JUDGMENT OF THE COURT (Grand Chamber)

26 February 2008 *

In Case C-506/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 23 November 2006, received at the Court on 14 December 2006, in the proceedings

Sabine Mayr

v

Bäckerei und Konditorei Gerhard Flöckner OHG,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and L. Bay Larsen, Presidents of Chamber, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, A. Ó Caoimh (Rapporteur), P. Lindh and J.-C. Bonichot, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 October 2007,

after considering the observations submitted on behalf of:

— Bäckerei und Konditorei Gerhard Flöckner OHG, by H. Hübel, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer and M. Winkler, acting as Agents,

— the Greek Government, by E.-M. Mamouna, K. Georgiadis and M. Apessos, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

— the Commission of the European Communities, by M. van Beek, V. Kreuschitz and I. Kaufmann-Bühler, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2(a) 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) (OJ 1992 L 348, p. 1).

2 The reference has been made in the course of proceedings between Ms Mayr, appellant in the main proceedings, and her former employer Bäckerei und Konditorei Gerhard Flöckner OHG ('Flöckner'), respondent in the main proceedings, following the dismissal of Ms Mayr by Flöckner.

Legal context

Community legislation

Directive 76/207/EEC

3 Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to

employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40) provides that '… 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'.

4 Article 2(3) of Directive 76/207 states that the directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

5 Article 5(1) of Directive 76/207 states:

'Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.'

6 Article 34(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23) repealed Directive 76/207, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15).

7 However, Directives 2002/73 and 2006/54 do not apply *ratione temporis* to the facts in the main proceedings.

Directive 92/85

8 It is apparent from the ninth recital in the preamble to Directive 92/85 that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women.

9 According to the 15th recital in the preamble to that directive, the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding, and provision should be made for the dismissal of such women to be prohibited.

10 A pregnant worker is defined in Article 2(a) of Directive 92/85 as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.

11 Article 10 of Directive 92/85 states:

'In order to guarantee workers [who are pregnant, who have recently given birth or who are breastfeeding], within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), 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;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

12 Article 12 of Directive 92/85 provides:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who should [consider] themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.'

National legislation

13 Paragraph 10 of the Law on Maternity Protection (Mutterschutzgesetz, 'MSchG') states:

'1. Workers may not be lawfully dismissed during pregnancy or the four months following childbirth, unless the employer has not been informed of the pregnancy or the birth.

2. Dismissal is also illegal when the employer is informed of the pregnancy or birth within five working days of the oral or written notice of the dismissal. Written notice of pregnancy or childbirth is considered to have been given in good time when it is posted within the five-day period. Where the worker indicates her pregnancy or the childbirth within the five-day period, she must at the same time prove the pregnancy or the presumption of pregnancy by means of a medical certificate, or by producing the birth certificate of the child …'

14 Under Paragraph 17(1) of the Law on Reproductive Medicine (Fortpflanzungsmedizingesetz, 'FMedG'), viable cells, namely, according to the legal definition in Paragraph 1(3) of the FMedG, fertilised ova and the cells grown from them, can be kept for up to 10 years.

15 Under Paragraph 8 of the FMedG, medically assisted reproduction can be carried out only with the consent of the partners, and the consent of the woman can be withdrawn until the viable cells are implanted in her body.

The dispute in the main proceedings and the question referred for a preliminary ruling

16 Ms Mayr was employed as a waitress by Flöckner from 3 January 2005.

17 In the course of attempted *in vitro* fertilisation and after hormone treatment lasting for about one and a half months, a follicular puncture was carried out on Ms Mayr on 8 March 2005. Her general practitioner certified her sick from 8 to 13 March 2005.

18 On 10 March 2005, by telephone, Flöckner informed Ms Mayr that she was dismissed with effect from 26 March 2005.

19 By letter of the same date, Ms Mayr informed Flöckner that, in the course of *in vitro* fertilisation treatment, the transfer of the fertilised ova into her uterus was planned for 13 March 2005.

20 According to the referring court, it is common ground that, at the date Ms Mayr was given notice of her dismissal, on 10 March 2005, the ova taken from her had already been fertilised with her partner's sperm cells and, therefore, *in vitro* fertilised ova already existed on that date.

21 On 13 March 2005, that is three days after Ms Mayr had been informed of her dismissal, two fertilised ova were transferred into her uterus.

22 She claimed payment of her salary and pro rata annual remuneration from Flöckner, maintaining that the notice of dismissal given on 10 March 2005 had no legal effect because, from 8 March 2005, the date on which the *in vitro* fertilisation of her ova took place, she was entitled to the protection against dismissal provided for in Paragraph 10(1) of the MSchG.

23 Flöckner rejected the claim on the ground that no pregnancy existed on the date on which notice of the dismissal was given.

24 The Landesgericht Salzburg (Regional Court, Salzburg) — the court at first instance — granted Ms Mayr's application holding that, according to the case-law of the Oberster Gerichtshof (Supreme Court, Austria), the protection from dismissal provided for in Paragraph 10 of the MSchG begins with the fertilisation of the ovum. It is fertilisation, according to that case-law, which is regarded as the starting point of a pregnancy. The Landesgericht Salzburg thus held that that must also be so in the case of *in vitro* fertilisation and that, if the transfer of the fertilised ovum is unsuccessful, the protection against dismissal is lost in any event.

25 However, the Oberlandesgericht Linz (Higher Regional Court, Linz), acting as appellate court for employment and social welfare cases, set aside the judgment of the Landesgericht Salzburg and dismissed Ms Mayr's application, on the ground that, irrespective of the point at which hormonal changes actually take place in pregnancy, a pregnancy which is independent of the female body is unimaginable and, consequently, in the case of *in vitro* fertilisation, the pregnancy begins only once the fertilised ovum has been transferred into the woman's body. It is therefore only at the moment of that transfer that the protection for a pregnant woman against the termination of employment begins.

26 That judgment on appeal was the subject of an appeal on a point of law (Revision) to the Oberster Gerichtshof. According to the case-law of that court, the protection ensured by Paragraph 10 of the MSchG arises only if, at the time of the dismissal, a pregnancy has actually begun. The objective of maternity protection, from which there can be no derogation, is to safeguard interests relating to the health of the mother and child and, in the case of protection against dismissal and termination of employment, to ensure the mother's economic existence. The need for protection for the duration of the woman's altered condition exists independently of whether the implantation of the fertilised ovum in the endometrium ('nidation') has already taken place or not, and whether proof of pregnancy can be easily produced is irrelevant in that regard. Nidation of the fertilised ovum in the endometrium is only one step in the state of pregnancy which, according to prevailing scientific opinion, exists as of conception, and it cannot, with regard to the scope of the protection against dismissal, arbitrarily be singled out as the point at which pregnancy begins.

27 However, that case-law of the Oberster Gerichtshof relating to Paragraph 10 of the MSchG is exclusively based on cases of *in utero* conception, that is to say natural conception. The Oberster Gerichtshof states that this is the first time that it has had to deal with the question of the point from which a pregnant woman is entitled to the protection against dismissal provided for in Paragraph 10 of the MSchG in the case of *in vitro* fertilisation.

28 Taking the view that the case before it raises a question of interpretation of Community law, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is a worker, who undergoes *in vitro* fertilisation, a "pregnant worker" within the meaning of the first part of Article 2(a) of [Directive 92/85] if, at the time at which she was given notice of dismissal, the woman's ova had already been fertilised with the sperm cells of her partner and "in vitro" embryos thus existed, but they had not yet been implanted within her?'

The question referred for a preliminary ruling

29 By its question, the referring court is asking, in essence, whether Directive 92/85 and, in particular, the prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive, must be interpreted as extending to a worker who is undergoing *in vitro* fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that *in vitro* fertilised ova exist, but those ova have not yet been transferred into her uterus.

30 As a preliminary point, it should be noted that *in vitro* fertilisation describes the fertilisation of an ovum outside a woman's body. According to the Commission of the European Communities, that treatment involves a number of stages, such as, inter alia, hormonal stimulation of the woman's ovaries intended to bring a number

of ova to maturation at the same time; follicular puncture; the removal of the ova; the fertilisation of one or more ova with previously prepared sperm cells; the transfer of the fertilised ovum or ova into the uterus, either on the third day, or on the fifth day following the removal of the ova, except where the fertilised ova are to be frozen, and nidation.

31 As regards Directive 92/85, it should be borne in mind that its objective is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

32 In that field, the Court has also pointed out that the objective pursued by the Community law rules governing equality as between men and women in regard to the rights of pregnant women and women who have given birth, is to protect female workers before and after they have given birth (see Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 42, and Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 28).

33 Before Directive 92/85 came into force, the Court had already held that, under the principle of non-discrimination and, in particular, Articles 2(1) and 5(1) of Directive 76/207, protection against dismissal must be granted to women not only during maternity leave, but also throughout the period of the pregnancy. According to the Court, a dismissal occurring during those periods affects only women and therefore constitutes direct discrimination on the grounds of sex (see, to that effect, Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13; Case C-394/96 *Brown* [1998] ECR I-4185, paragraphs 16, 24 and 25; *McKenna*, paragraph 47; and *Paquay*, paragraph 29).

34 It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the Community legislature laid down special protection for women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave (Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 21; *Brown*, paragraph 18; Case C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 26; *McKenna*, paragraph 48; and *Paquay*, paragraph 30).

35 It should also be pointed out that, during that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition of dismissing pregnant workers, save in exceptional cases not connected with their condition where the employer justifies the dismissal in writing (*Webb*, paragraph 22; *Brown*, paragraph 18; *Tele Danmark*, paragraph 27; and *Paquay*, paragraph 31).

36 Whether the protection against dismissal laid down in Article 10 of Directive 92/85 extends to a worker in circumstances such as those in the main proceedings must be determined in the light of the objectives pursued by that directive and, in particular, Article 10 thereof.

37 It is apparent, both from the wording of Article 10 of Directive 92/85 and from the primary objective pursued by that directive, which is recalled at paragraph 31 of the present judgment, that to benefit from the protection against dismissal granted by that article the pregnancy in question must have begun.

38 In that regard, it should be pointed out that, although, as the Austrian Government observed, artificial fertilisation and viable cells treatment is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of Directive 92/85 taking account of the wording, the broad logic and the objectives of that directive.

39 It is apparent from the 15th recital in the preamble to Directive 92/85 that the objective of the prohibition of dismissal provided for in Article 10 of that directive is to avoid the risk of a dismissal, for reasons linked to the pregnancy, having harmful effects on the physical and mental state of pregnant workers.

40 In those circumstances, it is clear, as has moreover been pointed out by the Austrian Government, that it is the earliest possible date in a pregnancy which must be chosen to ensure the safety and protection of pregnant workers.

41 However, even allowing, in regard to *in vitro* fertilisation, that the date is that of the transfer of the fertilised ova into the woman's uterus, it cannot be accepted, for reasons connected with the principle of legal certainty, that the protection established by Article 10 of Directive 92/85 may be extended to a worker when, on the date she was given notice of her dismissal, the *in vitro* fertilised ova had not yet been transferred into her uterus.

42 Thus, as is apparent from the observations submitted to the Court, and from points 43 to 45 of the Opinion of the Advocate General, before their transfer into the uterus of the woman concerned, those ova may, in certain Member States, be kept for an indeterminate period. The national legislation in question in the main proceedings provides, in that regard, that the fertilised ova may be kept for a maximum period of 10 years. Therefore, applying the protection against dismissal laid down in Article 10 of Directive 92/85 in favour of a female worker before the transfer of the fertilised ova could have the effect of granting the benefit of that protection even where that transfer is postponed, for whatever reason, for a number of years or even where such transfer is definitively abandoned, the *in vitro* fertilisation having been carried out merely by way of precaution.

43 However, even if Directive 92/85 is not applicable to a situation such as that at issue in the main proceedings, the fact remains that, in accordance with the case-law of the Court, the Court may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, and Case C-392/05 *Alevizos* [2007] ECR I-3505, paragraph 64).

44 In the proceedings before the Court, the Greek and Italian Governments and the Commission have suggested that, while a worker's protection against dismissal in a situation such as that at issue in the main proceedings cannot be inferred from Directive 92/85, such a worker could possibly rely on the protection against discrimination on grounds of sex granted by Directive 76/207.

45 In that regard, it should be recalled that Article 2(1) of Directive 76/207 states that '… 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'. Article 5(1) of that same directive provides that '[a]pplication 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'.

46 As is clear from paragraph 33 of this judgment, the Court has already held that, under the principle of non-discrimination and, in particular, Articles 2(1) and 5(1) of Directive 76/207, protection against dismissal must be granted to women not only during maternity leave, but also throughout the period of the pregnancy. According to the Court, dismissal of a female worker on account of pregnancy, or for a reason essentially based on that state, affects only women and therefore constitutes direct discrimination on the grounds of sex (see, to that effect, *Handels- og Kontorfunktionærernes Forbund*, paragraph 13; *Brown*, paragraphs 16, 24 and 25; *McKenna*, paragraph 47; and *Paquay*, paragraph 29).

47 As the order for reference did not specify the reasons for which Flöckner dismissed Ms Mayr, it is for the referring court to determine the relevant facts of the dispute before it and, inasmuch as Ms Mayr was dismissed while she was on sickness leave — in order to undergo *in vitro* fertilisation treatment —, to determine whether the dismissal is essentially based on the fact that she was undergoing such treatment.

48 If that is the reason for Ms Mayr's dismissal, it is necessary to establish whether that reason applies to workers of both sexes alike or, in contrast, whether it applies exclusively to one of them.

49 The Court has already held that, given that male and female workers are equally exposed to illness, if a female worker is dismissed on account of absence due to illness in the same circumstances as a man then there is no direct discrimination on grounds of sex (*Handels- og Kontorfunktionærernes Forbund*, paragraph 17).

50 It is true that workers of both sexes can be temporarily prevented from carrying out their work on account of the medical treatment they must receive. Nevertheless, the treatment in question in the main proceedings — namely a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilisation — directly affects only women. It follows that the dismissal of a female worker essentially because she is undergoing that important stage of *in vitro* fertilisation treatment constitutes direct discrimination on grounds of sex.

51 To allow an employer to dismiss a female worker in circumstances such as those in the main proceedings would, moreover, be contrary to the objective of protection which Article 2(3) of Directive 76/207 pursues, in so far as, admittedly, the dismissal is essentially based on the fact of the *in vitro* fertilisation treatment and, in particular, on the specific procedures, outlined in the previous paragraph, which such treatment involves.

52 Consequently, Articles 2(1) and 5(1) of Directive 76/207 preclude the dismissal of a female worker who, in circumstances such as those in the main proceedings, is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into the uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

53 Having regard to the foregoing, the reply to the question referred must be that Directive 92/85, and, in particular, the prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive, must be interpreted as not extending to a female worker who is undergoing *in vitro* fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that *in vitro* fertilised ova exist, but they have not yet been transferred into her uterus.

54 Nevertheless, Articles 2(1) and 5(1) of Directive 76/207 preclude the dismissal of a female worker who, in circumstances such as those in the main proceedings, is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into her uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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) and, in particular, the prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive must be interpreted as not extending to a female worker who is undergoing *in vitro* fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that *in vitro* fertilised ova exist, but they have not yet been transferred into her uterus.

Article 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preclude the dismissal of a female worker who, in circumstances such as those in the main proceedings, is at an advanced stage of *in vitro* fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilised ova into her uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

[Signatures]