# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 10 May 2001 [1]

1. The Højesteret (Danish Supreme Court) has made a reference to the Court of Justice, under Article 234 EC, for a preliminary ruling on two questions regarding the interpretation of Article 5(1) of Directive 76/207/EEC [2] and of Article 10 of Directive 92/85/EEC. [3]

Essentially, the Højesteret wishes to know whether these provisions preclude a pregnant worker from being dismissed, on the ground of pregnancy, where: (i) she was recruited under a six-month contract; (ii) she was aware of her condition when she entered into the contract but did not inform the employer of it, and (iii) due to her maternity leave, she would be unavailable for work for part of her period of employment.

1 — Original language: Spanish.

2 — 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).

3 — Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

## I — The facts

2. The appellant in the main proceedings is Tele Danmark A/S, a telephone company which employed Ms Brandt-Nielsen to work in its customer service department under a contract which ran from 1 July to 31 December 1995. At the recruitment interview, the worker was informed that the first two months would be given over to training and that, during this period, there would be 14 days of actual teaching.

3. The employee, who is the respondent in these proceedings, began work on the appointed date. In August, she announced that she was pregnant and that she expected to give birth on 6 November 1995. Under the collective agreement, she was entitled to eight weeks paid leave prior to the birth. This period commenced on 11 September, several days after she was, in theory, to have completed her training period, which, in actual fact, had been extended because the respondent was married on 12 August and had taken a short period of leave.

4. On 23 August, the respondent was given notice of her dismissal with effect from the

end of September, the date on which she was obliged to cease work. The reason given was that the respondent had breached the conditions of her employment, by failing to point out in the interview that she was pregnant and that the birth would take place in November.

5. In March 1996, the Handels- og Kontorfunktionærernes Forbund (Union of Commercial and Clerical Workers), acting on behalf of Ms Brandt-Nielsen, brought an action before the Retten de Århus (Århus District Court), seeking compensation on the ground that dismissal by reason of pregnancy is contrary to Article 9 of the Law on Equal Treatment for Men and Women, which refers to employment and maternity leave [4] ('the Law on Equal Treatment').

Tele Danmark A/S submitted that the court should dismiss the action on the ground that the worker, who was employed under a six-month contract, had failed to point out that she was pregnant and that she expected to give birth in November. This was, in fact, the ruling which the Retten de Århus made on 14 January 1997.

6. On appeal, the Vestre Landsret (Western Regional Court) awarded compensation to Ms Brandt-Nielsen, concluding that it had been proved that pregnancy was the reason for her dismissal. The Vestre Landsret took into account the fact that neither the preparatory documents prior to adoption of the Law on Equal Treatment nor the case-law of the Court of Justice supported the view that temporary workers were not protected, holding that it was immaterial that the worker was aware of her condition and of the fact that she would be unable to meet her employment commitments in full.

## II — The questions referred for a preliminary ruling

7. In September 1998, Tele Danmark A/S brought an appeal against the decision before the Højesteret which, prior to delivering its judgment, referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Article 5(1) of Council Directive 76/207... and/or Article 10 of Council Directive 92/85..., or other provisions in those directives or elsewhere in Community law preclude a worker from being dismissed on the ground of pregnancy in the case where:

(i) the woman in question was recruited as a temporary worker for a limited period;

4 — Law No 161 of 12 April 1978 (lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse og barselsorlov m.v.).

(ii) ... knew that she was pregnant but did not inform the employer...; and

(iii) her pregnancy meant that [she] was unable to work for a significant portion of her period of employment?

(2) Does the fact that the employment occurs in a very large undertaking and that that undertaking frequently uses temporary workers have any bearing on the answer to Question 1?'

## III — Community legislation

8. Directive 76/207 forms part of the Community's programme aimed at implementing the principle of equal treatment for men and women as regards access to employment, training, promotion, and working conditions. Under 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.'

9. Directive 89/391/EEC, [5] the aim of which is to improve the safety and health of workers, is a framework directive which has served as the basis for specific directives covering risks in the workplace. Article 15 provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them.

