# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 14 November 1989 *

*Mr President,*
*Members of the Court,*

1. In two sets of questions submitted for a preliminary ruling, the *Hoge Raad* of the Netherlands and the Danish *H jesteret* have requested the Court to consider generally the question of maternity and the status to be accorded to it, in the light of the Community-law principle of equal treatment of male and female workers, within the economic and social life of the European peoples.

2. The facts in Case C-177/88 may be summarized as follows: In June 1981 Mrs Dekker applied for a post as an instructor at the Stichting Vormingscentrum voor Jong Volwassenen Plus (Training Centre for Young Adults) at Wormer in the Netherlands (hereinafter referred to as 'the Training Centre'). On 15 June 1981 she informed the committee dealing with the applications that she was three months' pregnant. The committee put her name forward to the board of management of the Training Centre as the most suitable candidate for the post. However, on 10 July 1981 Mrs Dekker received a letter from the Training Centre informing her that it had decided not to appoint her, on the ground that, having consulted the Assurance Fund for the provision of social benefits in special education (*Risicofonds Sociale Voorzieningen Bijzonder Onderwijs*, hereinafter: 'the Risicofonds'), it had learnt that the daily benefits that it would have to pay would not be reimbursed by the Risicofonds, and it would therefore be unable to appoint a replacement during her maternity leave.

3. It should be explained that the employees of the Training Centre are not subject to the general law on sickness insurance, the *Ziektewet*, but to the combined provisions of the Royal Decree of 19 December 1967 [1] (hereinafter: 'the Decree') and the Rules governing daily sickness benefits, the *Ziekengeldreglement* (hereinafter: 'the Rules'), which can provide derogations. However, the rights conferred on workers by the Rules may not be less favourable than those accruing to them under the Decree. [2] Article 3(1) of the Decree treats an inability to work due to pregnancy and confinement in the same way as an inability due to sickness. Article 6 of the Rules further provides: 'The board of management [of the Risicofonds] has the power to withhold from a member payment of all, or part, of the daily sickness benefits if an insured person becomes unable to work within six months after the date of commencement of the insurance, when it was clearly to be anticipated from the state of health of the person concerned at the time of that commencement that an inability to work would supervene within six months'. In that event, an employer required to pay daily benefits [3] to employees

* Original language: French.

1 — *Stbl.* No 683, issued under the *Algemene Burgerlijke Pensioenwet* — the general law on retirement pensions for public servants.

2 — Article 14 of the Royal Decree.

3 — Full salary for 18 months, 80% of it thereafter: Article 4 of the *Ziekengeldreglement*.

during sick leave, subject to the right to claim reimbursement from the Risicofonds, obtains no reimbursement from the Risicofonds and becomes wholly liable for the payments.

4. It seems to be accepted that, although the Risicofonds was entitled, at its discretion, to refuse or consent to bear the cost of the daily benefits which the Training Centre would have had to pay to Mrs Dekker during her maternity leave, it had previously refused to bear the cost in similar circumstances. The judgment referring the matter to the Court also records that the Training Centre would not apparently have been mistaken in taking it as a foregone conclusion that the Risicofonds would refuse to refund to it the daily benefits which — had it appointed Mrs Dekker — it would have been required to pay her.

5. The *Arrondissementsrechtbank* (District Court) Haarlem at first instance and the *Gerechtshof* (Regional Court of Appeal) Amsterdam on appeal held that the Training Centre's refusal to employ Mrs Dekker was contrary to the Netherlands Law on the equality of treatment for men and women,[4] designed to bring Netherlands law into line with the provisions of Council Directive 76/207/EEC[5] (hereinafter: 'the Directive'). It seems that those courts none the less ruled that the financial difficulties which the Training Centre would have encountered if it had appointed Mrs Dekker afforded grounds for exonerating it, with the result that its refusal to employ her was not unlawful.

6. The dispute came before the *Hoge Raad*, which referred four questions for a preliminary ruling, seeking in essence an interpretation of Articles 2 and 3 of the Directive so as to ascertain, first, whether a refusal to employ a person on grounds of pregnancy is lawful in the light of the principle of equal treatment as regards access to employment and, secondly, what the consequences of any infringement of the Community principle would be in terms of the national provisions on civil liability.

