Directive, cannot serve as a basis for unfavourable treatment of a woman regarding her working conditions.

32 It must therefore be held that 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. Such conduct constitutes discrimination based directly on grounds of sex within the meaning of the Directive.

33 The answer to the question must therefore be that Articles 2(3) and 5(1) of the Directive preclude national rules which deprive a woman of the right to an assessment of her performance and, consequently, to the possibility of qualifying for promotion because she was absent from the undertaking on account of maternity leave.

Costs

34 The costs incurred by the French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the French Cour de Cassation by judgment of 28 March 1995, hereby rules:

Articles 2(3) and 5(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 preclude national rules which deprive a woman of the right to an assessment of her performance and, consequently, to the possibility of qualifying for promotion because she was absent from the undertaking on account of maternity leave.

Ragnemalm Schintgen Mancini

Murray Hirsch

Delivered in open court in Luxembourg on 30 April 1998.

R. Grass H. Ragnemalm

Registrar President of the Sixth Chamber