10. The Council considered that pregnant workers and workers who have recently given birth or are breastfeeding are a particularly sensitive risk group and that measures relating to their health and safety needed to be taken, and accordingly it adopted Directive 92/85, the aim of which is to protect such workers while they are in those circumstances.

Article 10(1) of Directive 92/85 prohibits the dismissal of such workers for reasons connected with their condition, the effect of

5 — Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

which might be harmful to their physical and mental health, in the following terms:

'(1) Member States shall take the necessary measures to prohibit the dismissal of workers... during the period from the beginning of their pregnancy to the end of the maternity leave..., save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.'

## IV — The Danish legislation

11. The Law on Equal Treatment transposed Directive 76/207 into Danish law, while Law No 412 of 1 June 1994 similarly implemented Directive 92/85.

12. Pursuant to Article 9 of the Law on Equal Treatment, an employer may not dismiss a worker on the ground that she has exercised her right of absence or for any other reason connected to the pregnancy, the postnatal period, or adoption.

13. Article 16 of the Law on Equal Treatment provides:

'1. If a worker is dismissed contrary to Article 9, the dismissal will be set aside if a request is made to that effect, unless, in exceptional cases and after balancing the interests of the parties, it is found to be manifestly unreasonable to require that the employment relationship be maintained or restored.

2. If a worker is dismissed contrary to Article 9 and the dismissal is not set aside, the employer shall pay the worker compensation.

...

4. If the dismissal occurs during pregnancy, or the postnatal period or on adoption, the employer shall be required to show that the dismissal was not based on those grounds.'

## V — The procedure before the Court of Justice

14. The appellant and the respondent in the main proceedings, the European Free Trade

Association (EFTA) Surveillance Authority [6] and the Commission have submitted written observations in these proceedings within the time limit laid down for that purpose by Article 20 of the Statute of the Court of Justice.

At the hearing, which took place on 29 March 2001, oral argument was presented by the representatives of the appellant and the respondent and the agents of the EFTA Surveillance Authority and the Commission.

## VI — Examination of the questions referred for a preliminary ruling

### A. *The first question*

15. This question concerns the legality of Ms Brandt-Nielsen's dismissal and its possible justification.

16. The appellant undertaking in the main proceedings argues that the directives in question do not cover dismissal on the ground of pregnancy in Ms Brandt-Nielsen's case and that a refusal to employ a pregnant women, or the dismissal of such a woman, is only contrary to Community law where the contract is for an indefinite term. In the appellant's view, the principle of equal treatment cannot extend to a fixed-term employment relationship, in which the absence of the employee due to maternity leave assumes vital importance because it obstructs performance of the obligations under the contract. Likewise, the fact that an employee conceals her condition when she is recruited is of fundamental importance in fixed-term contracts.

The appellant maintains that the circumstances surrounding the dismissal of Ms Brandt-Nielsen fall outside the scope of Directive 92/85, a provision which cannot, under any circumstances, justify imposing obligations unilaterally on an employer.

17. The employee asserts that the reason for her dismissal was that she was pregnant, and this, in her view, amounts to direct discrimination on the ground of sex. The difficulties which maternity leave causes for an employer are no more onerous in a temporary employment relationship than they are where the relationship is indefinite, and they do not justify discrimination. Neither of the two directives whose interpretation has been requested draw any distinction based on the duration of the contract, and nor is the protection they

6 — In accordance with the third paragraph of Article 20 of the Statute, as amended following the Declaration of the European Community on the Rights of the EFTA States before the Court of Justice of the European Communities, annexed to the Final Act of the Agreement on the European Economic Area (OJ 1994 L 1, p. 523 et seq, and in particular p. 567).

afford limited in the sense that an employee must have worked for a minimum period.

In the respondent's opinion, the costs associated with maternity leave should be covered by the employer who, in turn, would have had to cope with a shorter absence than would have been the case if the contract had been for an indefinite term. The respondent asserts that she intended to remain in her post until giving birth and that, since the birth took place on 13 November 1995, had she not been dismissed, she would have been able to work for four out of the six months. The respondent believes that the fact that she was aware of her condition when she was recruited is immaterial because the parties' mutual obligation to show good faith does not mean that a worker is under a duty to notify her employer that she is pregnant at the time when she is recruited.

18. The EFTA Surveillance Authority considers that, on the matters of protection against dismissal and of safeguarding the rights contained in the employment contract, the provisions of Directive 92/85, which is aimed exclusively at protecting pregnant workers, are more precise than those contained in Directive 76/207. In addition, Directive 92/85 is more specific, more detailed and more recent. For these reasons, the EFTA Surveillance Authority prefers to examine the questions referred in the light of Directive 92/85, Article 10 of which lays down several conditions which must be fulfilled before a dismissal can take place, which are cumulative and difficult to fulfil and which were not fulfilled at the time of Ms Brandt-Nielsen's dismissal. In the opinion of the EFTA Surveillance Authority, it was the legislature's wish to afford greater protection to pregnant workers and there is nothing in the preamble or the enacting terms to support the view that not all workers, irrespective of the length of their contracts, are entitled to the same protection.

By way of a subsidiary matter, the EFTA Surveillance Authority considers the facts in the light of Directive 76/207, starting from the assumption that pregnancy was the ground for the dismissal. For this reason, the worker was the victim of direct discrimination on the ground of sex, which cannot be justified by the financial burden which maternity leave can cause an employer, nor by the fact that the worker failed to inform the employer that she was pregnant when she was recruited.

19. The Commission asserts that Directive 76/207 and Directive 92/85 both apply to this case, because they do not distinguish between indefinite and fixed-term employment contracts. After offering a combined interpretation of the two directives, the Commission reasons that a dismissal in the manner of Ms Brandt-Nielsen's amounts to direct discrimination contrary to Article 2(1) of Directive 76/207, which is prohibited under Article 10 of Directive 92/85 during the protection period for

pregnancy. None of the circumstances surrounding the dismissal, which have been pointed out by the national court, would cause this view to change.

20. Once again, the Court of Justice finds itself faced with questions, referred for a preliminary ruling by a Danish court, which highlight the treatment in the workplace of pregnant workers in that Member State. I will cite the following examples: Ms Hertz, who was dismissed one year after her maternity leave because of absences due to an illness caused by the birth; [7] Ms Larsson, who was dismissed immediately after her maternity leave because she continued to be unable to work as a result of an illness caused by pregnancy, which had already prevented her from working for more than four months before she gave birth; [8] Ms Høj Pedersen, Ms Andresen and Ms Sørensen, who, being unfit to work by reason of illnesses caused by pregnancy, ceased to receive any of their wages, payment of which workers whose illnesses are due to different causes are entitled to receive; and Ms Pedersen, employed by a dentist who suspended her from employment and pay when he learnt that, due to complications arising from her pregnancy, the obstetrician had said she should only work part time. [9] It appears that Ms Brandt-Nielsen is destined to lengthen the saga.

21. In its question, the Højesteret cites Directive 76/207 and Directive 92/85. To my mind, the application of either directive in this case will lead to the same conclusion, albeit by different routes.

22. The Court has frequently had to interpret Directive 76/207 in situations where access to employment for women has been restricted or prevented, [10] or where the working conditions provided to women proved to be discriminatory. [11] Within this subject area, the different treatment suffered by pregnant women with regard to access to employment and working conditions merits special attention. As will emerge throughout my discussion, Denmark does not hold a monopoly on discrimination against women in the workplace.

23. According to the settled case-law of the Court, it follows from the provisions of Directive 76/207 that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on the ground of sex. [12] The referring court is aware of this interpretation but wonders whether the circumstances in which

7 — Case C-179/88 *Handels- og Kontorfunktionærernes Forbund, 'Hertz'* [1990] ECR I-3979.

8 — Case C-400/95 *Larsson* [1997] ECR I-2757.

9 — These were the facts at issue in Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327.

10 — As demonstrated by, for example, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, Case 79/83 *Hartz* [1984] ECR 1921 and Case C-285/98 *Kreil* [2000] ECR I-69.

11 — I will cite the following by way of examples: Case 152/84 *Marshall* [1986] ECR 723, Case C-188/99 *Foster and Others* [1990] ECR I-3313, Case C-345/89 *Stoeckel* [1991] ECR I-4047, Case C-158/91 *Levy* [1993] ECR I-4287 and Case C-13/93 *Minne* [1994] ECR I-371.

12 — This statement first appears in the judgment in *Hertz*, cited in footnote 7 above, paragraph 13.

Ms Brandt-Nielsen was recruited justify arriving at a different conclusion. I will look separately at each of these circumstances.

(a) The circumstance that the contract of employment was for a fixed term

24. So far, the Court has ruled in two cases in which the direct cause of a worker's dismissal was pregnancy. In both, the contract of employment had been entered into for an indefinite term, which the Court emphasised in its reasoning. [13]

25. In the first case, Ms Habermann-Beltermann, a nurse qualified in the care of the elderly, signed a contract in which she undertook to work as a night attendant in a home for the elderly. Several days after commencing work, she was absent for over a month due to illness and her doctor certified that she had been pregnant for 12 days before she signed the contract of employment. The employer cited Article 8(1) of the Law on the Protection of Mothers, which prohibits pregnant workers from carrying out night work, and informed the employee that it considered the contract to be void.

The Court reiterated that the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on the ground of sex. [14] The Court pointed out that the unequal treatment was not based so much on the worker's pregnancy as on the statutory prohibition of night-time work during pregnancy and went on to emphasise that the questions submitted for a preliminary ruling concerned a contract for an indefinite period and that, therefore, the prohibition on performance of night-time work by pregnant women took effect only for a limited period in relation to the total length of the contract.

26. In the second case, Ms Webb had been recruited for a probationary period of three months. During the interview prior to recruitment, she was informed that the post was vacant because Ms Stewart, another employee in the same department, was pregnant. Ms Stewart intended to continue working until the end of the year

13 — Jacqmain, J., 'Pregnancy as Grounds for Dismissal', *Industrial Law Journal*, 1994, pp. 355-359, and in particular p. 356: 'However, both the *Habermann* and the *Webb* judgments are surprising because of the importance accorded by the Court of Justice to the *duration of the contract of employment*.'

14 — Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 15.

and to return to her post after her maternity leave, but her return to work would not mean that Ms Webb, who needed to be trained for a period of six months in order to replace Ms Stewart, would have her contract of employment terminated. Two weeks after commencing work, Ms Webb realised that she too was pregnant, a circumstance which led the employer to inform her of her dismissal by a letter which stated that, since she had only just informed the employer that she was pregnant, he had no alternative other than to terminate her contract.

In its judgment, the Court pointed out that, in a situation such as Mrs Webb's, termination of a contract for an indefinite period, on the ground of the worker's pregnancy, cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged. [15]

27. Tele Danmark relies on the aforementioned case-law in contending that, for the purposes of applying the principle of equal treatment for male and female workers, the Court wished to draw a clear distinction between contracts for an indefinite term and those for a fixed term. [16]

To my mind, this is an erroneous interpretation of the case-law, one which is overly-faithful to the exact words used by the Court. [17] As I have already indicated, it is true that the Court has made such declarations in the past. However, when making them, it restricted itself to taking the factual context of each case into consideration without prejudging whether the solution would have to be different where the

15 — Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 27.

16 — Naturally, it is not the only undertaking to hold this view. Much of what has been written on this issue had already hinted that these judgments would be so interpreted. See, for example, McGlynn, C.M.S., 'Webb v EMO: A Hope for the Future?', *Northern Ireland Legal Quarterly*, 1995, pp. 50 to 62, and in particular p. 59: 'Although the decision in Webb is itself condemnatory of the dismissal of pregnant women, it would appear to leave the issue open to continued argument, particularly in respect of women employed for a fixed term'; Szyszczak, E., '"The status to be accorded to motherhood": Case C-32/93, Webb v EMO Cargo (UK) Ltd', *The Modern Law Review*, 1995, pp. 860 to 866, and in particular p. 861; Napier, B., 'Webb in Europe', *New Law Journal*, 1994, Vol. 144, p. 1020: 'What if there had been a fixed-term contract?'; and *Revue de jurisprudence sociale*, 2000, p. 413, 'On notera que seule l'embauche sous contrat à durée indeterminée est visée par cette solution... Il est permis de penser que la solution aurait été différente s'il s'était agi d'un contrat à durée déterminée' (It will be noted that this solution only applies to employment contracts for an indefinite term... It is possible to imagine that the solution would have been different if there had been a fixed-term contract).

