OPINION OF ADVOCATE GENERAL TESAURO
delivered on 1 June 1994 *

Mr President,
Members of the Court,

1. The question referred to the Court by the House of Lords for a preliminary ruling concerns the interpretation of certain provisions 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. [1]

The national court seeks in particular to establish whether the principle of equal treatment for men and women, as expounded in the directive, precludes the dismissal of a pregnant woman who has been recruited on the basis of a contract for an indeterminate period but for the specific purpose — initially — of replacing another female employee during the latter's maternity leave.

2. A summary of the relevant Community and national legislation is necessary in order to understand the terms of the question.

According to Article 2(1) of the directive, '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) provides that 'application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex'. Finally, Article 2(3) states that the directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

Still on the subject of conditions relating to dismissal, mention should be made of 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. [2] That article

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

2 — OJ 1992 L 348, p. 1.

prohibits the dismissal of female 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'. However, that directive has not yet entered into force; its transposition into national law is to be accomplished by 19 October 1994.

3. With regard to the relevant national legislation, the Employment Protection (Consolidation) Act 1978 prohibits unfair dismissal (Section 54) and dismissal on the ground of pregnancy is considered unfair (Section 60). However, those provisions do not apply when, as in the case under consideration, dismissal takes place during the initial two years of the employment relationship (Section 64).

The Sex Discrimination Act 1975 also defines and prohibits, as constituting direct discrimination on grounds of sex, the situation in which a woman is accorded, on account of her sex, less favourable treatment than that accorded to a man (Section 1(a)). The Act also prohibits indirect discrimination, which consists in applying to a woman a requirement or condition which, although applying equally to a man, is to the woman's detriment or is in any event more difficult for her to comply with (Section 1(b)). Section 2 of the Act states that the provisions relating to sex discrimination against women are to be read as applying equally to the treatment of men, except with regard to the special treatment afforded to women in connection with pregnancy or childbirth. Section 5(3) is of particular interest inasmuch as it provides that a comparison of the cases of persons of different sex or marital status 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other'. Lastly, for the purposes of the present case, Section 6(2) of the Act states that it is unlawful for an employer to discriminate against a woman employed by him by dismissing her or subjecting her to any other detriment.

4. I now turn to the facts of the case. By letter of 26 June 1987, EMO Air Cargo (UK) Ltd (hereinafter 'EMO') engaged Mrs Webb as an import operations clerk, subject to a probationary period of three months. At her interview Mrs Webb was told that the job was available because another import operations clerk, Mrs Stewart, was pregnant. In order to be capable of replacing Mrs Stewart, who intended to go on working until the end of the year and to return to her job after maternity leave, Mrs Webb needed to undergo training for a period of six months: she therefore started work on 1 July 1987. Let me make it quite clear at this point that,

as the Industrial Tribunal's reconstruction of the facts plainly reveals, Mrs Stewart's return would by no means have entailed the dismissal of Mrs Webb, a fact which confirms that the latter's contract was for an indeterminate period.

Two weeks after starting work, Mrs Webb realized that she too was pregnant, a state of affairs which led the managing director of EMO to tell her that he had no choice but to dismiss her. On 30 July 1987 Mrs Webb accordingly received a letter which, after reminding her that the position she held had become vacant on account of the pregnancy of another employee, stated: 'Since you have only now told me that you are also pregnant I have no alternative other than to terminate your employment with our company.'

5. The Industrial Tribunal, before which Mrs Webb brought proceedings contesting her dismissal, dismissed her claim that she had been the victim of direct discrimination on grounds of sex, holding instead that the real reason for her dismissal had been the fact that it would have been impossible for her to carry out the primary task for which she had been recruited, namely to replace Mrs Stewart during the latter's absence on maternity leave. The national court reached that conclusion on the ground that a male employee, engaged for the purpose of replacing a female employee during the latter's pregnancy, would also have been dismissed if he had requested leave of absence during the period in question.

Mrs Webb's subsequent appeals, first to the Employment Appeal Tribunal and then to the Court of Appeal, were both unsuccessful. She finally appealed to the House of Lords which decided that it would be appropriate to seek a preliminary ruling from the Court on the following question:

'Is it discrimination on grounds of sex contrary to Council Directive 76/207/EEC for an employer to dismiss a female employee ("the appellant")

(a) whom he engaged for the specific purpose of replacing (after training) another female employee during the latter's forthcoming maternity leave,

(b) when, very shortly after appointment, the employer discovers that the appellant herself will be absent on maternity leave during the maternity leave of the other employee, and the employer dismisses her because he needs the job holder to be at work during that period,

(c) had the employer known of the pregnancy of the appellant at the date of appointment, she would not have been appointed, and

(d) the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons?'

6. Before we turn to the substance of that question, some attention should be given to the issue, raised on several occasions in the course of the proceedings, of the applicability of the directive to the case under consideration, bearing in mind that the dispute is between two persons governed by private law and the Court has not so far held that directives have horizontal direct effect.

In that connection, the first point to note is that in applying national law, regardless of whether the provisions in question were adopted before or after the directive, 'the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty'. [3]

In view of the fact that the national court seeks the interpretation of a directive which has already been transposed into national law, the answer may be of assistance to it for the purposes of interpreting and applying the relevant provisions of the Sex Discrimination Act 1975. Moreover, the House of Lords itself stated in the order for reference that 'it is for a United Kingdom court to construe domestic legislation in any field covered by a Community directive so as to accord with the interpretation of the directive as laid down by the Court of Justice of the European Communities'.

7. That said, the first question which arises is whether dismissal in a case such as this constitutes direct discrimination on grounds of sex within the meaning of the directive. For that purpose it must be ascertained whether the material reason for the dismissal applies without distinction to workers of both sexes or whether, on the contrary, it applies only to one of the sexes.

It is quite clear that termination of an employment contract on the ground of pregnancy applies only to women and therefore constitutes direct discrimination on grounds of sex. The Court has already had occasion to give a ruling to that effect, both in '*Dekker*' [4] with respect to the refusal to appoint a

3 — Judgment in Case C-106/89 *Marleasing* [1990] ECR I-4135, at paragraph 8.

4 — Case C-177/88 *Dekker* [1990] ECR I-3941.

pregnant woman, and in *Hertz* [5] with respect to the dismissal of a pregnant woman. In connection with the latter situation, which corresponds to the present case, the Court stated that 'the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as ... [does] ... a refusal to appoint a pregnant woman'. [6]

8. The view that a refusal to appoint and/or a decision to dismiss on the ground of pregnancy can relate only to women, thus constituting direct discrimination on grounds of sex, implies — obviously — that substantive equality between men and women as regards employment precludes any consideration, either when taking up employment or during the employment relationship, of a factor which — by definition — only affects women. It follows, therefore, from the reasoning underlying the judgments in *Dekker* and *Hertz* — and how could it be otherwise — that the directive must be construed so as to achieve substantive equality, and not mere formal equality which would constitute the very denial of the concept of equality.

Consequently, the dismissal of a female employee for the sole reason that she is pregnant is contrary to Article 5(1) of the directive, inasmuch as it constitutes — at least in principle — direct discrimination on grounds of sex. [7]

9. However, the national court points out that in the present case, unlike the *Dekker* case, the unequal treatment is not directly based on the female employee's pregnancy but is the result of her inability to carry out, during a particular period, the task for which she had specifically been engaged. In other words, Mrs Webb was not dismissed because of her pregnancy but because her condition would have prevented her from working during the period in which she should have replaced Mrs Stewart.

It is, indeed, difficult to separate and to distinguish pregnancy from inability to work for a specific length of time which coincides moreover with the duration of maternity leave. In such cases, absence from work is in fact determined by the pregnancy, that is to say, by a condition which only affects women. While it may be true that the woman in question was engaged for the purpose of replacing for a short time another employee during the latter's maternity leave, the fact remains that she was engaged on the basis of a contract for an indefinite period and therefore her inability to carry out the

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

6 — See the judgment in *Hertz*, cited above, at paragraph 13.

7 — From this perspective, Article 10 of Directive 92/85/EEC, cited above, which prohibits the dismissal of female workers during the period from the beginning of their pregnancy to the end of maternity leave, save in exceptional cases not connected with their condition, merely confirms the interpretation of Article 5(1) set out here.

task for which she was engaged affects only a limited period in relation to the total length of the contract.

10. The Court's recent judgment in *Habermann-Beltermann* [8] is of considerable significance with regard to the point at issue. In that case, the Court was asked to rule on the lawfulness of the termination of an employment relationship — whether by annulment or avoidance of the contract — in circumstances in which the unequal treatment was not based directly on the woman's pregnancy but was the result of the prohibition on night-time work during pregnancy, laid down by Article 2(3) of the aforementioned directive.

The Court established that in the circumstances the questions submitted for a ruling related to a contract without a fixed term in relation to which, consequently, the prohibition on night-time work by pregnant women could take effect only for a limited period, and concluded that 'the termination of a contract without a fixed term on account of the woman's pregnancy ... cannot be justified on the ground that a statutory prohibition, imposed because of pregnancy, temporarily prevents the employee from performing night-time work' (paragraph 25), that is to say, the work for which she had been specifically engaged.

11. In my view, the circumstances of the present case call with even greater justification for a similar conclusion, in view of the fact that the termination of the employment relationship is not connected with a statutory prohibition, as in the case just mentioned, but was occasioned simply by the employer's concern to avoid possible financial [9] or in any event organizational burdens arising from the need to engage an employee to perform — on a temporary basis — the tasks which the female employee who was subsequently dismissed had been recruited to carry out. It follows that the dismissal of the employee in question owing to the fact that, because of her pregnancy, she would not have been able to fulfil one of the (express or implied) terms of the relevant contract — an inability which is, however, temporary in relation to the duration of the contract — must therefore be considered incompatible with the principle of equal treatment, as laid down in the directive.

From that point of view it is of no significance whatever, even though the national court lays emphasis on it in the question submitted, that the employer would not have recruited the person in question if he had been aware of her pregnancy. In that connection, suffice it to say that the dismissal

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

9 — In the present case, moreover, it seems that the employer would not have to shoulder special financial burdens since the relevant national legislation makes entitlement to allowances during maternity leave subject to a series of conditions which Mrs Webb did not satisfy. In any event, however, it scarcely needs reiterating that, as expressly stated by the Court in *Dekker*, discrimination cannot be justified by the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her pregnancy (paragraph 12).

cannot in any case be considered lawful when the appellant herself, as the order for reference reveals clearly enough, was not aware of her condition. [10] That is the corollary, although only implicitly, of the judgment in *Habermann-Beltermann*, in which the Court had been called upon to take that factor into account for the purposes of its ruling.

12. It has been argued, however, that in the present case the question of unequal treatment does not even arise, inasmuch as the employer would also have dismissed a male employee who had asked for leave of absence, whether for medical or other reasons, over the same period in which he was meant to replace the female employee absent on maternity leave. Such 'proof' purports to confirm that the dismissal arose exclusively from the need for the holder of the post in question to be at work during the period in question.

In other words, in a case such as this, dismissal should not be classified as (direct) discrimination on grounds of sex, inasmuch as the underlying cause (inability to perform the contract during a predetermined period of time) would lead to the same consequences with respect to a male employee in the same situation. That line of reasoning presupposes, however, that the circumstances of a pregnant woman are comparable to those of a male employee who is unable, for medical or other reasons, to work during a given period.

13. That possibility is expressly contemplated in the question submitted by the national court. What is more, it is clear from the order for reference that the problem has been raised in precisely those terms by the various national courts who have had occasion to deal with the case, precisely in order to verify in accordance with Section 5(3) of the Sex Discrimination Act whether there exists treatment which is in effect accorded only to men that can serve as a basis for comparison with that accorded to a woman in the appellant's situation, and, more particularly, whether it is permissible to compare a woman's inability to work on account of maternity and a man's inability to work, whether or not on medical grounds.

