JUDGMENT OF THE COURT (Third Chamber)

1 July 2010 *

In Case C-194/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 28 March 2008, received at the Court on 9 May 2008, in the proceedings

Susanne Gassmayr

v

Bundesminister für Wissenschaft und Forschung,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 20 May 2009,

after considering the observations submitted on behalf of:

— the Austrian Government, by M. Winkler, acting as Agent,

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

after hearing the Opinion of the Advocate General at the sitting on 3 September 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1) to (3) 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 was made in the course of proceedings between Ms Gassmayr and the Bundesminister für Wissenschaft und Forschung (Federal Minister for Science and Research) ('the Bundesminister') concerning the minister's refusal to continue to pay her an allowance for on-call duty at the work place during periods in which she was granted leave or was prohibited from working on account of her pregnancy and subsequently during maternity leave.

Legal context

European Union law

3 The 9th, 16th and 18th recitals in the preamble to Directive 92/85 are worded as follows:

'Whereas 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;

…

Whereas measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance;

…

Whereas the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness'.

4 Article 2 of Directive 92/85 states:

'For the purposes of this Directive:

(a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

(b) *worker who has recently given birth* shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;

(c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

5 Article 4 of Directive 92/85, entitled 'Assessment and information', provides in paragraph 1:

'For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of [Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1)], in order to:

— assess any risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers within the meaning of Article 2,

— decide what measures should be taken.'

6 Article 5 of Directive 92/85, entitled 'Action further to the results of the assessment', states in paragraphs 1 to 3:

'1. Without prejudice to Article 6 of Directive 89/391/EEC, if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on

the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.'

7 Article 8 of Directive 92/85, entitled 'Maternity leave', provides in paragraph 1:

'Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

8 Article 11 of that directive, entitled 'Employment rights', is worded as follows:

'In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:

1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;

2. in the case referred to in Article 8, the following must be ensured:

   (a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

   (b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;

4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.'

National law

Law on Maternity Protection

9 Under Paragraph 3(1) of the Law of 1979 on maternity protection (Mutterschutzgesetz 1979) ('the MSchG'), pregnant women are not allowed to work during the last eight weeks before the expected date of confinement ('the eight-week period').

10 Paragraph 3(3) of the MSchG provides that, in addition to the eight-week period, the prohibition on working also applies to a pregnant woman if, according to a certificate produced by her from an employment inspectorate doctor or other public medical officer, continuing to work would endanger the life or health of the mother or the child.

11 Paragraph 5 of the MSchG, entitled 'Prohibition on work after giving birth', provides in subparagraph 1:

'Women must not work during the eight weeks after giving birth. … If the period of time prior to confinement has been shorter than the eight-week period, the period of protection following confinement is increased by that shortfall, subject, however, to a maximum of 16 weeks …'

12 Paragraph 14 of the MSchG, entitled 'Continuation of pay', in its amended version published in the BGBl. 833/1992 and 434/1995, is worded as follows:

'1. If, unless Paragraph 10a(3) provides otherwise, the application of Paragraphs 2b, 4, 4a, 5(3), 5(4) or 6 makes it necessary for work within a business to be changed, a woman worker shall be entitled to the pay that corresponds to the average earnings received by her during the last 13 weeks of employment prior to that change. If that period includes times during which she did not receive her full pay due to sickness or short-time working, the period of 13 weeks shall be extended by those times; those times shall not be taken into account when calculating average earnings. …

2. Women workers who are not allowed to work under Paragraph 3(3) and women workers for whom it is not possible to work in a business under Paragraphs 2b, 4, 4a, 5(3), 5(4) or 6 shall be entitled to pay that is calculated *mutatis mutandis* by reference to Paragraph 14(1).'

Law on salaries

13 Under Paragraph 3(1) and (2) of the Law of 1956 on salaries (Gehaltsgesetz 1956) ('GehG'), applicable to workers in the federal public sector such as the applicant in the main proceedings, officials are entitled to a monthly salary which comprises both the salary and any allowances.

14 Paragraph 13c of the GehG, entitled 'Rights in the event of incapacity for work', provides:

'1. If an official is prevented from carrying out his functions as a result of an accident (except for an accident at work) or illness, that official is entitled, after being unfit for work for 182 days, to 80% of the monthly salary to which he would have been entitled if he were not unfit for work. The allowance for children is excluded from that reduction.

…

3. The reduction made in accordance with subparagraph 1 is to be abated by 80% of the basis of assessment referred to in subparagraph 4, at most, however, by the total amount of the reduction under subparagraph 1.

4. The basis of assessment for the purposes of subparagraph 3 is the total amount of the allowances (excluding exceptional payments), supplements, compensatory payments and extra emoluments (except for those under Articles 19, 20b or 20c) that the official would have received if he had not been unfit to work, and to which he is no longer entitled as a result of his absence from work. In the case of extra emoluments

within the meaning of the first sentence which are not flat-rate payments, the calculation is based on one 12th of the total of those extra emoluments that the official received during the 12 months prior to the commencement of the first of the periods of sick leave to be aggregated in accordance with subparagraph 2.

5. The reduction of the monthly salary shall take effect on the first day of unfitness for work, at the earliest the day after the period of 182 working days referred to in subparagraph 1 has elapsed, and ends on the day immediately preceding the day on which the official resumes his duties.

…

8. During a prohibition on work in accordance with the MSchG (both before and after giving birth), subparagraphs 1 to 6 shall not be applied. Such a prohibition on working stops the running of all the periods set out in subparagraphs 1 to 6.'

15 Paragraph 15 of the GehG, entitled 'Extra emoluments', provides in subparagraphs 1, 2 and 5:

'1. Extra emoluments shall mean:

(1) overtime payments (Paragraph 16),

…

(4) allowance for on-call duty at the work place (Journaldienstzulage) (Paragraph 17a)

…

Only periods in respect of which there is a right to payment of salary can give rise to the right to extra emoluments.

2. The extra emoluments referred to in subparagraph 1(1), (4) to (6) and (8) to (11) and the supplements for Sunday and holiday working referred to in subparagraph 1(3) may take the form of a flat rate where the work on which such extra emoluments are based is performed on a permanent basis or so regularly that it is possible to calculate monthly average values (individual flat rate). The fixing of a flat rate requires the agreement of the Federal Chancellor in the cases referred to in subparagraph 1(1), (3) to (6) and (10). The fixing of uniform flat rates for services which are substantially the same is permissible (group flat rate). In the case of flat-rate extra emoluments for overtime work, the fraction of the payment which represents the supplement paid for overtime must be calculated.

…

5. The right to flat-rate extra emoluments is not affected by leave during which the official retains his right to a monthly salary or by unfitness for work as a result of an accident at work. If, for any other reason, the official remains absent from work for more than one month, the flat-rate extra emolument shall be suspended from the first

day of the month following the expiry of that period until the last day of the month in which the official returns to work.'

16 Paragraph 17a of the GehG, entitled 'On-call duty allowances', provides:

'1. An official who is required to perform on-call duties outside the working hours stated in the duty roster shall be entitled to an on-call duty allowance for the period of time on standby and periods of service comprising on-call duties in place of the payments under Paragraphs 16 and 17.

2. The amount of the on-call duty allowance shall be determined having regard to the duration of that duty and the average calls made during that duty …; its calculation must be approved by the Federal Chancellor.'

17 It is apparent from the file that, in application of Paragraph 17a of the GehG, the Republic of Austria has adopted the Regulation on the flat-rate calculation of on-call duty allowances for doctors in university clinics (Pauschalierungsverordnung für Journaldienstzulage für Ärzte an Universitätskliniken, BGBl. II 202/2000), which, for the payment of each hour on-call at the place of work, lays down a specific percentage of the standard salary.

Law on the status of officials

18 Under Article 50(1) of the Law of 1979 on the statute of officials (Beamten-Dienstrechtsgesetz 1979), for reasons of service, the official may be required to be available at his place of work or at another specified place, outside the normal hours in the duty roster and, in case of need or on request, to resume work (availability at the place of work; on-call duty at work).

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

19 The applicant in the main proceedings worked from 1 January 1995 as a junior hospital doctor at the University Anaesthesia Clinic of the University of Graz ('the employer'). She received an on-call duty allowance for extra hours that she worked in addition to the normal hours set out in the duty roster.

20 The applicant in the main proceedings stopped working on 4 December 2002, first under Paragraph 3(3) (prohibition on work on production of a medical certificate stating that continuing to work is likely to endanger the life or health of the mother or the child), then under Paragraph 3(1) (prohibition on work during the eight-week period), and finally under Paragraph 5(1) of the MSchG (prohibition on work during the eight weeks after giving birth).

21 By a letter to her employer of 9 February 2004, the applicant in the main proceedings claimed that for the duration of the prohibition on work, which because of her pregnancy and then her maternity leave had prevented her from performing on-call duties, she was still entitled to payment of an allowance corresponding to the average on-call duties performed. Therefore, she requested payment of the sums corresponding to such an allowance.

22 By decision of 31 August 2004 her employer rejected that claim. It took the view that the on-call duty allowances paid with respect to the specific duties performed in the months preceding the prohibition on working are not covered by the retention provision in Paragraph 14 of the MSchG, and are not flat-rate extra emoluments within the meaning of Paragraph 15 of the GehG. The employer argued in particular that, during the prohibition on working, the applicant in the main proceedings had received her pay, that is, the monthly salary and allowances in accordance with Paragraph 3(2) of the GehG, without any deductions. However, she had no longer been allowed to perform on-call duties at the work place because she was prohibited from working, and therefore no remuneration for on-call services had become payable during that period. According to the employer, the on-call duty allowance has to be paid according to services actually rendered and is not a flat-rate extra emolument. There are no circumstances in which such an allowance could give rise to a calculation of a monthly average.

23 The applicant in the main proceedings brought an action before the referring court against the decision of the Bundesminister of 9 May 2005 relating to the refusal to continue paying the allowance at issue, relying on the principle of European Union law of equal pay for men and women.

24 Before the referring court, the Bundesminister submits that the maintenance, without any deductions, of the salary of the applicant in the main proceedings corresponding to her grade as a university assistant and the allowances referred to in Paragraph 3(2) of the GehG during the period in which she was prohibited from working is clearly compatible with Article 141 EC and Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19). While the judgment in Case C-147/02 *Alabaster* [2004] ECR I-3101 explained the principle of non-discrimination in the context of pay rises in general, the claim put forward by the applicant in the main proceedings does not concern her ordinary monthly salary, that is her reference pay, or a general pay increase.

25 Similarly, the defendant in the main proceedings submits that, unlike the Christmas bonus at issue in Case C-333/97 *Lewen* [1999] ECR I-7243, the present case concerns an on-call duty allowance paid for services actually rendered on an individual basis. Such an allowance in addition to the salary is intended solely to compensate for the extra work for the worker when he is actually called on to perform such duties outside the normal hours on the duty roster. If a worker is not requested to carry out on-call duties he cannot claim any payment on that basis, regardless of the duties performed in the course of his regular work.

26 It is not disputed that the applicant in the main proceedings performed on-call duties during the reference period laid down in Paragraph 14(1) of the MSchG prior to the commencement of the period in which she was prohibited from working pursuant to Paragraph 3(3) of the MSchG, or that she was paid an allowance for those services calculated in accordance with Paragraph 17a of the GehG.

27 Taking the view that it is not possible to provide a clear answer to the questions raised in the dispute before it in the light, in particular, of Article 11(1) to (3) of Directive 92/85, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Does Article 11(1), (2) and (3) of [Directive 92/85] have direct effect?

(b) If those provisions do have direct effect are they to be construed as meaning that there is a continued entitlement to payment of an allowance for on-call duty during periods in which expectant mothers are prohibited from working and/or during maternity leave?

(c) Does this apply, in any event, where a Member State decides on a system of continuation of "pay" which in principle encompasses total income, with the exception, however, of so-called "extra emoluments" based on tasks performed (contingent on performance of those tasks) (as listed in Paragraph 15 of the [GehG], such as the allowance for on-call duty at issue here?

2. If the aforementioned provisions do not have direct effect, are they to be transposed by the Member States in such a way that a woman worker who no longer performs on-call duties during periods in which expectant mothers are prohibited from working and/or during maternity leave is entitled to continue to be paid an allowance for such duties?'

Admissibility of the reference for a preliminary ruling with regard to Article 11(1) of Directive 92/85

28 As a preliminary point, it should be observed that the Commission of the European Communities challenges the admissibility of the questions referred for a preliminary ruling in so far as they concern Article 11(1) of Directive 92/85, doubting their relevance to the resolution of the dispute in the main proceedings. It takes the view that that provision is not relevant in the present case, since the question which arises in that dispute does not concern the rights governed by Articles 5, 6 and 7 of the directive, but only the amount of the remuneration due to the applicant for the period during which she was absent from work on account of her pregnancy and then her maternity leave.