17 — This, however, was the line taken by the House of Lords when it applied the Court of Justice's ruling in its own judgment, this being contained in the Court's 'National Decisions' database under the reference QP/02459-P1. Busby, N., 'The Unequal Treatment of Pregnant Workers: Webb v EMO Air Cargo (UK) Ltd (No 2)', *The Juridical Review*, 1996, pp. 156-159, in particular p. 156: 'In a strict and narrow application of the preliminary ruling of the European Court of Justice... the House of Lords has distinguished the rights of pregnant women engaged on fixed-term contracts from those of women engaged on indefinite or open-ended contracts. The scenario was distinguished "in order to avoid a situation likely to be perceived as unfair to employers and as tending to bring the law on sex discrimination into disrepute."'

contract was for a fixed, rather than an indefinite, term. [18]

28. Various arguments support this view. First, the provisions of Directive 76/207 lay down the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, without differentiating between fixed and indefinite-term contracts.

Second, once the Court has established that dismissal of a worker by reason of pregnancy constitutes direct discrimination on the ground of sex, then a dismissal will be equally discriminatory regardless of whether the employment relationship is indefinite or temporary in nature.

Third, if fixed-term employment were to be excluded from the scope of Directive 76/207, a significant portion of labour relations would not be covered by the principle of equal treatment for men and women, as regards access to employment and working conditions, and this would deprive the directive of much of its effectiveness, in addition to encouraging the use of temporary contracts because a lower level of protection could then be provided to female workers.

Finally, Clause 4 of the framework agreement on fixed-term work concluded between the European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe and the European Centre of Enterprises with Public Participation, [19] which concerns the principle of non-discrimination, provides, in subparagraph 1, that, in respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract unless different treatment is justified on objective grounds. [20] There can be no doubt that the circumstances in which a dismissal takes place form part of the working conditions and that pregnancy is not an objective ground capable of justify-

18 — Lousada Arochena, J.F., 'La prohibición de despido de las trabajadoras embarazadas y la discriminación por embarazo: dos instituciones diferentes llamadas a integrarse' (The Prohibition of Dismissal of Pregnant Workers and Discrimination on the Ground of Pregnancy: Two Distinct Institutions Required to Merge), *Revista del Poder Judicial*, 1999, No 54, pp. 563 to 586, in particular p. 570: 'Tanto el caso Habermann-Beltermann, como el caso Webb, han levantado, con razón, algunas susceptibilidades, al hacer hincapié en el hecho de ser los contratos de carácter indefinido: ¿acaso sería diferente el fallo si fuesen temporales? Esperemos que el Tribunal, si llegase el momento, no incidiese en una circunstancia que, en buena dogmática, resulta intrascendente' (Both the *Webb* and *Habermann-Beltermann cases* have justifiably aroused certain sensitivities, due to their highlighting of the fact that the contracts were for an indefinite term; would the judgment perhaps have been different had they been temporary contracts? Let us hope that, should the moment arrive, the Court does not stress a factor which, logically speaking, is irrelevant); and Boch, Ch., *Common Market Law Review*, 1996, pp. 547 to 567, in particular p. 560: 'This distinction — fixed term/indefinite term — is at odds with the reasoning of the Court elsewhere in the judgment.'

19 — This framework agreement was concluded on 18 March 1999 by the general cross-industry organisations. It was implemented by Council Directive 1999/70/EC of 28 June 1999 (OJ 1999 L 175, p. 43).

20 — The time limit for transposing Directive 1999/70 into the national laws of the Member States expires on 10 July 2001.

ing a difference in treatment between permanent and fixed-term workers.

(b) The fact that the worker was aware of her condition when she was recruited but did not inform the employer

29. Directive 76/207 contains no provisions in this regard, but Article 2(a) of Directive 92/85 defines a pregnant worker as one who informs her employer of her condition, in accordance with national legislation and/or national practice. [21]

As the Commission states in its written observations, under Article 7 of the Law on the Legal Relationship between Employers and Employees (Funktionærlov), a pregnant worker is obliged to inform her employer, at least three months before the expected date of the birth, of the date on which she intends to commence her maternity leave, in order to facilitate the employer's work planning.

