JUDGMENT OF THE COURT (Sixth Chamber)
29 May 1997 *

In Case C-400/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Sø- og Handelsret, Copenhagen, for a preliminary ruling in the proceedings pending before that court between

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson

and

Dansk Handel & Service, acting on behalf of **Føtex Supermarked A/S**

on the interpretation of Articles 5(1) and 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),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, P. J. G. Kapteyn (Rapporteur), G. Hirsch and H. Ragnemalm, Judges,

* Language of the case: Danish.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson, by U. Jacobsen, of the Århus Bar,

— Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S, by P. Vibe Jespersen, of the Copenhagen Bar,

— the Netherlands Government, by J. G. Lammers, Legal Adviser, acting as Agent,

— the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and D. Rose, Barrister, and

— the Commission of the European Communities, by M. Wolfcarius and H. Støvlbæk, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Handels- og Kontorfunktionærernes Forbund i Danmark, represented by U. Jacobsen; of Dansk Handel & Service, represented by P. Vibe Jespersen; of the Danish Government, represented by P. Biering, Head of Division in the Ministry for Foreign Affairs, acting as Agent; of the United Kingdom Government, represented by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and by R. Plender QC; and of the Commission, represented by M. Wolfcarius and H. Støvlbæk, at the hearing on 16 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 18 February 1997,

gives the following

Judgment

1 By order of 19 December 1995, received at the Court on 21 December 1995, the Sø- og Handelsret (Maritime and Commercial Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 5(1) and 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, hereinafter 'the Directive').

2 That question was raised in proceedings between Ms Larsson and her former employer, Føtex Supermarked A/S ('Føtex'). Ms Larsson, who was employed by Føtex as from March 1990, informed her employer in August 1991 that she was pregnant. During her pregnancy, Ms Larsson was twice on sick leave. The first period of sick leave was from 7 to 24 August 1991. The second, which was caused by a loosening of the pelvic ring linked to her pregnancy, lasted from 4 November 1991 to 15 March 1992, when her maternity leave commenced.

3 Ms Larsson gave birth on 2 April 1992. She then took maternity leave of 24 weeks, to which she was entitled under the applicable Danish legislation. Her maternity leave came to an end on 18 September 1992, after which she took her annual leave until 16 October 1992. Then, as she was still under treatment for the loosening of the pelvic ring, she was again on sick leave. She was not found fit to resume work until 4 January 1993.

4 By letter dated 10 November 1992, less than one month after the end of her annual leave, Føtex informed Ms Larsson that it was terminating her employment contract as from the end of December 1992 on the ground of:

'your lengthy period of absence and the fact that it is scarcely likely that you will at any time in the future — on grounds of health — be again in a position to carry out your work in a satisfactory manner...'.

5 Ms Larsson claims that her dismissal while on sick leave was contrary to the Directive inasmuch as her illness began during her pregnancy and continued after the expiry of her maternity leave.

6 According to Article 1(1), the purpose of the Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and as regards working conditions.

7 Article 2(1) of the Directive defines the principle of equal treatment as meaning that there is to be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status. Article 2(3), however, provides that the Directive is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

8 Article 5(1) specifies that the principle of equal treatment thus defined relates to working conditions, including the conditions governing dismissal.

9 In the proceedings brought by Handels- og Kontorfunktionærernes Forbund i Danmark ('HK'), acting on behalf of Ms Larsson, against her employer, the parties requested the Sø- og Handelsret to refer a question to the Court of Justice for a preliminary ruling as to whether the Directive precludes dismissal in circumstances such as those in the main case.

10 The Sø- og Handelsret refused that request on the ground that it was clear from Case C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* [1990] ECR I-3979 (the '*Hertz*' judgment) that Ms Larsson's dismissal was not precluded by the Directive. On 27 October 1995, however, on appeal by the plaintiff, the Sø- og Handelsret's order was quashed by the Højesteret (Supreme Court), which considered that the *Hertz* case was not identical to that in the present main proceedings.

11 The Sø- og Handelsret has therefore referred the following question to the Court:

'Does Article 5(1), in conjunction with 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, cover dismissal as a result of absence following the end of maternity leave if the absence is attributable to an illness which arose during pregnancy and continued during and after maternity leave, it being assumed that the dismissal took place after the end of the maternity leave?'

12 In the *Hertz* case, which concerned the dismissal of a woman on the ground of periods of absence following her maternity leave, the Court held that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of the Directive, Article 5(1), in conjunction with Article 2(1), thereof does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.