29 According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-305/05 *Ordres des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 18).

30 Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of European Union law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Bosman*, paragraph 61, and Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20).

31 Furthermore, it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the provisions of European Union law which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (see, in particular, Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34).

32 In the case in the main proceedings, the order for reference states that the applicant stopped working during her pregnancy in accordance with Paragraph 3(3) of the MSchG, pursuant to which a pregnant woman cannot work during her pregnancy where it is clear from a certificate produced by her from an employment inspectorate doctor or other public medical officer that the life or health of the mother or the child would be endangered if she continued to work.

33 By its questions, which refer to Article 11(1) to (3) of Directive 92/85, the referring court seeks to determine the income which that worker may claim during the period in which she stopped work while pregnant, pursuant to Article 5(3) thereof, and during the maternity leave covered by Article 8.

34 It should be recalled that Articles 4(1) and 5 of Directive 92/85 guarantee special protection for pregnant women and women who have recently given birth or are breastfeeding in respect of any activity liable to involve a specific risk to their safety or health or negative effects on the pregnancy or breastfeeding (Case C-320/01 *Busch* [2003] ECR I-2041, paragraph 42). The legislature of the European Union, by adopting that directive, introduced the requirement to evaluate and communicate risks, and a prohibition of the exercise of certain activities (see, to that effect, Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 44).

35 If the results of the risk assessment carried out in accordance with Article 4 of Directive 92/85 reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker, Article 5(1) and (2) of that directive provide that the employer is required temporarily to adjust the working conditions and/or the working hours or, if that is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, to move the worker concerned to another job.

36 It is only when such a move is also not feasible that Article 5(3) of that directive provides the worker is to be granted leave, in accordance with national legislation and/or national practice, for the whole of the period necessary to protect her safety or health (Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 57, and Case C-471/08 *Parviainen* [2010] ECR I-6533, paragraph 32).

37 In the order for reference the Verwaltungsgerichtshof cited the provisions of Article 4 and 5 of Directive 92/85 on risk assessments and the taking of measures following such an assessment and referred questions relating to Article 11(1) of that directive, which refers to Article 5.

38 At the hearing, in answer to the questions put by the Court, the Austrian Government confirmed that, in accordance with Paragraph 3(3) of the MSchG, pregnant women are prohibited from working where continuing to work endangers their health or life or that of their child. According to the Austrian Government, that provision is often applied to pregnant women aged over 30 or 35 years old, allowing a cessation of work well before the start of the normal maternity leave in order to avoid complications. It is not a prohibition related to working, rather a prohibition which is dependent on the personal situation of the pregnant woman and her physical condition.

39 It is for the referring court to ascertain whether, during her pregnancy, the applicant in the main proceedings suffered from an illness or complications related to her pregnancy or whether she was granted leave in order to protect her safety or health because of an occupational risk which might endanger her safety or health or the health of her child.

40 However, it should be noted that, in any event, in both cases the reason for a cessation of work during pregnancy is the same, namely the protection of the safety or health of the pregnant worker or of her child. Furthermore, Article 11(1) of Directive 92/85 is the only provision which governs the income to which a pregnant worker is entitled during pregnancy.

41 Since it is not evident that the interpretation of Article 11(1) of Directive 92/85 requested by the national court bears no relation to the actual facts of the main action or its purpose and the Court has sufficient information to interpret the rules laid down by that directive, having regard to the situation which is the subject of the dispute in the main proceedings, the questions referred for a preliminary ruling cannot, contrary to the Commission's submissions, be considered inadmissible in so far as they concern that provision.

42 In those circumstances the reference for a preliminary ruling, in so far as it concerns Article 11(1) of Directive 92/85, must be held to be admissible.

The questions referred for a preliminary ruling

Question 1(a) relating to the direct effect of Article 11(1) to (3) of Directive 92/85

43 By Question 1(a), the referring court asks essentially if Article 11(1) to (3) of Directive 92/85 is capable of having direct effect and of giving rise to rights for the benefit of individuals which they can rely on against a Member State which has failed to implement that directive in national law or has implemented it incorrectly, and which the national courts are required to protect.