30. In the summary of the facts which the Højesteret sets out in the order for reference, it does not state that the worker failed to fulfil her obligation under national law to inform the employer of her condition. I deduce, therefore, that the fact that the undertaking complained about her failure to point out that she was pregnant at the time when she was recruited means that, had it been aware of the pregnancy, the offer of employment would not have been made.

31. Pursuant to Article 3(1) of Directive 76/207, application of the principle of equal treatment means that there should be no discrimination whatsoever on the ground of sex in the conditions for access to positions of employment.

32. In *Dekker*, the Court declared that a refusal of employment on the ground of pregnancy can only apply to women and, therefore, constitutes direct discrimination on the ground of sex. [22]

33. In *Mahlburg*, the Court stressed that the application of the provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that an employer may not refuse to take on

21 — On the subject of this requirement, Jacqmain, J., op. cit., p. 358, wonders: 'Is it possible that a visibly pregnant woman who does nothing to inform her employer of her pregnancy is not protected?'

22 — Case C-177/88 [1990] ECR I-3941, paragraph 12.

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 for the duration of the pregnancy in the post of unlimited duration to be filled. [23]

34. If, under Directive 76/207, pregnancy is not a factor which may be taken into account when a woman is engaged and a refusal to recruit a woman because of her condition constitutes direct discrimination on the ground of sex, then, to my mind, an employer is not entitled to ask a worker whether she is pregnant. Were he to be so entitled, it would, besides constituting an infringement of the worker's right to privacy, seriously impede access to the labour market for pregnant women.

An employer may not therefore rely on a failure to provide this information in order to justify dismissal of the worker later on.

(c) The fact that the worker was unable to work for a significant portion of the contract

35. In *Dekker*, the Court examined the financial losses which maternity leave can impose on an undertaking. The employer had refused to engage a pregnant woman, alleging that, under Dutch legislation, it would have been unable to obtain from its insurer reimbursement of the worker's pay while she was on maternity leave and that, were it to have employed a replacement, it would have had to pay that person from its own funds. To my mind, the financial consequences which the Dutch employer would have had to bear, namely having to pay two salaries during the whole of this period, were more serious than the losses which Tele Danmark would have suffered.

Nevertheless, the Court found that not only does a refusal of employment by reason of pregnancy constitute direct discrimination on the ground of sex but also that a refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer during this period. [24] In *Mahlburg*, the Court added that the same conclusion applies as regards the financial loss caused by the fact that the woman appointed cannot be employed in the vacant post for the duration of her pregnancy. [25]

36. Webb also concerned reliance on a woman's inability to fulfil one of the

23 — Case C-207/98 [2000] ECR I-549, paragraph 27.

24 — Judgment cited in footnote 23 above, paragraph 12.

25 — Judgment cited in footnote 23 above, paragraph 29.

essential requirements of her contract of employment as a ground for her dismissal. The Court stated in this regard that the availability of an employee is, for the employer, a precondition for the proper performance of the employment contract, but that the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of Directive 76/207. [26]

37. I concur with the Court's view. Any other interpretation of the directive would have resulted in making it possible to view pregnancy, which normally entails quite a lengthy absence on the part of the worker, as a ground justifying a refusal to employ a woman or her subsequent dismissal.

38. The employer appears to start from the assumption that the first two months, during which the employee was to undergo a period of training, did not form part of her job. However, it was the employer which stipulated that, out of the six months that the contract was to last, two would be given over to training. The employer is not, therefore, entitled to allege that Ms Brandt-Nielsen worked for only a few days when, in reality, she was with the undertaking until the end of September and the reason she did not remain there was that she was dismissed.

As regards the time of commencement of her maternity leave, the employee has stated that she was willing to work until a date very close to the birth, which took place in the middle of November. I do not know if she would have been able to do so because I do not have a detailed knowledge of the relevant Danish legislation or of the collective agreement applicable to the undertaking. However, she would not have been precluded from doing so under Directive 92/85, since Article 8 provides that the continuous period of maternity leave of at least 14 weeks must include compulsory maternity leave of at least two weeks, allocated before and/or after confinement.

Given that the dismissal took place quite some time before the birth, it is impossible to say when the employee would have commenced her maternity leave, which is essential to know in order to assess whether, in practice, she ceased to work for a significant portion of her contract.

39. Furthermore, as the Commission points out, there is no reason why the impact of maternity leave should be any more significant where the contract is for a fixed term than it is where the contract is open-ended. In recent decades, undertakings have, of course, been relying on temporary employees much more frequently than in the past; fixed-term employment contracts tend to be renewed, and such contracts

26 — Judgment cited in footnote 15 above, paragraph 26.

have to a large extent shed the stigma of instability which characterised them at their outset. [27]

The circumstances of Ms Brandt-Nielsen's employment, under a contract for six months, two of which were to be taken up by training, lead me to conclude that there was a likelihood that the contract might have been renewed at least once or more than once because to train a worker for two months represents a significant investment on the part of an employer. Accordingly, had she not been unexpectedly dismissed, I see no reason why Ms Brandt-Nielsen, who had already undergone training, would not have been able to remain with the undertaking, under a new temporary contract, once her maternity leave had ended.

40. It is therefore my view that the combined effect of Articles 2(1) and 5(1) of Directive 76/207 is to preclude a pregnant worker, who is engaged under a fixed-term contract and who, despite being aware of her condition, did not inform her employer of it when she was recruited, from being dismissed on the ground that the pregnancy would prevent her from meeting her employment commitments in full.

41. It still remains for me to examine the facts of the case in the light of Article 10(1) of Directive 92/85, which imposes a duty on the Member States to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases not connected with their condition which are permitted under national legislation and practice, provided that the competent authority has given its consent.

42. The Court observed in *Webb* that, in view of the harmful effects which the risk of dismissal may have on the physical and mental state of pregnant workers, including the serious risk that they may be prompted voluntarily to terminate their pregnancy, the Community legislature provided, in Article 10 of Directive 92/85, for special

27 — Moore, S., 'Sex, Pregnancy and Dismissal', *European Law Review*, 1994, pp. 653 to 660, and in particular p. 659: 'Nevertheless, in the light of the unequivocal ruling of the Court of Justice that detrimental action taken against a woman on the grounds of her pregnancy constitutes direct discrimination on grounds of sex, it now seems difficult to distinguish in law between women employed pursuant to indeterminate contracts, such as Ms Webb, and women employed pursuant to determinate contracts... In each case, the woman's inability to perform her contract of employment is essentially due to her pregnancy, however fundamental that inability may be in relation to the terms of the contract.'

protection to be given to women,[28] by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave.[29]

43. I note, first, that the provisions of Directive 92/85 make no distinction between indefinite and fixed-term contracts. This is not to suggest that the Community legislature has failed to consider the special nature of temporary employment in a Community where, as the EFTA Surveillance Authority points out, continual thought is given to the question of how best to make the labour market more flexible.

However, the only provision which envisages different treatment is Article 11(4), about which the national court has failed to enquire and under which Member States may make the entitlement to pay or an allowance during maternity leave conditional upon women fulfilling a period of previous employment which must not exceed 12 months immediately prior to confinement.

44. Neither the Højesteret nor the parties which have submitted observations in these proceedings have explained to the Court the exceptional cases, unconnected with the condition of the worker, which Danish law permits as a ground for dismissal, irrespective of the fact that a worker is pregnant.[30] It is my view that, for example, a dismissal on the ground of a *force majeure* situation which permanently prevented a person from working, or a collective dismissal for financial, technical, organisational or production reasons affecting an undertaking, would fulfil this requirement.[31]

What is clear, though, is that the exceptional cases must not be connected to the worker's condition. Ms Brandt-Nielsen, however, was dismissed precisely because she was pregnant.

45. Consequently, it is appropriate to declare that Article 10 of Directive 92/85 also precludes a dismissal which takes place in the circumstances described above.

