OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 7 October 1999 *

1. By order of 16 April 1998, the Landesarbeitsgericht (Higher Labour Court) Mecklenburg-Vorpommern referred to the Court for a preliminary ruling a question on the interpretation of Article 2(1) of Council Directive 76/207/EEC. [1] Its purpose is to clarify whether the refusal by an employer to employ a pregnant woman on the grounds that, under national maternity legislation, she could not carry out from the outset the duties entailed by the post, should be considered to be discrimination on grounds of sex, which is incompatible with Community law.

Community law

2. Council Directive 76/207/EEC of 9 February 1976 (hereinafter 'the Directive') [2] put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and social security. [3]

3. Article 2(1) of the Directive defines the principle of equal treatment, stating that it is to 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.'

Paragraph 3 of the same article introduces a kind of derogation by which 'this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

4. For the purposes of this case Article 3 of the Directive is also important, which states 'application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.'

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

2 — Cited above.

3 — Article 1(1).

National law

5. The national law relevant to this case is contained primarily in Paragraph 611a of the BGB (German Civil Code).

According to this provision, an employer may not discriminate against an employee on grounds of sex under any agreement or measure, in particular when initiating the contractual relationship, in connection with promotion, when giving instructions and in connection with dismissal. However, different treatment may be considered legitimate in so far as the sex of the worker constitutes a determining factor for carrying out the work.

6. Paragraphs 3 to 5 of the Mutterschutzgesetz (Law on the Protection of Working Mothers) are also important. Paragraph 3 provides that during pregnancy pregnant women must not be employed if, as attested by a medical certificate, the life or health of the mother or child will be jeopardised if the mother continues to work. In any event, pregnant women must not work during the six weeks preceding confinement unless they specifically state their wish to continue working. This declaration can be revoked at any time.

Paragraph 4 lists the duties which cannot be carried out during pregnancy. Pregnant women may not perform heavy physical work or work exposing them to the harmful effects of substances or rays, dusts, gases or steam, heat, cold or humidity, vibrations or noise that pose a risk to health. In addition, it is specifically prohibited, among other things, for pregnant women to carry out work after the fifth month which requires them to stand for more than four hours a day, and for tasks to be assigned to them which, because of their pregnancy, may expose them to a greater risk of contracting an occupational illness or which, by reason of that risk, endanger the pregnant women or foetus to a greater degree.

Finally Paragraph 5(1) provides that the pregnant worker must inform her employer of the pregnancy and probable date of confinement as soon as she knows that she is pregnant.

Facts and question referred for a preliminary ruling

7. Ms Silke-Karin Mahlburg (hereinafter 'the applicant') is a nurse who worked under a fixed-term contract from 26 August 1994 to 31 August 1995 at the Rostock University Heart Surgery Clinic.

8. In February 1995, she asked to be employed for an indefinite period in that hospital. However, the University's personnel department told her that such engagement was not possible and that it was necessary to apply for an advertised post.

9. On 1 June 1995, the applicant applied for two posts for an indefinite period which had become vacant in the hospital. Those posts were for two vacancies for shift work in the operating theatre, to be filled immediately. The duties were equivalent to her current job under her fixed-term contract. They consisted of the preparation and supervision, in accordance with instructions, of all sterile instruments and medicines required for operations and the handling of instruments during operations. As far as the required qualifications were concerned, one of the two posts was for a 'fully qualified operating theatre nurse' whilst the other post was for a 'fully qualified nurse with operating theatre experience.'

10. In the meantime, the applicant found that she was pregnant. Since she was still under a fixed-term contract, she informed the University of her pregnancy on 13 July 1995, in accordance with Paragraph 5(1) of the Mutterschutzgesetz.[4] Following that letter, and in accordance with the provisions also contained in the Mutterschutzgesetz, the applicant was no longer employed in the operating theatre, but employed in clerical work until the expiry of the contract.

11. As a further consequence of this letter, on 18 September 1995 the University of Rostock informed the applicant that she would not be appointed to either of the two posts. The reason given was that the posts required the performance of duties in the operating theatre which are prohibited for pregnant women, under Paragraphs 3 to 5 of the Mutterschutzgesetz.

12. It should also be noted that only one other candidate applied for the two posts in question. That applicant, who was also pregnant, was also refused. As a result, the two vacancies were not filled until the autumn of 1995 following an open selection procedure.

4 — See point 3 of this Opinion.

13. Following the refusal, the applicant appealed to the Arbeitsgericht (Labour Court), Rostock, asking that court to rule that her working relationship with the University of Rostock continued to exist after 31 August 1995 (expiry date of the fixed-term contract) or, alternatively, that the University of Rostock should pay her compensation.

14. The court rejected the appeal on 15 April 1997. The applicant appealed against that decision to the Landesarbeitsgericht Mecklenburg-Vorpommern and asked it to rule that as from 1 September 1995 an employment relationship had been created by virtue of which she had been employed for an indefinite period as an operating theatre nurse. As stated in the observations presented by the applicant, this claim is based on the circumstance that, due to discrimination on the grounds of sex, the applicant had obtained the right to be employed by the University.

15. According to the order for reference, the Landesarbeitsgericht takes the view that the question whether or not the applicant has the right to employment depends on the interpretation to be given to Paragraph 611a of the BGB. According to the referring court, from the case-law of the Bundesarbeitsgericht (Federal Labour Court) it can be concluded that Paragraph 611a does not preclude an employer from deciding not to appoint a pregnant worker when, because of her condition, she is not able to do the job applied for.

16. However, the Landesarbeitsgericht also maintains that, as the aforementioned paragraph of the German Civil Code transposes the Directive into German law, it must be interpreted in conformity with the Directive.

17. Taking the view that there are legitimate doubts as to whether the interpretation of Paragraph 611a of the BGB is compatible with the Directive and in particular with Article 2(1) thereof, the Landesarbeitsgericht has referred the following question to the Court for a preliminary ruling:

'Is there unlawful discrimination on grounds of sex within the meaning of Article 2(1) of Directive 76/207/EEC of 9 February 1976 where an employer does not employ an applicant in a vacant post, which she is qualified to hold, because she is pregnant and cannot from the outset and for the duration of her pregnancy be

employed in the post which is intended to be occupied permanently, because of a prohibition on employment under the Mutterschutzgesetz?'

The question referred for a preliminary ruling

18. The Court is asked once again to give a ruling on the question, already widely dealt with in previous judgments, of the implementation of the principle of equal treatment between men and women in the particular case of pregnant women.

19. In the present case, the national court asks whether the Court considers the refusal by an employer to employ a pregnant woman to constitute discrimination on grounds of sex where the refusal is based on the fact that the woman could not carry out the duties entailed by the post for the duration of her pregnancy, owing to a prohibition laid down in the national maternity legislation.

20. On this point, it should be emphasised first of all that, as is clear in particular from the *Dekker* case,[5] a refusal to employ a woman must be regarded as direct discrimination on grounds of sex if the fundamental reason for the refusal applies only to female workers and not to male workers. Upon the application of this principle, the Court has emphasised many times that '... only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex.'[6]

21. More recently, in the *Brown* case,[7] concerning the legality of the dismissal of a pregnant employee on the grounds of prolonged absences for illness related to her pregnancy, the Court stated that '... dismissal on account of pregnancy, *or essentially on account of pregnancy*, can affect only women and therefore constitutes direct discrimination on grounds of sex.' It is clear that with this judgment — which can also be extended fully to a refusal of employment[8] — the Court wanted to stress that, in order for a measure taken with regard to a pregnant woman to be considered to be direct discrimination, it is not necessary for it to be explicitly based on her pregnant state. It is sufficient that the

5 — Case C-177/88 *Dekker* [1990] ECR I-3941, at paragraph 10.

6 — *Dekker*, cited above, at paragraph 12. See also Case C-179/88 *Handels-og Kontorfunktionærernes Forbund* [1990] ECR I-3979, at paragraph 13; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, at paragraph 15, and Case C-32/93 *Webb* [1994] ECR I-3567, at paragraph 19.

7 — Case C-394/96 *Brown* [1998] ECR I-4185, at paragraph 16, italics added.

8 — In my opinion it is undisputed that, as regards the aspects which interest us here, refusal of employment is equivalent to dismissal. In both cases, in fact, we have a measure by which the pregnant woman is deprived of her post.

reason given relates essentially to that state. [9]

22. In my view, there can be no doubt that in the present case we have the latter situation. It is true that the refusal to take into consideration the applicant's application was based on the fact that she would not be able to carry out her duties from the outset. However, it is also evident that this situation is clearly due to the pregnancy and therefore, at least in principle, that the conduct of the University of Rostock must be considered to be contrary to Article 2(1) and Article 3 of the Directive.

23. That being so, it is also necessary to examine whether the conduct in question can be justified under the national maternity legislation contained in the Mutterschutzgesetz. As I have already stated, [10] the University of Rostock argues that this legislation, in prohibiting pregnant women from carrying out during their pregnancy certain duties considered to be dangerous, imposes a real, actual legal prohibition against employing the applicant.

24. To deal with this question we must start from two assumptions. First, the Mutterschutzgesetz represents, in Germany, the implementation of the possibility of derogation from equal treatment as provided for in Article 2(3) of the Directive. As can be seen clearly from the text, [11] this provision authorises the Member States to introduce or maintain in force national provisions which involve different treatment according to sex if these provisions are designed to protect the woman during her pregnancy and the period immediately after childbirth. Second, as is shown by case-law which is now well established, [12] when a national court has to give a judgment on a case which falls within the scope of a directive, it is under a duty to interpret the national law in the light of that directive.

25. It follows that, in the case now before us, the possibility of justifying the refusal to employ a pregnant woman by referring to a rule laid down in national maternity law prohibiting the performance of particular duties does indeed depend on the interpretation of Article 2(3) of the Directive. In other words, to resolve the question posed by the referring court, we must inquire whether the derogation from the principle of equal treatment provided for by the aforementioned Community provision can properly be applied to this case.

9 — On this point, see the Opinion of Advocate General Tesauro in *Webb*, cited above, in particular points 9 and 10.

10 — See point 11 of this Opinion.

11 — See point 3 of this Opinion.

12 — See Case 111/75 *Mazzalai* [1976] ECR 657, at paragraph 10; Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, at paragraph 26, and Case C-106/89 *Marleasing* [1990] ECR I-4135, at paragraphs 7 and 8.

26. In my opinion, the answer to this question must be negative. As the Court held in the *Hoffman* case, [13] Article 2(3) of the Directive, 'by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with "pregnancy and maternity", ... recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter, until such time as her physiological and mental functions have returned to normal after childbirth, and secondly, it is legitimate to protect the special relationship between a woman and her child, over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.'

27. Moreover, in the *Thibault* case, [14] the Court held that '... the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, and not formal, equality.'

28. It seems to me that it is clear from the case-law cited that the main purpose of the Community provision under consideration is to allow the Member States the possibility of introducing or maintaining in force national legislation which, even though it implies different treatment between the two sexes, is necessary to 'compensate' for the disadvantageous situations which may affect women because of pregnancy, the idea being to achieve real equality even in cases where simple formal equality, achieved though identical treatment, would not be sufficient. It must therefore be considered that Article 2(3) of the Directive authorises derogations from the principle of equal treatment only if two conditions are met, namely, if women are guaranteed greater protection, and therefore more favourable treatment than men, and if this treatment has the specific aim of obtaining substantial equality which is otherwise not achievable.

29. It is clear that in the case now under consideration these two conditions are not met. Any application of the national legislation adopted in implementation of Article 2(3) of the Directive would, firstly, not offer the applicant more favourable treatment but, on the contrary, would penalise her by denying her access to employment. Secondly, real equality would not be

13 — Case 184/83 *Hofmann* [1984] ECR 3047, at paragraph 25. Also see *Habermann-Beltermann*, cited above, at paragraph 21; *Brown*, cited above, at paragraph 17; and *Webb*, cited above, at paragraph 20.

14 — Case C-136/95 *Thibault* [1998] ECR I-2011, at paragraph 26. Also on this point, see the Opinion of Advocate General Tesauro in the *Habermann-Beltermann* case, cited above, in particular point 11.

achieved, but would itself become the cause of discriminatory conduct. I therefore consider that such an application of the provisions of the Mutterschutzgesetz would be clearly contrary to the *ratio* of the Community provision.

30. The Court has indeed already ruled to this effect in the *Habermann-Beltermann* case. [15] At issue there was the alleged discriminatory nature of a measure by which an employer had terminated a contract with a female worker who had become pregnant soon after starting her job. This action, like that now under consideration, was purportedly based on the fact that, under the provisions of the Mutterschutzgesetz, the female worker could not carry out the contractually stipulated night-time work for the duration of her pregnancy and the period immediately after childbirth. [16]

In that case, the Court stated that '... to acknowledge that the contract may be held to be invalid or may be avoided because of the temporary inability of the pregnant employee to perform the night-time work for which she has been engaged, would be contrary to the objective of protecting such persons pursued by Article 2(3) of the Directive, and would deprive that provision of its effectiveness.' It added that 'termination of a contract for an indefinite period on grounds of the woman's pregnancy, whether by annulment or avoidance, cannot be justified by the fact that she is temporarily prevented, by a statutory prohibition imposed because of pregnancy, from performing night-time work.' [17]

31. Another particularly important point emerges from the case mentioned above. As I have already stated, [18] in the present case, the two posts for which the applicant applied were both for an indefinite period. In *Habermann-Beltermann* [19] the Court held that the discriminatory behaviour against the pregnant woman could not be justified under Article 2(3) of the Directive, as '... the questions submitted for a ruling relate to a contract for an indefinite period' and that 'the prohibition on night-time work by pregnant women therefore only takes effect for a limited period in relation to the total length of the contract.'

15 — *Habermann-Beltermann*, cited above.

16 — The similarities of that case with the present case are even greater if we accept the argument of Advocate General Tesauro in *Habermann-Beltermann*, that '... a declaration of invalidity, since it operates retroactively and thus has precisely the same effect as if the contract had never been concluded, would amount to a refusal to engage her' (point 7).

17 — *Habermann-Beltermann*, cited above, at paragraphs 24 and 25.

18 — See point 9 of this Opinion.

19 — *Habermann-Beltermann*, cited above, at paragraph 23.

This aspect assumed even more importance in the *Webb* case.[20] That case concerned the dismissal of a female worker who found that she was pregnant soon after taking up her employment. The grounds given were that for the period corresponding to the maternity leave the worker could not carry out the main task for which she was employed: to replace another employee who was also pregnant. Despite the fact that the post was temporary, the employer had clearly given the worker an assurance that the contract would be continued after the period of replacement. Consequently, the post had to be considered to be for an indefinite period.

On the basis of these factors, the Court decided that '... dismissal of a pregnant woman, recruited for an indefinite period, cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the Directive.'

The Court therefore concluded that '... termination of a contract for an indefinite period on the grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged.'[21] It seems to me that this ruling can be transposed to the present case excluding, from this point of view also, the applicability of the derogation laid down in Article 2(3) of the Directive.

32. In view of all the considerations set forth above and taking into account the case-law cited, I consider that in this case the conclusion must be that a national law, adopted in application of Article 2(3) of the Directive, which bars a pregnant woman from carrying out certain duties considered to be dangerous to her health or that of her unborn child cannot be successfully invoked to justify a directly discriminatory action such as refusal of employment on the grounds that this woman cannot temporarily carry out the duties for which she was employed for an indefinite period. Such use of the national legislation would

20 — *Webb*, cited above.

21 — *Webb*, cited above, at paragraphs 26 and 27.

be clearly contrary to the aims of the Community provision which it implements and would render the maternity protection granted by the Directive ineffective.

33. That being so, I think it is appropriate at this point to make some comments on a question raised during the hearing. It concerns the problem of the costs, sometimes very high, which employers may be forced to bear to ensure equal treatment for pregnant women and thus guarantee maternity protection. Indeed, it has been asked whether it is always necessary to favour the principle of non-discrimination or whether, in certain circumstances, exceptions may be justified to take into account the requirements of more vulnerable employers.

34. There is no doubt that the fact that often much of the burden of maternity protection falls on employers is a real problem which deserves attention. However, I do not think that this can influence in any way the conclusions reached above. Equal treatment for men and women, especially in situations such as those we are now considering, represents a fundamental principle of Community law, which cannot be subject to restrictions to cater for this type of requirement.

35. Among other things, at least as far as the economic aspects are concerned, the case-law of the Court is very clear. In its judgment in *Dekker* it expressly ruled that '... a refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.' [22]

36. In my opinion, therefore, the question raised at the hearing should find an answer in 'positive' action to protect the position of more vulnerable employers, to be achieved within the context of the social policy of the Member States, perhaps even with the support of coordination at Community level. I would only add that provision for such action would not necessarily be contrary to the protection of women. On the contrary, the position of women would be strengthened by eliminating the *raison d'être* of much discriminatory behaviour.

22 — *Dekker*, cited above, at paragraph 12.

Conclusion

37. On the basis of the considerations set out above, I propose that the Court should answer the question from the Landesarbeitsgericht Mecklenburg-Vorpommern as follows:

The fact that an employer does not appoint a candidate to a vacant post, which she is qualified to hold, on the grounds that, being pregnant, the candidate cannot from the outset and during her pregnancy be employed in the post which is for an indefinite period, because of a maternity law rule prohibiting pregnant women from being employed in certain jobs, must be considered to be unlawful discrimination on grounds of sex within the meaning of Article 2(1) of Council Directive 76/207/EEC of 9 February 1976.