44 According to settled case-law, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, in particular, Case 8/81 *Becker* [1982] ECR 53, paragraph 25; Joined Cases C-246/94 to C-249/94 *Cooperativa Agricola Zootecnica S. Antonio and Others* [1996] ECR I-4373, paragraph 17; and Case C-226/07 *Flughafen Köln/Bonn* [2008] ECR I-5999, paragraph 23 and the case-law cited).

45 A provision of European Union law is unconditional where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the European Union or by the Member States. It is sufficiently precise to be relied on by an individual and applied by a court where it sets out an obligation in unequivocal terms (see, in

particular, *Cooperativa Agricola Zootecnica S. Antonio and Others*, paragraph 19, and Case C-317/05 *Pohl-Boskamp* [2006] ECR I-10611, paragraph 41).

46 Article 11(1) to (3) of Directive 92/85 satisfies those criteria, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved which consists in ensuring, following the adjustment of the working conditions, a temporary transfer to another job and, during the periods of absence from work during pregnancy referred to in Articles 5 to 7 thereof and maternity leave referred to in Article 8, the employment rights of pregnant workers and workers who have recently given birth or are breastfeeding and the maintenance of payment and/or entitlement to an adequate allowance.

47 It is true that Article 11(1) of Directive 92/85 provides that, as regards pregnant workers in the cases referred to in Article 5 – that is, pregnant workers whose conditions of employment have been temporarily adjusted, who have been temporarily transferred to another job or, as a last resort, who have been granted leave from work – that income must be guaranteed in accordance with national legislation and/or national practice.

48 However, the precision and unconditional nature of Article 11(1) of Directive 92/85 is not affected by the reference to national legislation and national practice. Although that provision leaves to the Member States a certain degree of latitude when they adopt rules in order to implement it, that fact does not affect the precise and unconditional nature of that provision. The implementing rules cannot, by any means, apply to the content of the right enshrined by Article 11(1) and cannot thereby limit the existence or restrict the scope of that right (see, *Parviainen*, paragraph 55, and, as regards Article 10 of Directive 92/85, Case C-438/99 *Jiménez Melgar* [2001] ECR

I-6915, paragraphs 33 and 34; see also, by analogy, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 105, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 63).

49 Similarly, Article 11(3) of Directive 92/85 provides that, as regards workers on maternity leave referred to in Article 8, the allowance referred to in Article 11(2)(b) is to be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health.

50 However, the fact that, under Article 11(3) of Directive 92/85, that income may be subject to a ceiling determined by national legislation, so that the amount of such an allowance may vary from one Member State to another, likewise does not affect the precise and unconditional nature of that provision, nor that of Article 11(2). Since the income which must be guaranteed to a worker on maternity leave is established by law, the application of the ceiling provided for in Article 11(3) does not render Article 11(2) and (3) incapable of being applied by a court to the facts of the dispute which it is to hear and determine and, consequently, cannot render the subject-matter of that provision insufficiently precise (see, by analogy, *Impact*, paragraph 61).

51 As regards the power left to the Member States, in accordance with Article 11(4) of Directive 92/85, to subject the right to pay or the allowance referred to in Article 11(1) and (2)(b) to the condition that the worker concerned must fulfil the conditions for the entitlement to those advantages provided for by national legislation, it must be observed that those conditions of entitlement do not affect the minimum protection laid down in Article 11(1) to (3) and are, in any event, open to judicial review.

52 It must therefore be held that the provisions of Article 11(1) to (3) of Directive 92/85 fulfil all the conditions required to have direct effect.

53 In those circumstances, the answer to Question 1(a) is that Article 11(1) to (3) of Directive 92/85 has direct effect and gives rise, for the benefit of individuals, to rights which they can rely on against a Member State which has failed to implement that directive in national law or has implemented it incorrectly, and which the national courts must protect.

Questions 1(b) and (c) on the right to the payment of an on-call duty allowance

54 By Questions 1(b) and (c), the national court asks essentially whether Article 11(1) to (3) of Directive 92/85 must be interpreted as meaning that, during the period of absence from work or during the prohibition on working for pregnant workers and/or workers on maternity leave, the entitlement to payment of the on-call duty allowance must be maintained. In that connection, the referring court asks in particular whether the answer to that question is affected by the fact that the relevant national legislation in the main proceedings provides for the entitlement of a pregnant worker, who is granted leave during her pregnancy or is on maternity leave, to pay equivalent to the average salary she received in a reference period prior to her absence from work during the pregnancy and to the beginning of her maternity leave, with the exception of the on-call duty allowance.