28 — Protection of which they are in real need, to judge by the article which appeared in the newspaper *El País* on 19 March 2001, describing how the contract of a professional female handball player was terminated when her club discovered that she was pregnant. Apparently, her contract contained a clause which stipulated that pregnancy was a ground for termination. On 23 March 2001, the same newspaper reported that the player had suffered a miscarriage, possibly as a result of having played a competitive match when she was two months pregnant.

29 — Judgment cited in footnote 15 above, paragraph 21.

30 — At the hearing, in response to a question I asked, the representatives of both Tele Danmark and Ms Brandt-Nielsen agreed that Danish legislation does not provide for any specific circumstances where it would be permissible to dismiss a pregnant worker and that it is the courts which decide based on the circumstances of each case.

31 — Gorelli Hernández, J.,: 'Situación de embarazo y principio de igualdad de trato. La regulación comunitaria y su jurisprudencia' (The Condition of Pregnancy and the Commencement of Equal Treatment. Community Legislation and Case-law), *CIVITAS Revista Española de Derecho del Trabajo*, 1999, No 97, pp. 729 to 768, and in particular p. 764, where the author states that Article 10 of Directive 92/85 would not preclude the dismissal of a pregnant worker on disciplinary grounds where she had, through her own fault, committed a serious breach of her duties, provided that the breach was not justified by reason of her condition.

B. *The second question*

46. The Højesteret also wishes to know whether the fact that Ms Brandt-Nielsen was employed by a large undertaking, which frequently employs temporary workers, has any bearing on the answer to the first question.

47. Those who have submitted observations in these proceedings all agree that the answer to this question must be in the negative.

The appellant is of the opinion that it would be unacceptable for the legal position to vary depending on the size of the undertaking and that, in addition, it would be difficult to demarcate size and problems would arise if workers in the same situation were entitled to differing levels of protection according to the scale of the undertaking by which they were employed. The respondent and the Commission agree that this is a factor which should only be taken into consideration where the purpose behind the appointment of temporary employees is to circumvent the rules which confer rights on workers. Otherwise, it must be understood that this factor has no bearing on the reply which they propose to the first question.

48. I concur with these views. First, neither the provisions of Directive 76/207 on the principle of equal treatment, nor those of Directive 92/85 on improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding, state that their scope should differ according to the size of the employer undertaking. As the EFTA Surveillance Authority rightly points out, only the third recital in the preamble to Directive 92/85 refers to Article 118A of the Treaty, [32] pursuant to which directives must avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. Given that Tele Danmark is a large undertaking, this restriction cannot apply to it. [33]

49. The same must be said in relation to the fact that the undertaking which dismissed a pregnant worker, with whom it had concluded a fixed-term employment contract, frequently used this type of contract. As I have already pointed out in my discussion of the bearing which the temporary nature

32 — As a result of the amendments introduced under the Treaty of Amsterdam, this provision is now contained in Article 137(2) EC.

33 — Boch, Ch., op. cit., points out, on p. 561, that: 'The preamble to the Pregnancy Directive which the Court relies upon, also refers, in its third recital, to the need to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. Presumably, Air Cargo, Ms Webb's employer, with 16 employees, falls within the SME category, yet the Court made no reference to this recital.'

of the employment might have on the application of both directives, neither piece of legislation provides for a distinction to be made on this ground.

Moreover, the documents submitted in these proceedings contain no suggestion that the object behind Tele Danmark's preference for temporary contracts was to circumvent certain rules which confer rights on workers.

50. Accordingly, it is my opinion that this question should be answered in the negative.

## VII — Conclusion

51. In view of the foregoing considerations, I propose that the Court of Justice should reply as follows to the Højesteret:

(1) Articles 2(1) and 5(1), in conjunction, 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, and Article 10 of Council Directive 92/85/EEC of 19 October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive

89/391/EEC), preclude a pregnant worker, who is employed under a fixed-term contract and who, despite being aware of her condition, did not inform her employer of it when she was recruited, from being dismissed on the ground that the pregnancy would prevent her from meeting her employment commitments in full.

(2) The fact that the worker was employed by a large undertaking which frequently engages temporary workers has no bearing on the reply to the first question.