13 During the main proceedings in the present case, the parties have disagreed as to the interpretation and scope of the *Hertz* judgment. Unlike the defendants, HK considers that a distinction must be drawn between illnesses related to pregnancy or confinement which, as in the *Hertz* case, did not arise until after the end of the maternity leave and those which had already arisen, as in the present case, during the period of pregnancy or maternity leave and which continue to be treated after the expiry of that leave. Whilst it is clear from the *Hertz* judgment that the former situation falls within the general rules applicable in the event of illness, the Directive none the less precludes the dismissal of a woman in the second situation. Were that not so, the right of a woman employee suffering from an illness attributable to pregnancy or confinement to be protected or not in accordance with the applicable Community principles would be solely dependent on the duration of the maternity leave laid down by the Member State.

14 That argument cannot be accepted.

15 At paragraph 15 of its judgment in the *Hertz* case, the Court held that the Directive does not envisage the case of an illness attributable to pregnancy or confinement. It does not, however, preclude national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave, so

that, during the maternity leave accorded to her pursuant to national law, a woman is protected against dismissal due to absence. Finally, the Court stated that it is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the problems inherent in pregnancy and confinement occur.

16 The Court went on to consider, at paragraph 16, that, in the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness, and that such a pathological condition is therefore covered by the general rules applicable in the event of illness.

17 Contrary to what HK maintains, the Court was not thereby drawing a distinction on the basis of the moment of onset or first appearance of the illness. It merely held that, in the factual situation submitted to it on that occasion, there was no reason to distinguish, from the point of view of the principle of equal treatment enshrined in the Directive, between an illness attributable to pregnancy or confinement and any other illness. That interpretation is confirmed, moreover, by the absence of any reference in the operative part of the *Hertz* judgment to the moment of onset or first appearance of the illness.

18 As the Court stated at paragraph 17 of that judgment, male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.

19 Similarly, the Court considered at paragraph 18, in such a case there is no reason to consider the question whether women are absent owing to illness

more often than men, and whether there exists therefore any indirect discrimination.

20 The Directive therefore does not preclude dismissal on the ground of periods of absence due to an illness attributable to pregnancy or confinement, even where such illness first appeared during pregnancy and continued during and after the period of maternity leave.

21 HK, the Danish Government and the Commission maintain that it is in any event incompatible with Community law for an employer to be able, when calculating the period giving grounds for dismissal under national law, to take account of a period of absence extending from the beginning of pregnancy to the beginning of the period of maternity leave or of absence during maternity leave. It appears from the documents in the main case that, if those periods and the four weeks of annual leave are not taken into account, Ms Larsson was absent as a result of illness for less than four weeks prior to her dismissal.

22 During the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence (see the *Hertz* judgment, paragraph 15). To accept that absence during such a period could be taken into account as grounds for a subsequent dismissal would be contrary to the objective of permitting national measures concerning the protection of women, particularly as regards pregnancy and maternity, pursued by Article 2(3) of the Directive, and would deprive that provision of its effectiveness (see, with regard to night-time work by pregnant women, Case C-421/92 *Habermann-Beltermann* v *Arbeiterwohlfahrt Bezirksverband* [1994] ECR I-1657, paragraph 24).

23 Outside the periods of maternity leave laid down by the Member States to allow female workers to be absent during the period in which the problems inherent in pregnancy and confinement occur, however, and in the absence of any national or, as the case may be, Community provisions affording women specific protection, a woman is not protected under the Directive against dismissal on grounds of

periods of absence due to an illness originating in pregnancy. As has been pointed out above, as male and female workers are equally exposed to illness, the Directive does not concern illnesses attributable to pregnancy or confinement.

24 The principle of equal treatment enshrined in the Directive does not, therefore, preclude account being taken of a woman's absence from work between the beginning of her pregnancy and the beginning of her maternity leave when calculating the period providing grounds for her dismissal under national law.

25 It must, however, be noted that, 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, the Community legislature subsequently provided, pursuant to 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 (OJ 1992 L 348, p. 1), for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases unconnected with their condition (Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, paragraphs 21 and 22). It is clear from the objective of that provision that absence during the protected period, other than for reasons unconnected with the employee's condition, can no longer be taken into account as grounds for subsequent dismissal. However, the period within which Directive 92/85 was to be transposed had not yet expired when Ms Larsson was dismissed.

26 The answer to be given is therefore that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of the Directive, Article 5(1), in conjunction with Article 2(1), thereof does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement,

even where that illness arose during pregnancy and continued during and after maternity leave.

Costs

27 The costs incurred by the Danish, Netherlands and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Sø- og Handelsret by order of 19 December 1995, hereby rules:

Without prejudice to the provisions of national law adopted pursuant to Article 2(3) 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, Article 5(1), in conjunction with Article 2(1), of that directive does not

preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement, even where that illness arose during pregnancy and continued during and after maternity leave.

Mancini Murray Kapteyn

Hirsch Ragnemalm

Delivered in open court in Luxembourg on 29 May 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber