OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 21 November 2002 [1]

1. The Arbeitsgericht (Labour Court), Lübeck, Germany, has made a reference to the Court of Justice, under Article 234 EC, for a preliminary ruling on two questions concerning the interpretation of Directive 76/207/EEC, [2] in order to determine whether an employee who is on parental leave is under an obligation to inform her employer that she is pregnant if she seeks to return to work early, having regard to the fact that, owing to her condition, she is unable to perform some of the tasks that make up her job.

I — The facts of the main proceedings

2. Ms Wiebke Busch, the plaintiff in the main proceedings, is a nurse who, since April 1998, has been employed in a hospital run by the defendant, Klinikum Neustadt GmbH & Co. Betriebs-KG.

When her first child was born in June 2000, Ms Busch was granted three years' parental leave. In October 2000, she became pregnant again and, on 30 January 2001, she made a written request for permission to return to full shift work. After various telephone calls between the head of personnel and the employee, the employer decided to assign the employee to a ward with 39 beds looked after by three nurses per shift, in which there was a job vacancy that needed to be filled urgently.

3. On 22 March 2001, the defendant consented to the termination of Ms Busch's parental leave, but did not ask her if she was pregnant. Ms Busch took up her post on 9 April 2001 and, on the following day, she informed her employer that she was seven months' pregnant. The reason she had returned to work was so that she would receive maternity allowance, which is higher than the allowance paid during parental leave, together with the supplementary allowance paid by the employer.

1 — Original language: Spanish.

2 — Council Directive 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).

4. In accordance with Article 3(2) of the Law on the Protection of Working Mothers (Mutterschutzgesetz; 'the MuSchG'), Ms Busch's maternity leave was due to commence on 23 May 2001. The defendant reacted by sending Ms Busch home on 11 April 2001 and by then proceeding to rescind its consent to her return to work on the grounds of fraudulent misrepresentation and mistake about an essential characteristic. In the light of the prohibition in Article 4(2) of the aforementioned Law, the employer is of the view that the worker is no longer of full working capacity.

5. Ms Busch confirms that the duties of a nurse on her ward include helping bedridden patients to sit up to eat, washing patients in need of intensive care, regularly repositioning patients with the help of another nurse, and preparing and administering injections. She asserts that, during her first pregnancy, she continued to carry out her normal duties, but that she also worked in administration. She states that she could have worked until the start of her maternity leave, meaning that no prohibition of employment would have applied until 23 May 2001 since, in the hospital concerned, beds were pushed and a specialised internal service took care of transportation within the building.

Ms Busch claims payment of DEM 4 181.77 (EUR 2 138.11) gross as remuneration, and DEM 3 258.50 (EUR 1 666.04) net as supplementary maternity allowance.

6. The defendant refuses to make those payments, claiming that the employee should have informed it of her condition before returning to work. As her employment was for a limited period (9 April to 23 May 2001), the pregnancy was an essential characteristic of the employee and the fact that the employer was unaware that she was pregnant amounted to a mistake on its part.

7. It appears that the parties do not dispute that Ms Busch could not have been employed in administration during the period concerned.

II — The national legislation [3]

8. Paragraph 3 of the Law on the Protection of Working Mothers provides that pregnant women must not work during the six weeks prior to the birth unless they expressly state that they are willing to do so.

3 — Information provided by the Commission in its written observations.

Under Paragraph 4(1), pregnant women must not be assigned to heavy physical work or work exposing them to the harmful effects of substances or rays, dust, gases, steam, heat, cold, humidity, vibrations or noise that pose a risk to health. Paragraph 4(2) prohibits pregnant women from being assigned to work involving the regular lifting, moving or carrying, without mechanical assistance, of loads of more than 5 kg, or, on occasion, of more than 10 kg.

Paragraph 11 governs the remuneration of pregnant workers to whom the prohibition of work under the Law on the Protection of Working Mothers applies. Where a worker has no right to maternity allowance, and she stops work completely or partially, she will continue to receive from her employer the average salary either of the last thirteen weeks or of the three months prior to the month in which she became pregnant.

Under Paragraph 13, workers who are registered with a sickness fund receive an allowance during the period of maternity leave in the amount of DEM 25 (EUR 12.78) per day. Paragraph 14 provides that, where a woman is entitled to that allowance, she shall also receive from her employer a supplementary allowance equal to the difference between DEM 25 and her average daily remuneration, minus the deductions required by law.

9. Paragraph 5 of the Federal Law on Parental Allowance and Parental Leave (Gesetz über Gewährung von Erziehungsgeld und Erziehungsurlaub) sets the amount of the allowance paid during parental leave at DEM 600 [4] (EUR 306.78) per month. Under Paragraph 7, after the birth, the maternity allowance is offset against the parental allowance.

Paragraph 16 provides that employees who wish to take parental leave must make a request to their employers at least four weeks before the start date, specifying how long they wish to take. Employees may shorten or extend their parental leave, provided that their employers, who, it appears, have a margin of discretion for the purpose, consent. [5]

10. Paragraph 123 of the German Civil Code (Bügerliches Gesetzbuch; 'the BGB') provides that anyone is entitled to rescind his consent where it was obtained by deceit or threats.

4 — From 1 January 2001, this amount was set at either DEM 900 (EUR 460.16) for the first year after the child's birth or at DEM 600 for the first two years after the birth, depending upon the income and the wishes of the recipient.

5 — This provision was amended and extended, with effect from 1 January 2001, with the result that, from that date, an employer may only object to the shortening of parental leave on account of the birth of another child or of absolute necessity, in the case of pressing requirements linked to the smooth running of the business. An employee may not, however, shorten parental leave during the period which corresponds to maternity leave. These reforms do not apply to the facts of the main proceedings because of the transitional provision laid down in Paragraph 24(1) of the law concerned.

Under Paragraph 119(1), a person may also rescind his consent if, when he gave it, he was mistaken as to its content, or would not have given it if he had been aware of the actual circumstances and had appraised the matter with full knowledge of the facts. Paragraph 2 provides that a mistake can also include a mistake as to the characteristics of a person or thing, deemed by custom to be essential.

III — The questions referred for a preliminary ruling

11. The Arbeitsgericht Lübeck decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does it constitute illegal discrimination on the grounds of sex, within the meaning of Article 2(1) of Directive 76/207, if a woman, who, after she has started her parental leave wishes to shorten that leave with the consent of her employer, is under an obligation to inform her employer if she knows she is pregnant again before the agreement on her return to work is concluded, where she cannot fully carry out the proposed work because, from the very first day, a prohibition of employment applies in respect of particular tasks?

(2) In the event that Question 1 is answered in the affirmative, in the case described, does it constitute unlawful discrimination on the grounds of sex, within the meaning of Directive 76/207, if the employer then has the right to rescind his consent to the shortening of parental leave because he was mistaken about the fact that the woman was pregnant?'

IV — The Community legislation

12. A number of the provisions of Directive 76/207 must be interpreted in order to answer the questions referred.

'*Article 2*

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.'

'*Article 5*

1. 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.'

V — The procedure before the Court of Justice

13. The parties to the main proceedings, the German Government and the Commission have submitted written observations in these proceedings within the time-limit laid down in Article 20 of the Statute of the Court of Justice.

At the hearing, which was held on 23 October 2002, oral argument was presented by the defendant's representative and the Commission.

VI — The first question referred for a preliminary ruling

14. By this question, the national court enquires whether Article 2(1) and (3) and Article 5(1) of Directive 76/207 preclude a requirement that an employee — who, after she has started her parental leave, wishes to shorten that leave with the consent of her employer — must inform her employer that she is pregnant before the agreement on her return to work is concluded, where, owing to her condition, she is unable to carry out all her duties because, from the very first day, a statutory prohibition applies.

A — *The positions set out in the observations*

15. In Ms Busch's view, the obligation to declare her pregnancy before returning to work constitutes discrimination on the grounds of sex, since it is only women who can be prevented by their condition from carrying out certain tasks. The employer is not entitled to dispute the validity of its consent by claiming that it was misled because it did not ask her whether she was pregnant, and its claim that it was mistaken as to her essential personal characteristics constitutes discrimination, since the fact of not being pregnant does not form part of a woman's essential characteristics. Ms Busch maintains that she would, in fact, have been able

to carry out most of her duties, since the prohibited tasks only took up a few minutes out of her whole working day. It would have been preferable to relieve her of those duties, instead of preventing her from working altogether.

16. The defendant in the main proceedings maintains that the work that the employee was prohibited from carrying out represented a significant part of the work involved in her job. In its view, there has been no discrimination because the contract of employment has not been rescinded, and a six-week period of work is comparable to a fixed term employment relationship where the employee is unable to perform her job. In accordance with the duty of good faith implicit in the employment contract, only the principal obligations of which are suspended during parental leave, Ms Busch should have disclosed that, owing to her condition, she was unable to care for sick people. Any discrimination that may have occurred would be justified because the provisions which restrict the activities of women in certain circumstances were adopted in order to protect women during maternity.

17. The German Government draws a distinction between the case of a pregnant woman who is discriminated against as regards access to, or dismissal from, employment, and the case of a woman who is already employed under a contract for an indefinite term, the validity of which is not in question. At the outset of an employment relationship, a woman cannot be required to disclose her condition as that might place her at a disadvantage. In the opinion of the German Government, Ms Busch is not claiming the right to equality with men but rather she is seeking to gain an economic advantage vis-à-vis other pregnant employees who are still on parental leave, and that, in its view, is tantamount to an abuse of rights.

18. The Commission considers that the refusal by an employer to permit a pregnant employee to return to her job before the end of her parental leave, on account of her condition, constitutes discrimination on the grounds of sex, contrary to Directive 76/207. Since the contract in question is for an indefinite term, there is no opportunity to examine whether the fact that, in the period leading up to her maternity leave, the employee was unable to carry out all the duties that form part of her job as a result of a statutory prohibition is an exception to the general principle of non-discrimination. On the basis that pregnancy is not a criterion which may be taken into account by an employer, since to do so would be discriminatory, it follows that the matter of whether or not the employee disclosed her condition is immaterial.

B — *The answer to the question referred*

19. The Framework Agreement on Parental Leave [6] represents an undertaking by cer-

6 — Done at Brussels on 14 December 1995.

tain general cross-industry organisations (UNICE, CEEP and the ETUC) to set out minimum requirements on parental leave, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women. It was made binding on the Member States, with the exception of the United Kingdom, by Directive 96/34/EC, [7] adopted on 3 June 1996 pursuant to Article 4(2) of the Agreement on Social Policy, [8] which provides that management and labour may request jointly that agreements at Community level be implemented by a Council decision on a proposal from the Commission. The time-limit for transposing the terms of the Framework Agreement on Parental Leave into national law expired on 3 June 1998. [9]

20. Clause 1 of the Agreement on Parental Leave provides that the agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents. Clause 4 stipulates that Member States may apply or introduce more favourable measures than those set out in the agreement. The agreement does not restrict the individual right to parental leave to those employees with an employment relationship for an indefinite term.

21. Under Clause 2(7), it is also left to the Member States and to management and labour to define the status of the employment contract or employment relationship for the period of parental leave. Nevertheless, it is clear that, although the primary obligations of the parties have been suspended, the contract remains in force, since Clause 2(5) provides that, at the end of parental leave, workers have the right to return to the same job or, if that is not possible, to an equivalent or similar job.

22. The period of parental leave is set at a minimum of three months until a given age of up to eight years. There is, however, no provision governing the situation where employees return to work before the end of the agreed period of leave. Accordingly, the conditions under which employees may return to work early are determined at a national level, by either legislation or collective agreements.

The German Law on parental allowance and parental leave, as it stood at the time of the facts of the main proceedings, stipu-

7 — Council Directive of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4).

8 — Agreement on Social Policy concluded by the Member States of the European Community, with the exception of the United Kingdom of Great Britain and Northern Ireland, annexed to Protocol No 14, and incorporated into the Treaty establishing the European Community by the Treaty on European Union, signed in Maastricht on 7 February 1992. The wording of the provisions of the Agreement on Social Policy was incorporated into Articles 117 to 120 of the Treaty establishing the European Community (now Articles 136 to 143) by the Treaty of Amsterdam, signed on 2 October 1997, which entered into force on 1 May 1999.

9 — Directive 96/34 was amended and extended to the United Kingdom by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10, p. 24). The time-limit granted to that Member State for transposing the directive into national law expired on 15 December 1999.

lated that an employee could return to work before the end of the agreed period provided only that the employer, who had a margin of discretion for the purpose, consented.

23. Directive 76/207 is aimed at the implementation of the principle of equal treatment for men and women as regards access to employment, including promotion, vocational training and working conditions. [10] Article 5 provides that application of the principle of equal treatment with regard to working conditions means that men and women are guaranteed the same conditions without discrimination on the grounds of sex.

Implicit in the status of an employee is the right to parental leave, during which the employment contract remains in force. Accordingly, the conditions governing an employee's early return to work form part of the working conditions and, as such, are subject to the provisions of Directive 76/207, from which it follows that they may not vary according to an employee's sex.

24. The Court has begun to build up a substantial body of case-law on the interpretation of the principle of equal treatment laid down in Directive 76/207, where the employment rights of pregnant employees are at issue. To date, the Court has always held that direct discrimination on the grounds of sex exists in cases where an employer relies on the fact that a woman is pregnant as a ground for refusing to employ her, [11] for dismissing her, [12] or for refusing to renew a fixed-term contract. [13] It is also discriminatory to dismiss a pregnant employee for absences due to an illness attributable to her condition. [14] The Court has never accepted that such discrimination may be justified on the basis of arguments relating to the financial loss suffered by an employer of a pregnant woman during the period of maternity leave or during pregnancy.

According to the above case-law, since the prohibition of discrimination on the grounds of sex is mandatory in nature, it not only applies to the action of public authorities but extends also to all agreements which are intended to regulate paid

10 — Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) specifies the substance, the scope and the arrangements for the application of the principle of equal treatment in matters of social security.

11 — Case 177/88 *Dekker* [1990] ECR I-3941 and Case C-207/98 *Mahlburg* [2000] ECR I-549.

12 — Case C-32/93 *Webb* [1994] ECR I-3567 and Case C-109/00 *Tele Danmark* [2001] ECR I-6993.

13 — Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915.

14 — Case C-394/96 *Brown* [1998] ECR I-4185. In that judgment, the Court, sitting in plenary session, overturned the decision of the Sixth Chamber in Case C-400/95 *Larsson* [1997] ECR I-2757. See the Opinions I delivered in both cases.

labour collectively, as well as to contracts between individuals. [15] The prohibition also applies to unilateral action by an employer vis-à-vis his employees. [16]

25. It is true that Ms Busch's case does not concern access to employment or dismissal but rather the conditions under which the rights and obligations derived from the employment contract are exercised and fulfilled. However, as I have already pointed out, the provisions of Directive 76/207 prohibit an employer from relying on the fact that an employee is pregnant as a ground for taking a decision which is prejudicial to her employment rights. It follows that, if the reason why an employer refuses to allow an employee to return to work before the end of parental leave is that she is pregnant, there is direct discrimination on the grounds of sex contrary to Article 5(1) of Directive 76/207, since the conditions laid down for her return to work are part of the working conditions which must apply equally to men and women, whereas pregnancy is a state which affects only women.

Since an employer is not entitled to take into account the fact that a woman is pregnant when considering her return to work, on the basis that that would constitute direct discrimination on the grounds of sex, the employee's condition is immaterial to the employer's decision, from which it follows that the employee is not under an obligation to inform her employer that she is pregnant.

26. The Court has also ruled on the termination of an employment contract on the grounds of pregnancy where the contract was held invalid or avoided on account of a mistake as to the essential characteristics of the employee, owing to a statutory prohibition on night-time work, [17] and on the refusal to employ a pregnant woman on the ground that a statutory prohibition on employment existed in relation to the post to which she had been assigned. [18] As in the case of Ms Busch, both prohibitions were laid down by the German Law on the Protection of Working Mothers.

27. In those two cases, the Court pointed out that the unequal treatment was not based directly on the woman's pregnancy but on a statutory prohibition on employment attaching to that state and based on Article 2(3) of Directive 76/207, according to which such a prohibition is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

15 — See the judgments in Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 12; in Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 11; and in Case C-281/97 *Krüger* [1999] ECR I-5127, paragraph 20.

16 — Judgment in Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 26.

17 — Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657.

18 — *Mahlburg*, cited above.

Nevertheless, in the first case, the Court held that direct discrimination, such as the termination of a contract for an indefinite term on account of an employee's pregnancy, whether by annulment or avoidance, cannot be justified by the fact that she is temporarily prevented, by a statutory prohibition imposed because of pregnancy, from performing night-time work.

In the second case, the Court concluded that the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that it is not permissible for an employer to refuse to take on a pregnant woman on the ground that a prohibition on employment arising on account of the pregnancy would prevent her being employed, from the outset and until she goes on maternity leave, in the post of unlimited duration to be filled. The Court went on to hold that, in addition, a refusal to employ a woman on account of her pregnancy cannot be justified on the basis of the financial loss suffered by an employer as a result of the fact that the woman appointed cannot be employed in the post concerned for the duration of her pregnancy.

28. The prohibition applying to Ms Busch on account of her pregnancy is similar to, although less stringent than, the one which applied to Ms Habermann-Beltermann and Ms Mahlburg, and it is laid down in the Law on the Protection of Working Mothers, pursuant to Article 2(3) of Directive 76/207. That provision leaves Member States with a discretion as to the social measures which they adopt in order to guarantee, within the framework laid down by the directive, the protection of women in connection with pregnancy and maternity, and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment. [19]

In that connection, the Court has held that the exercise of the rights conferred on women under Article 2(3) of Directive 76/207 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. [20]

29. The defendant in the main proceedings maintains that if Ms Busch were to return to work in the circumstances described, it would discriminate against other employees who remain on parental leave, despite the fact that they are pregnant.

30. It is difficult to agree with that view in the light of the case-law of the Court, which defines discrimination as consisting of the application of different rules to

19 — Judgment in Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 27.

20 — Judgment in Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 26.

comparable situations or the application of the same rule to different situations. [21]

A pregnant employee who returns to work before the end of her parental leave recovers her working status and is entitled to receive her salary and the supplementary maternity allowance from her employer. On the other hand, a woman who remains on parental leave during pregnancy is a member of the inactive population. Since each woman is in a different situation, it would amount to an infringement of the principle of equality to treat them identically.

31. In the order for reference, the German court demonstrates an awareness of the case-law of the Court on the question of equal treatment; however, it appears that, when it drafted the order, the judgments in *Tele Danmark* [22] and *Jiménez Melgar* [23] had not yet been delivered.

32. That observation is of interest because the national court, relying on several of the judgments that I have just examined, which were delivered in cases where there was a dispute over access to employment or over the dismissal of a pregnant woman employed under a contract for an indefinite term, has reached a number of conclusions which, in the light of the Court's interpretation of the principle of equal treatment in those two judgments of autumn 2001, [24] are erroneous. In the judgments concerned, the Court examined for the first time whether the principle of equal treatment applied in the same way to employment relationships that are concluded for a fixed term.

For example, in point 1(b) of the second part of the order, the Arbeitsgericht Lübeck cites two decisions of the Court and then states that 'it is inferred... that, except where an employment contract for an indefinite term is entered into, not only is an employer entitled to ask a job candidate whether she is pregnant, but also a pregnant candidate has a duty to disclose if she is pregnant even if not expressly asked'. The national court adds that Ms Busch was aware that she would only be employed for approximately six weeks and that her 'situation was therefore comparable to taking up fixed-term employment'.

In the light of the Court's recent case-law, those conclusions could not be more erroneous.

33. In *Tele Danmark*, the Court was required to determine whether it was dis-

21 — Judgments in Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; in Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 40; in Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 21; and in Case C-411/98 *Ferlini* [2000] ECR I-8081, paragraph 51.

22 — Cited above.

23 — Cited above.

24 — *Tele Danmark* and *Jiménez Melgar*.

criminatory to dismiss an employee on the grounds that she was pregnant, having regard to the fact that she had been recruited for a limited period and had failed to inform her employer of her condition, despite the fact that, when she was recruited, she was aware that she was pregnant, and that, owing to her condition, she would be unable to work for a significant portion of her period of employment.

34. The Court upheld the case-law laid down in *Webb*,[25] pursuant to which, while the availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period corresponding to maternity leave is essential to the proper functioning of the undertaking in which she is employed. A contrary interpretation would render ineffective the provisions of Directive 76/207.

The Court went on to state that such an interpretation cannot be altered by the fact that the contract of employment was concluded for a fixed term. The Court was of the opinion that, since the dismissal of a worker on account of pregnancy constitutes direct discrimination on the grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal. In either case the employee's inability to perform her contract of employment is due to pregnancy.

35. One of the questions referred in *Jiménez Melgar* concerned the refusal to renew the fixed-term employment contract of a pregnant employee. The Court held that, whilst the prohibition of dismissal laid down in Article 10 of Directive 92/85/EEC[26] applies to both fixed-term employment contracts and to those concluded for an indefinite period, non-renewal of a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal prohibited by that provision. However, where non-renewal of a fixed-term contract is motivated by the employee's pregnancy, it constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and 3(1) of Directive 76/207.

36. It cannot be denied that the fact that an employee is unable to perform all the duties which form part of her job after she has returned to work is likely to have an impact on the business, from both an organisational and a financial point of view. However, Article 5 of Directive 92/85 provides employers with some room for manœuvre since, where there is a risk to the safety or

25 — Cited above.

26 — Council Directive 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).

health, or an effect on the pregnancy or breastfeeding, of a worker, it gives an employer the right, in the first instance, to adjust temporarily the working conditions and/or the working hours of the worker concerned. If that is not feasible, the employer must take the necessary measures to move the worker concerned to another job. Only where those solutions are impracticable may the employer then grant the worker concerned leave for the period necessary for her protection.

37. The Court has interpreted Directives 76/207 and 92/85 as precluding national legislation which provides that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her, where he does not first examine the possibility of adjusting the employee's working conditions and/or working hours or even the possibility of moving her to another job. [27]

Rather than relying on the measures available to it under Article 5 of Directive 92/85, the defendant in the main proceedings decided to relieve the employee of her duties with immediate effect, [28] rescinding its consent to the early termination of her parental leave on the grounds of fraudulent misrepresentation and mistake about an essential characteristic.

27 — Judgment in Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraphs 58 and 59.

28 — However, at the hearing, the defendant's representative informed the Court that most of the nursing staff at the hospital are women and that, when planning staffing requirements, regard is always had to the possibility of pregnancies.

38. In any event, as the Commission rightly points out in its written observations, it is for the Member States to define the costs to be assumed by employers and those which are to be borne from public funds, financed through taxation to cover collective social responsibilities, having regard at all times to the fact that the protection granted to pregnant women must not be at the expense of her individual status in the labour market.

39. I should like to make some additional observations for the benefit of the Arbeitsgericht Lübeck, since, although it has not asked directly about whether the employee is guilty of an abuse of rights, it appears to hint at that possibility in some of its observations in paragraph 1(b) of the second part of the order.

Firstly, German law provides that employees have the right to return to work following parental leave.

Secondly, although the request to return to work was made in January, the employer did not give its consent until March, meaning that, had the agreement not taken so long to conclude, the employee would have been able to continue working for a longer period before starting her maternity leave.

Thirdly, although Ms Busch's aim was to receive maternity allowance, which is higher than the allowance paid during parental leave, together with the supplementary allowance paid by the employer, there is no reason to assume that all pregnant women who seek to return to work are pursuing the same objective. There are other reasons why a woman returns to work, such as, for example, the fact that she has the opportunity to receive several months' full salary before the birth; the fact that she is no longer looking after the child in respect of whose care she requested parental leave; or the fact that there is the chance of promotion or of taking part in an occupational training programme.

Lastly, the prohibition of certain work during pregnancy only affects women who are employed in an occupation which exposes them to risks to their health and safety, and in such cases the employer must either adjust temporarily the woman's working conditions and/or working hours, or, where that is not feasible, he must move her to another job; or, as a last resort, he may grant her leave.

40. For the reasons set out, it should be held that Article 2(1) and (3), and Article 5(1), of Directive 76/207 preclude a requirement that an employee — who, after she has started her parental leave, wishes to shorten that leave with the consent of her employer — must inform her employer that she is pregnant before the agreement on her return to work is concluded, even though, owing to her condition, she cannot carry out all her duties because, from the very first day, a statutory prohibition applies.

VII — The second question

41. By this question, the national court enquires whether it constitutes unlawful discrimination on the grounds of sex, within the meaning of Directive 76/207, if the employer has the right to rescind his consent to the shortening of parental leave because he was mistaken about the fact that the woman was pregnant.

42. I agree with the Commission that the national court must interpret the provisions of the Civil Code in the light of the wording and the purpose of Directives 76/207 and 92/85, so that the aim pursued by the Community legislation is achieved.

It seems clear to me that, since an employer may not refuse to allow a woman to return to work before the end of parental leave on account of her pregnancy, it would be unacceptable for an employer who has already given his consent then to do so by relying on Articles 123 and 119 of the German Civil Code.

43. For that reason, I am of the opinion that giving an employer the right to rescind his consent to the shortening of parental leave by a pregnant employee, because he was mistaken about her condition, constitutes direct discrimination on the grounds of sex, contrary to Directive 76/207.

VIII — Conclusion

44. In the light of the foregoing considerations, I propose that the Court of Justice should reply to the Arbeitsgericht Lübeck as follows:

(1) Article 2(1) and (3), and Article 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 a requirement that an employee — who, after she has started her parental leave, wishes to shorten that leave with the consent of her employer — must inform her employer that she is pregnant before the agreement on her return to work is concluded, even though, owing to her condition, she cannot carry out all her duties because, from the very first day, a statutory prohibition applies.

(2) The right of an employer to rescind his consent to the shortening of parental leave by a pregnant employee, because he was mistaken about her condition, constitutes direct discrimination on the grounds of sex, contrary to Directive 76/207.