55 It should be stated to begin with that, by that question, the referring court raises doubts as to the extent of the right to an income of a pregnant worker during two separate periods, namely the interruption of work during pregnancy and, second, the period in which a pregnant woman is prohibited from working corresponding to maternity leave.

56 Bearing in mind that different provisions of Directive 92/85 govern those two periods, it is appropriate to answer the question referred by the national court in two parts, according to whether it concerns the right to remuneration of a worker during pregnancy or during maternity leave.

The entitlement to the on-call duty allowance of a pregnant worker granted leave during pregnancy on account of risks to her safety or health

57 In accordance with Article 11(1) of Directive 92/85, in the cases referred to in Articles 5 to 7 of that directive, the employment rights relating to the employment contract, including the right to maintenance of a payment to, and/or entitlement to an adequate allowance for, pregnant workers and workers who have recently given birth or are breastfeeding, must be ensured in accordance with national legislation and/or national practice.

58 Unlike the pregnant workers referred to in Article 5(1) and (2) of Directive 92/85, who actually continue working and performing the duties entrusted to them by their employers, a pregnant worker covered by Article 5(3) is granted leave from work for the whole period necessary to protect her safety and health and, by implication, that of her child.

59 That being the case, the protective measures referred to in Article 5 of Directive 92/85 apply not at the request of the pregnant worker but by reason of her pregnancy. They result from a risk assessment and a legal prohibition imposed by Article 5 and the relevant provisions of national law, and they are intended to avert any risk to the safety or health of the worker or her child. Therefore, although the result of the risk assessment that the employer is required to carry out pursuant to Article 4 of that directive depends on which paragraph of Article 5 is applicable, the objective of protection pursued by that directive with respect to the pregnant workers referred to in that article remains unchanged. Furthermore, as is clear from its wording, the employer is required to observe the exact order according to which the protective measures provided for in that article must be taken, and the conditions governing that order.

60 An examination of the wording of Article 11(1) of Directive 92/85 and the objective of protecting the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding pursued by that directive shows that a pregnant worker such as the applicant in the main proceedings, who is granted temporary leave of absence from work and whose pay relating to the period prior to that leave is made up of a basic salary, a number of supplements and an on-call duty allowance for hours worked in addition to the regular hours indicated on the duty roster, is not entitled, on the basis of that provision, to the payment of such an allowance.

61 First of all, even though, being based on the employment relationship, the on-call duty allowance constitutes pay within the meaning of Article 141 EC, the fact remains that Article 11(1) of Directive 92/85, in most of the language versions existing at the time of adoption, refers to the maintenance of 'a' payment and not 'the' pay of the worker concerned.

62 Furthermore, Article 11(4) of that directive provides that the Member States may make entitlement to pay or the allowance referred to in Article 11(1) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

63 Next, the Court has already held that facts relating to the nature of the work done and the conditions in which it is carried out may in some circumstances be considered to be objective factors unrelated to any discrimination on grounds of sex such as to justify any differences in pay between different groups of workers (see, to that effect, in the context of Article 141 EC, Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 52).

64 In the case in the main proceedings, according to the information available to the Court, the on-call duty allowance is paid to workers according to the length of the on-call duty performed during overtime hours and the average calls on the worker concerned during that duty. It is common ground that during the period in which a pregnant woman is prohibited from working she does not perform duties entitling her to the payment of that allowance.

65 As the Court held in paragraphs 49 and 61 of *Parviainen*, concerning a pregnant worker temporarily transferred to another job during and because of her pregnancy under Article 5(2) of Directive 92/85, the Member States and, where appropriate, management and labour are not required under Article 11(1) of that directive to maintain, during the temporary transfer, the pay components or supplements which are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance. The same applies to a pregnant worker granted leave from work under Article 5(3) of that directive and the relevant provisions of national law.

66 Finally, Article 11(1) of Directive 92/85 expressly refers to national legislation and/or national practice.

67 As is clear from paragraph 48 of this judgment, that provision leaves the Member States a certain degree of latitude when defining the conditions for the exercise and implementation of the entitlement to an income for the pregnant workers referred to in Article 5(3) of Directive 92/85. It is therefore for the Member States to define the arrangements for that entitlement, although they are not authorised to make the existence of that entitlement, which derives directly from that directive and the employment relationship between the pregnant worker and her employer, subject to any preconditions whatsoever (see, by analogy, Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 53, and also *Parviainen*, paragraph 55).

68 The exercise by the Member States and, where appropriate, management and labour of that discretion when determining the entitlement to income of a pregnant worker temporarily granted leave from work by reason of her pregnancy cannot undermine the objective of protecting the safety and health of pregnant workers pursued by Directive 92/85, nor can it disregard the fact that that leave is a protective measure of last resort which is required only where a temporary transfer to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds.

69 As follows from the 16th recital in the preamble to Directive 92/85, the measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would lose their effectiveness unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of a payment and/or entitlement to an adequate allowance.

70 As regards pregnant workers granted leave from work as a last resort, pursuant to Article 5(3) of Directive 92/85, the Member States or, if appropriate management and labour, may guarantee the payment of an income in the form of an adequate allowance, a payment, or a combination of the two, but the choices they make in that respect and the level at which the income is set must not undermine that effectiveness.

71 It is clear that the effectiveness of Directive 92/85 and the objectives pursued by it would not be guaranteed if it were open to an employer, because of the establishment of a reduced level of income on the basis of Article 11(1) of that directive, to have recourse to Article 5(3) in order to reduce the financial loss he might suffer on account of the absence of the pregnant worker during her pregnancy.

72 Where the Member States and, where appropriate, management and labour choose, in accordance with Article 11(1) of Directive 92/85, to ensure that a pregnant worker who is granted leave or is prohibited from working in accordance with Article 5(3) receives an income in the form of a payment, an adequate allowance or a combination of the two, that income must in any event be made up of that worker's basic monthly salary and the pay components or supplements relating to her occupational status – which is in not in any way affected by the leave granted – such as allowances relating to the seniority of the worker concerned, her length of service and her professional qualifications (see, to that effect, *Parviainen*, paragraph 60).

73 Any other interpretation of Article 11(1) of Directive 92/85 concerning the entitlement to income of pregnant workers covered by Article 5 would be liable to undermine the effectiveness of the directive and deprive it of a significant part of its substance.

74 According to the documents before the Court, the pay to which a pregnant worker who is prohibited from working during her pregnancy under Paragraph 3(3) of the MSchG is entitled is calculated in accordance with Paragraph 14(1) and (2) of that law. Under those provisions, a pregnant worker is entitled to pay equivalent to the average earnings she received in the 13 weeks preceding the prohibition on working. However, the on-call duty allowance to which the worker was entitled during that reference period is not taken into account in calculating those average earnings.

75 For the reasons set out in paragraphs 60 to 67 of this judgment, the exclusion of the on-call duty allowance from the pay which a pregnant worker, temporarily granted leave from work during her pregnancy, is entitled to claim cannot be regarded as contrary to Article 11(1) of Directive 92/85.

76 Having regard to all of the foregoing, the answer to be given to the referring court is that Article 11(1) of Directive 92/85 must be interpreted as not precluding national legislation which provides that a pregnant worker temporarily granted leave from work on account of her pregnancy is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her pregnancy with the exception of the on-call duty allowance.

The entitlement to the on-call duty allowance of a worker on maternity leave

77 The referring court also asks whether Article 11(2) and (3) of Directive 92/85 must be interpreted as precluding national legislation which provides that a worker on maternity leave is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her maternity leave with the exception of the on-call duty allowance.

78 As is clear from paragraphs 61 and 64 of this judgment, as it is based on the employment relationship and paid to the worker according to the length of the on-call duty performed during overtime hours and the average number of calls on the worker made during that period, the on-call duty allowance falls within the definition of pay in Article 141 EC.

79 However, it does not follow that a worker who is absent from work on account of maternity leave is entitled, in accordance with Article 11(2) and (3) of Directive 92/85, to all the supplements and allowances that she receives every month when she is working and carries out the duties entrusted to her by her employer.

80 According to settled case-law, workers taking maternity leave provided for by national legislation are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work, or on sick leave (see, to that effect, Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 17; Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 40; and *Alabaster*, paragraph 46).

81 The maternity leave granted to a worker is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25; Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 25; and *Boyle and Others*, paragraph 41).

82 In those circumstances, pregnant workers cannot usefully rely on the provisions of Article 141 EC or Article 11(2) and (3) of Directive 92/85 to claim that they should continue to receive full pay while on maternity leave as though they were actually working, like other workers (see, to that effect, *Gillespie and Others*, paragraph 20, and *Alabaster*, paragraph 46).

83 As is clear from Directive 92/95 and the relevant case-law of the Court, the legislature of the European Union wished to ensure that, during her maternity leave, the worker receives an income at least equivalent to the sickness allowance provided for by national social security legislation in the event of a break in her activities on health grounds (*Boyle and Others*, paragraph 32).

84 Female workers must be guaranteed an income of that level during their maternity leave, irrespective of whether, in accordance with Article 11(2)(b) of Directive 92/85, it is paid in the form of an allowance, a payment, or a combination of the two (*Boyle and Others*, paragraph 33, and *Lewen*, paragraph 22).

85 In accordance with Article 11(2) and (3) of the directive, during maternity leave, the employer must ensure that workers continue to receive a payment and/or entitlement to an adequate allowance, and the income guaranteed to female workers during maternity leave must be adequate within the meaning of Article 11(3) whether it is

paid in the form of a payment, an allowance, or a combination of the two (*Boyle and Others*, paragraph 34).

86 Where a worker is absent from work because she is on maternity leave, the minimum protection required by Article 11(2) and (3) of Directive 92/85 does not therefore require that the person concerned should continue to receive full pay or the payment of the on-call duty allowance.

87 In the case in the main proceedings, the referring court is unsure, however, as to the possible effect on the entitlement to remuneration of a worker on maternity leave of the fact that the Member State provides that that worker is entitled to pay equivalent to the average earnings that she received during a reference period prior to the beginning of her maternity leave with the exception of the on-call duty allowance.

88 In that connection, it should be recalled that Article 11(2) and (3) of Directive 92/85 provides only for minimum protection with respect to the entitlement to income of pregnant workers who have been granted leave from work during their maternity leave under Article 8 of that directive. No provision of the directive prevents the Member States or, where appropriate, management and labour from providing that a pregnant worker should continue to receive all the pay components and allowances, including the on-call duty allowance, to which she was entitled before her pregnancy and maternity leave.

89 Directive 92/85, which was adopted in accordance with Article 118A of the EC Treaty (Articles 117 to 120 of the EC Treaty were replaced by Articles 136 EC to 143 EC), does not prevent a Member State, as is clear from Article 137(4) EC, from maintaining

or introducing more stringent protective measures provided that they are compatible with the provisions of the Treaty (see, to that effect, *Jiménez Melgar*, paragraph 37).

90 If the pay scheme provided for by national legislation such as that at issue in the main proceedings constitutes a protective measure more favourable to workers on maternity leave than that required by Directive 92/85, the exclusion of certain pay components from the calculation of the income due during maternity leave cannot be regarded as contrary to Article 11(2) and (3) of that directive.

91 Accordingly, the answer to be given to the referring court is that that Article 11(2) and (3) of Directive 92/85 must be interpreted as not precluding national legislation which provides that a worker on maternity leave is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her maternity leave, with the exception of the on-call duty allowance.

Question 2 relating to the consequences of the lack of direct effect

92 By this question, the referring court asks essentially whether, if the provisions of Article 11(2) and(3) of Directive 92/85 do not have direct effect, they must be implemented by the Member States so that a worker who, during the prohibition on working covering pregnant women and/or women on maternity leave, no longer performs on-call duties at the workplace should be entitled to continue receiving an allowance corresponding to such duties.

93 Given the reply to the Question 1(a), there is no need to answer the second question.

Costs

94 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Third Chamber) hereby rules:

1. **Article 11(1) 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) has direct effect and gives rise, for the benefit of individuals, to rights which they can rely on against a Member State which has failed to implement that directive in national law or has implemented it incorrectly, and which the national courts are required to protect.**

2. **Article 11(1) of Directive 92/85 must be interpreted as not precluding national legislation which provides that a pregnant worker temporarily granted leave from work on account of her pregnancy is entitled to pay equivalent**

to the average earnings she received during a reference period prior to the beginning of her pregnancy with the exception of the on-call duty allowance.

3. Article 11(2) and (3) of Directive 92/85 must be interpreted as not precluding national legislation which provides that a worker on maternity leave is entitled to pay equivalent to the average earnings she received during a reference period prior to the beginning of her maternity leave with the exception of the on-call duty allowance.

[Signatures]