In that connection it seems to me of no avail to rely on the judgment in *Hertz*, [11] in which the Court considered that the dismissal of a female employee on account of repeated absences through illness, even though the illness may be attributable to pregnancy or

10 — In my view, moreover, whether or not the parties are aware of the pregnancy at the time they enter into an employment relationship is, for the purposes of a valid employment relationship and — *a fortiori* — of a possible dismissal, actually irrelevant save in exceptional cases to be assessed individually (see point 12 of my Opinion in *Habermann-Beltermann*, cited above).

11 — See Case C-179/88, cited above, in particular paragraphs 14 to 17.

confinement, does not constitute direct discrimination on grounds of sex if those absences occur after the period of maternity leave and would also lead in the same circumstances to the dismissal of a male employee. [12] In that case, the same conditions (a number of absences over a certain period) were applied to workers of both sexes. In the present case, on the other hand, the termination of the employment relationship resulted from a condition (pregnancy) which indisputably affects women alone.

14. The judgment in *Hertz* serves to demonstrate, if anything, that absence through illness may not be equated with absence on maternity leave. To the extent to which that judgment holds that it is not discriminatory to dismiss an employee on account of absences through an illness which, while it may be attributable to pregnancy or confinement, began after the end of the maternity leave, it follows *a fortiori* that pregnancy may not be equated with illness. An inference which can be drawn, however obvious it may sound, is that a sick woman is to be treated in the same way as a sick man, whatever the cause of her illness. A pregnant woman, on the other hand, may not simply on account of her pregnancy be placed at a disadvantage to such an extent as to be excluded from the employment sector.

Nor does it seem to me to be possible *a fortiori* to draw comparisons, although these were referred to in the course of the proceedings, between a woman on maternity leave and a man unable to work because, for example, he has to take part in a sporting event, even if it were the Olympic Games. Other considerations apart, a sportsman, even a champion (whether a man or a woman) is confronted with a normal choice reflecting his needs and priorities in life; the same cannot reasonably be said of a pregnant woman, unless the view is taken — but it would be absurd — that a woman who wishes to keep her job always has the option of not having children.

15. In view of the foregoing observations, I see no need to tackle the question raised by the Commission in the course of the proceedings, concerning hypothetical situations in which the contract at issue is not, as in the present case, for an indefinite period but is for a fixed term, in the circumstances limited to the period in which a female employee who has just been engaged would have to be absent on maternity leave.

12 — That judgment may certainly not be construed as meaning that the Court has recognized as permissible (or even justifiable) the dismissal of a woman who is absent from work for a reason (illness) connected with pregnancy. Closer examination reveals that the Court's decision turned on the fact that Mrs Hertz's illness began after her return to work at the end of her maternity leave. The implication is that an illness connected with pregnancy is covered by the directive, thus rendering dismissal unlawful, to the extent that such illness occurred during maternity leave, that is to say, during a period defined by the Member States for the purposes of the derogation referred to in Article 2(3) of the directive.

Nor do I find it necessary to reflect on the various devices suggested by the Commission in order to spare the employer the attendant financial consequences when it transpires that a female employee who has just been engaged will not be able, even if only temporarily, to do the work required of her. Whether or not the contract of employment may be suspended and/or the terms of the contract modified as a result of a female employee being unable to work during a given period are at present matters still governed by national law, [13] provided — of course — that such practices do not lead to a breach of the principle of equal treatment.

16. In the light of the foregoing considerations, therefore, I propose that the Court give the following answer to the questions submitted by the House of Lords:

Articles 2(1) and 5(1) of Directive 76/207/EEC preclude an interpretation of national law which permits the dismissal of a woman engaged on the basis of an employment contract for an indefinite period on the ground that the employee in question must — on account of pregnancy — be absent from work during the period in which she would have had to replace another female employee, herself absent on maternity leave.

13 — Although Directive 92/85/EEC, which is due to enter into force on 19 October 1994, imposes on Member States a series of unconditional obligations with regard to the treatment of female employees during maternity leave, it still leaves them the option of making pay and the grant of certain allowances subject to the requirement of previous employment for a given period not in excess of 12 months, immediately prior to the anticipated date of the employee's confinement (Article 11).