7. This case cannot, however, be settled until certain difficulties pointed out by the Commission in its written observations have first been resolved. Basically, the Commission takes the view that the Directive was not correctly enacted in Netherlands law, since, although there is an 'implementing' law, the domestic law of the Netherlands still contains legislative provisions at variance with it. Accordingly, in the light of the *Marshall* judgment,[6] the question is whether the Training Centre can properly have the provisions of the Directive pleaded against it, given the absence of any so-called 'horizontal' effect.[7]

8. This is one of the difficulties inevitably raised by the ambiguity of the national provisions at issue. As far as individuals are concerned, the coexistence of the Netherlands Law on equality of treatment between men and women as regards access to employment and the Royal Decree, Article 3 of which, by treating maternity as equivalent to sickness, might well represent (to quote the judgment of the Court in *Commission* v *France*):

4 — *Wet gelyke behandeling van mannen en vrouwen* of 1 March 1980, inserting a new Article 1637ij into the *Burgerlyk Wetboek* (Stbl. 1980, No 86).

5 — Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

6 — Case 152/84 [1986] ECR 723.

7 — Written observations of the Commission, pp. 14 and 15.

'an ambiguous state of affairs by maintaining . . . a state of uncertainty as to the possibilities available to them of relying on Community law'. [8]

9. Where there is such a contradiction between disparate national legal provisions, the Commission may, in my view, in appropriate circumstances bring infringement proceedings against the Member State concerned in reliance on the judgments cited above. If the concept of an 'incorrect implementation' is to be viewed in unitary terms, it follows that the mere existence of a particular regulatory provision which conflicts with a more general law implementing a directive will lead to a declaration that the directive has not been properly implemented. Although the Court ruled in the *Kolpinghuis Nijmegen* judgment that:

'The question whether the provisions of a directive may be relied upon as such before a national court arises only if the Member State concerned has not implemented the directive in national law within the prescribed period or has implemented the directive incorrectly', [9]

it has never defined what is meant by 'incorrect implementation'. In any event, the term must not be defined differently according to whether the matter before the Court is an action by the Commission against a Member State or a request for a preliminary ruling.

10. The Commission considers that the directive has been incorrectly implemented in this case and infers that, in accordance with the *Marshall* judgment, the directive may be relied on only in proceedings against the State or State-controlled bodies. However, that inference appears to arise from inverted reasoning. The Court has already emphasized that the right of a person affected to rely on a directive in proceedings against a defaulting State is a minimum guarantee. [10] The Court's case-law on the 'direct effect of directives', as it is commonly known, is no more than a last resort designed to compensate, as far as possible, for the non-implementation or the incorrect implementation of a directive. It follows that, if there is some other means available under Community law for making the third paragraph of Article 189 of the Treaty fully effective, use should be made of it before the possibility of 'direct effect' is considered.

11. The case-law of the Court on *interpreting national law* in accordance with the requirements of Community law seems to be particularly well suited to a situation such as the present one. As the Court has held on many occasions,

'in applying the national law and in particular the provisions of a national law specifically introduced in order to implement the directive, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the Treaty,' [11]

and they must do so irrespective of whether or not the period for implementation has expired. [12]

8 — Judgment in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 41.

9 — Judgment in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 15.

10 — Judgment in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 12.

11 — Case 80/86, cited above, paragraph 12; see also the judgments in Case 14/83 *Von Colson* [1984] ECR 1891 and Case 157/86 *Murphy* [1988] ECR 673.

12 — Case 80/86, cited above, paragraph 15.

12. This right to rely on a directive is not limited to proceedings against the State or against bodies more or less controlled by the State, because the legal provisions applied are still those of the national law in question, assisted (as it were) by an interpretation brought into line with Community law. [13]

13. In other words, even though a Member State, despite the adoption of an 'implementing' law, may not have implemented a directive correctly, inasmuch as other, conflicting provisions of national law have been retained, the national court must nevertheless interpret its national law — and particularly the provisions of the 'implementing' law — in a manner consistent with the requirements of the directive.

14. In the *Mazzalai* judgment, moreover, the Court dismissed the objection by the government of a Member State to its jurisdiction, holding that:

'Under Article 177, the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions of the Community, regardless of whether they are directly applicable'. [14]

15. It should be noted that my approach leads — as indeed previous judgments of the Court have done — to a distinction which has not often been stressed, between the possibility of relying on a directive, in cases where there are no national rules giving effect to its aims, so as to have its provisions applied directly (doctrine of 'direct effect' [15]) and reliance on a directive for the sole purpose of the interpretation of national law, including an interpretation of national provisions intended to implement the Community instrument (the doctrine of *interprétation conforme*). Whereas the former is confined to those provisions in directives which are sufficiently precise and unconditional, and cannot, according to the case-law, govern relations between individuals, the latter is very broad in scope, regardless of whether or not the directive has direct effect and regardless of the parties involved.

16. The national court's question must therefore be understood to relate exclusively to the interpretation of the Directive, and its ambiguous wording cannot be construed as meaning that the national court wished to raise the question of direct effect.

17. It is therefore by reference to the interpretation which this Court places on Directive 76/207/EEC that the national court will have to interpret the relevant provisions of the Netherlands law.

18. The facts of Case C-179/88 may be set out more briefly. Mrs Birthe Hertz was appointed an employee of Aldi Marked on 15 July 1982. She gave birth to a child in June 1983 and resumed her duties on the expiry of her maternity leave. From June 1984 to June 1985 she was on sick leave for 100 working days. By letter of 27 June 1985

13 — On this point, see Yves Galmot and Jean-Claude Bonichot: 'La Cour de justice des Communautés européennes et la transposition des directives en droit national' in *Revue française de droit administratif*, January/February 1988, in which they state: 'Thus the procedure for interpretation in accordance with Community law allows directives to become fully effective in precisely those cases where the conditions required for their direct applicability under national law are not fulfilled'.

14 — Judgment in Case 111/75 [1976] ECR 657, paragraph 7.

15 — See the reservations about this term expressed by Pierre Pescatore in 'L'effet des directives communautaires: une tentative de démythification', Dalloz Sirey, 1980, *Chronique XXV*, p. 171.

she was informed of her dismissal on account of her frequent absences due to illness.

19. According to the order for reference, it is common ground that the periods of sick leave taken by Mrs Hertz between June 1984 and June 1985 arose from her confinement.

20. The dispute came before the *Højesteret* of Denmark, which has asked for a preliminary ruling on two questions seeking, in essence, to establish (a) whether the Directive, and in particular Article 5 thereof, is to be interpreted as prohibiting the dismissal of a woman on grounds of illness when that illness is a consequence of her pregnancy or motherhood, and (b), if so, whether or not that prohibition is limited *ratione temporis.*

21. As was suggested above, these two cases, raising issues of principle, require the Court to decide on the status to be accorded to motherhood in our community of European societies.

22. Being a male preserve, economic life could long afford to take no account of the physiological differences between the sexes. That is no longer so today. It is therefore necessary to undertake the difficult task of reconciling the demands of professional life with motherhood.

23. Defining the question sometimes supplies the answer to it. Is there any event more closely connected to the specific nature of womanhood? Is it conceivable to treat female workers on an equal footing with their male counterparts without taking account of motherhood?

24. The need to do so was, indeed, perceived by the Danish legislature; whereas Article 2(1) of the Directive speaks of '[any] discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status', Danish Laws Nos 161 and 162 of 12 April 1978 on equal treatment for men and women in respect of employment speak of 'discrimination . . . with reference in particular *to pregnancy* or marital or family status'. [16]

25 Consequently, it appears that, in Mrs Dekker's case, refusal of employment on account of forthcoming motherhood, by taking account of an event which affects only female workers, is direct discrimination on grounds of sex. Thus I do not think it possible to apply to this case the judgments of the Court in the Jenkins, [17] Bilka [18] and Rinner-Kühn [19] cases on indirect discrimination, which have never been applicable except in the presence of factors capable in theory of affecting either sex — part-time working, for example — but found in actual fact to be associated with the circumstances of a woman more commonly than with those of a man. At the expense of stating the obvious, motherhood can only ever affect women; taking account of it in order to justify a refusal of employment is therefore *ipso facto* direct discrimination on grounds of sex.

16 — Emphasis added.
17 — Case 96/80 [1981] ECR 911.
18 — Case 170/84 [1986] ECR 1607.
19 — Case 171/88 [1989] ECR 2743.

26. It cannot be asserted that the position can be covered only by Article 2(3) of the Directive, which provides that the Directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'. That article is intended only to enable Member States to adopt measures contrary to the principle of equality of treatment in order to give special protection to female workers — for example, by confining to them the benefit of certain rights. In other words, it envisages 'affirmative action', as American law terms it. It was, indeed, on the basis of that article that the Court, in its *Hofmann*[20] judgment, accepted that legislation allowing women alone the right to maternity leave, without granting similar leave to fathers, was compatible with the Directive. The present case, however, is concerned solely with establishing strict equality between male and female workers, so that when they enter the labour market an event which affects only female workers is disregarded.

27. It must be added that this principle does not impinge on the right of a Member State, when providing for the grant of daily benefits connected with maternity leave, to lay down conditions governing the length of the insurance period or work period. There is a distinction between the two. The employer may not refuse to employ a female employee, but in the event that she fails to fulfil the statutory condition concerning the insurance period or work period, the principle of equality of treatment demands that she shall be treated like her male counterparts and that, in certain circumstances, she shall not receive any daily benefits.

20 — Case 184/83 [1984] ECR 3047.

28. As the *Dekker* case clearly shows, the difficulty lies far more with the existence of laws which make the employer liable for part-payment of the daily benefits during maternity leave. While benefits in Spain, Italy, France, Portugal and Luxembourg are paid by social security institutions, and employers merely make contributions to the different social-security schemes, in other States the employer is liable for part of the benefits. Thus, in the Federal Republic of Germany, although the sickness-insurance fund pays a maternity allowance,[21] the supplementary allowance must be borne by the employer.[22] In Belgium a female worker continues to be entitled to claim from the employer, at the commencement of the period of maternity leave, the guaranteed weekly or monthly wage.[23] In Denmark the municipal authorities pay 90% of the wage from four weeks prior to the estimated date of confinement until 24 weeks after confinement; nevertheless, the employer pays half the wage for five months and is subrogated to the claims of his employee against the municipal authorities.[24] In the United Kingdom the benefits[25] are paid by the employer, who is reimbursed by the State.[26]

29. In Netherlands law, I propose to confine my attention to the special position of those employed in special education, which involves the difficulties giving rise to the *Dekker* case. As was observed above, Article 3(1) of the Royal Decree treats the inability to work on grounds of pregnancy and confinement in the same way as

21 — *Mutterschaftsgeld* under Paragraph 200 of the Reichsversicherungsordnung; daily maximum, DM 25.

22 — *Arbeitgeberzuschuß* under Paragraph 14 of the Mutterschaftsgeldgesetz.

23 — Articles 55 and 75 of the Law of 3 July 1978 on employment.

24 — *Lovbekendtgørelse* No 949 of 23 December 1986, Article 33, and No 516 of 23 July 1987, Article 7.

25 — Statutory Maternity Pay.

26 — Social Security Acts 1975 and 1986, Sections 46 to 50.

inability to work on account of sickness. Furthermore, as was noted earlier, Article 6 of the Rules governing daily sickness benefits enables the Risicofonds to refuse to refund the daily benefits to the employer when the insured became unable to perform his duties within six months of the commencement of the insurance if at that time it was clearly to be anticipated from the insured's state of health that there would be a supervening inability to work.

30. I am perfectly aware that, had the Training Centre appointed Mrs Dekker, it would probably have faced certain financial difficulties if the cost of the benefits to which she might have become entitled was not payable by the Risicofonds. Nevertheless, I do not consider that the principle of equality of treatment such as I am proposing to the Court should be overridden by those difficulties, which stem largely from the treatment of pregnancy as equivalent to sickness — an equivalence technically justified for the purpose of quantifying the daily benefits but definitely questionable when it leads to a refusal of employment.

31. In order to give full effect to the Directive and to the Community principle of equal treatment as regards access to employment, Member States are under a duty to adopt all relevant measures to ensure that the obligation placed on employers to appoint a pregnant woman — provided that she is the most competent candidate, which is not in dispute in Case C-177/88 — does not, by reason of the application of national legal provisions (especially social security provisions), place them in a less favourable position than if they had employed a male worker.

32. Accordingly, I propose that the Court should rule, in answer to the first question, that Articles 2(1) and 3(1) of the Directive are to be interpreted as meaning that the refusal by an employer to appoint a female worker because she is pregnant constitutes direct discrimination on grounds of sex, irrespective of any financial consequences that might ensue for the employer.

33. For the same reasons as led me to propose that answer, I would also suggest that the answer to the second question should be to the effect that it makes no difference whether or not there are male candidates at the time the employee is to be recruited.

34. The third and fourth questions concern the possible application of the rules of national law regarding civil liability. The Hoge Raad der Nederlanden has enquired, in essence, whether national legal provisions making fault a prerequisite and offering possible grounds for exemption are applicable to a case of discrimination practised by an employer in contravention of the Directive. This raises the classic problem of separating Community law from the national legal system. In its judgments in *Von Colson and Kamann*,[27] *Harz*[28] and *Commission* v *Germany*,[29] the Court considered this problem in the context of the sanctions for discrimination prohibited

27 — Case 14/83 [1984] ECR 1891.
28 — Case 79/83 [1984] ECR 1921.
29 — Case 248/83 [1985] ECR 1459.

by the Directive. The point at issue here is whether infringement of the requirements of Community law may escape sanction if the employer can plead the absence of fault or the existence of grounds of exemption under national law.

35. In that regard I think that it would defeat the practical effect of the Directive if, where there was evidence of discrimination infringing the Community provisions, proof was also required of a *separate* fault on the employer's part. Admittedly, the law of 'classic' civil liability presupposes the existence of fault, of injury suffered, and of a causal link between the two. But in that case the fault is in my view constituted by the actual infringement of the Community provision — that is, by the discriminatory act or conduct.

36. Similarly, it would greatly weaken the practical effect of the Community principle of equality of treatment, as well as the uniform application of Community rules, if it were possible to rely on grounds of exemption which necessarily differ between the legal systems of the Member States. Once a female worker has established that she has been discriminated against and has shown the injury caused by that discrimination, it is not, in my opinion, open to the employer to plead any exemption under national law, and the national court will then have the task of imposing sanctions on the discriminatory conduct in accordance with national law, since the Directive leaves that to the discretion of the Member States, subject to the proviso laid down by the Court, that sanctions shall be 'sufficiently effective to achieve the objective of the directive'.[30]

30 — Cases 14/83 and 79/83, cited above

37. I therefore propose that the Court's answer to the third question should be to the effect that it is incompatible with Articles 2 and 3 of the Directive, when a breach of the principle of equality of treatment is established, to impose the further requirement of proof of a separate fault on the part of the employer, or to allow that employer to rely on a ground of exemption available under national law — subject, of course, to the provisions of Article 2(2), (3) and (4).

38. There is therefore no need to answer the fourth question.

39. The difficult task of reconciling the principle of equality of treatment with the demands of economic life is perhaps even more pressing in the case of Mrs Hertz.

40. How are periods of sickness occurring after the maternity leave but directly attributable to pregnancy and confinement to be viewed? Should it or should it not be subject to what might be termed the 'ordinary rules' governing absences for reasons of health?

41. The legal systems of the Member States differ widely in this regard. In many States the origin of the illness is not taken into account, but their legislation usually imposes an interval before the employer is permitted to dismiss a person on account of sickness. Thus in Ireland the Unfair Dismissals Act enables employers to dismiss an employee on grounds of sickness rendering him unable to perform his job. In Luxembourg the employer may terminate the contract of employment on the expiry of

a period of three months from the month following the one in which the sickness began, and, in the case of manual workers, on the expiry of a 26-week period.[31] Lastly, in France the employer cannot terminate the employment contract while it is suspended or for four weeks thereafter.[32] He may then dismiss his employee for repeated absences due to sickness.

42. In Italian law, on the other hand, the employer may not terminate the employment contract in the event of complications arising after the maternity leave but caused by pregnancy or confinement,[33] and, pursuant to Article 2110 of the Civil Code, is so bound for a period laid down by collective agreements by reference to seniority.[34] Nor may a female worker be dismissed during a period running from the beginning of the pregnancy until the end of the child's first year of life. In Greek law, the legislature distinguishes between the specific case of an illness attributable to the confinement, which cannot justify dismissal unless the employer can demonstrate that there is a 'serious reason',[35] and the case of 'ordinary' illness, where dismissal is justified merely on the ground that the statutory periods for sick leave have been exceeded.

43. I have to confess that I was tempted to propose a solution whereby medical conditions which were directly, definitely and preponderantly due to pregnancy or confinement would enjoy a sort of 'immunity', in the sense that the principle of equality of treatment would restrain the employer from dismissing his employee for a reasonable period after the event in question. In my view, however, Community law as it stands does not envisage such a requirement, and indeed the ostensibly attractive expedient would be sure to produce a number of negative effects which it would be hard to remedy.

44. As was seen above, Article 2(3) of the Directive leaves to Member States the task of adopting appropriate provisions 'concerning the protection of women, particularly as regards pregnancy and maternity'. That provision appears to mark the limit of the intervention of Community law as it now stands. The directive enjoins strict equality of treatment between male and female workers, which in present circumstances means a prohibition on treating medical conditions attributable to maternity less favourably than conditions due to some other cause; it does not in any way oblige Member States to introduce positive discrimination by giving preferential treatment to the former category, but merely allows them to do so.

45. In any event, that expedient will surely create serious difficulties. If complications resulting from a confinement are severe, a female worker may remain unable to work for several years, without her employer's being able to dismiss her — and it will be

31 — Article 8 of the Law of 12 November 1971 and Article 8 of the Law of 24 June 1970.

32 — Article L 122-25 et seq. of the Code du travail (Labour Code).

33 — Law of 30 December 1971 on maternity.

34 — In their case-law the courts appear to apply this provision universally, by requiring the observance of a reasonable interval after the expiry of that period, before any dismissal takes place.

35 — Article 15 of Law No 1483/1984.

realized that I am now contending with the difficulties of the second question submitted by the national court. The implications are onerous enough even when their only effect is to oblige the employer to keep the person concerned on his staff, without his having to contribute to the payment of benefits for sick leave or, subsequently, to an invalidity pension. The proper management of the business could be impaired by the difficulty of assigning the post to a replacement forthwith. Most importantly, however, the most serious difficulties will arise when the employer, restrained from dismissing his employee, is obliged by law to contribute, even if only in part and whether directly or indirectly, to the social security benefits payable to the employee, as is required under the social legislation of some of the Member States. Thus, in the Federal Republic of Germany the employer continues for six weeks [36] to pay the wages of his employee on sick leave. In Italy the daily sickness benefit is in principle paid by the social security institutions, [37] but collective agreements may require employers to pay supplements at the statutory rates. [38] In the Netherlands it is apparently only in special circumstances — and, as the case of Mrs Dekker shows, in respect of special education, by virtue of the employer's negligence in appointing an employee whose sickness could be anticipated — that the employer is obliged to bear the cost of paying the daily benefits.

46. I also believe that the financial difficulties that could confront an employer required to keep on the staff of his undertaking an employee unable to work on maternity grounds might well induce many employers to refuse to appoint pregnant women, probably on spurious pretexts, or even women of an age at which they may be expected to have children soon. Such conduct is, of course, contrary to the principle of equality of treatment, but it is doubtful whether it can readily be detected and sanctioned. This is a measure of the risk whereby an expedient protecting a few women affected by severe post-natal problems — in statistical terms, fortunately, a minute percentage of cases — may jeopardize the chances of all women wishing to enter the labour market.

47. Lastly, the criteria which the Court might adopt in defining the cases in which a medical condition must fall within the protection demanded by maternity — the presence of a direct, definite and preponderant causal link — and in determining the duration of such protection — by resorting to the concept of a 'reasonable period', which is hard to define — would, in my view, be certain to cause problems for both national courts and employers. The difficulties facing those employers in determining whether or not a given employee could be dismissed can well be imagined. Such a solution — the desirability of which is not denied — would plainly necessitate the intervention of the Community or national legislatures to lay down precise rules, especially as regards the duration of the protection and the question of who bears the cost.

36 — Paragraph 47 of the Sozialgesetzbuch V.

37 — Articles 15 to 18 of Law No 1204 of 30 December 1971.

38 — Garofalo: *Indennità di malattia e maternità*, Milan, 1986; Riva-Sanseverino: *Libro quinto*, 'Del lavoro da commentario del codice civile', Bologna/Rome, 1986, pp. 499 to 503, 515 and 516.

48. In my opinion, the solution is rather to be found in drawing a distinction between, on the one hand, the normal risks of pregnancy and confinement, and the common attendant complications sometimes leading to the grant of additional maternity leave, which are risks that should qualify for Community protection inasmuch as they are specific to motherhood, and, on the other hand, medical conditions which do not belong to the ordinary risks of pregnancy and should therefore be treated on the same footing as 'ordinary' sickness. In my view, the Court should be guided by whether the risk attaching to maternity is a normal one. In other words, in the absence of national legal provisions conferring special protection on women, the employer must be able to dismiss his employee at the end of maternity leave, or at the end of any additional leave. Thus, once a female worker has exhausted her entitlement to the various types of maternity leave, her periods of absence for reasons of sickness, even if those reasons can be traced back to pregnancy or confinement, cannot be attributed to the normal risks of maternity and must accordingly be viewed in the same light as the absences of any other worker, unless the national legislature provides special protection pursuant to Article 2(3) of the Directive.

49. More generally, I consider that the principle of equal treatment for male and female workers must mean a search for remedies to the problems specific to women to which pregnancy always gives rise. However, it is necessary to adjust the rules governing the labour market only in so far as the risk attaching to maternity remains one of the 'normal' risks of life. It is, surely, in the duality of those two principles that the solution must lie.

50. Thus, women must have access to employment without regard being had to their forthcoming maternity, which will prevent them for a while from meeting the demands of the work-place. Accordingly, their continued employment must not be jeopardized by the fact of their being unavailable when this is due to the usual risks of pregnancy. If, therefore, a situation is no longer contained within those usual risks but is due to a medical condition in the full sense of the term, it is not possible to infer from the principle of equal treatment special protection which could only be afforded by positive discrimination — compatible (in appropriate cases) with Community law pursuant to Article 2(3) of the Directive.

51. My conclusion is therefore that the Court should rule as follows:

(i) in Case C-177/88:

(1) Articles 2(1) and 3(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 must be interpreted as meaning that an employer's refusal to appoint a female worker on the ground that she is pregnant constitutes discrimination directly founded on grounds of sex;

(2) the answer to the first question does not vary according to whether or not there are male candidates for the post in question;

(3) once a breach of the principle of equal treatment as envisaged by Articles 2 and 3 of the aforesaid directive is established, those articles prevent the sanctioning of the breach from being subject either to proof of separate fault on the part of the employer, or to the absence of provision under national law of grounds of exemption, other than those set out in Article 2(2), (3) and (4);

(4) there is no need to answer the fourth question;

(ii) in Case C-179/88:

(1) Articles 2(1) and (5) of Directive 76/207/EEC must be interpreted as meaning that, subject to the application of Article 2(3), the dismissal of a female worker outside the periods of maternity leave, on account of periods of absence due to sickness which is attributable to the pregnancy or confinement does not constitute discrimination directly founded on grounds of sex;

(2) there is no need to answer the second question.