OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 18 February 1997 *

1. The question referred for a preliminary ruling by the Court of Justice in the present case has been raised by the Danish Sø- og Handelsret (Maritime and Commercial Court), which seeks an interpretation of a number of provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. [1]

2. That question arises in the dispute currently 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, plaintiff and defendant respectively.

3. According to the facts as set out in the order for reference, Ms Larsson was engaged by Føtex in March 1990. In August 1991, she informed her employer that she was pregnant.

During her pregnancy, she was absent on medical grounds on two occasions. The first occasion lasted 18 days (from 7 to 24 August 1991). The second was the result of a loosening of the pelvic ring caused by her pregnancy and lasted some four and a half months (from 4 November 1991 to 15 March 1992). Immediately afterwards, her maternity leave commenced, and she gave birth on 2 April 1992.

4. The 24 weeks' maternity leave to which she was entitled came to an end on 18 September 1992. Thereafter, she took annual leave until 16 October.

During her maternity leave and annual leave, Ms Larsson continued to be treated for the loosening of her pelvic ring. She remained absent on medical grounds once her leave was over and was not considered fit for work until 4 January 1993.

5. On 10 November 1992, less than a month after the end of her annual leave, her employer sent her a letter informing her that

* Original language: Spanish.

1 — OJ 1976 L 39, p. 40.

she was dismissed with effect from the end of December. The reasons given for the dismissal were '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'.

6. Ms Larsson brought an action challenging her dismissal, alleging that it contravened the national law on equal treatment and seeking compensation of DKR 172 602, corresponding to 78 weeks' salary. The defendant objected that, without prejudice to the provisions of national law, Directive 76/207 does not preclude a woman from being dismissed after the expiry of her maternity leave on the ground of absence due to an illness attributable to pregnancy or confinement and that Danish law does not lay down any specific rules affording special protection to a woman in that situation.

7. The parties asked the Sø- og Handelsret to seek a preliminary ruling from the Court of Justice on the interpretation of Article 5(1) of Directive 76/207. In a note to the parties of 4 April 1995, the national court considered that, in the light of this Court's ruling in Case C-179/88 [2] (the '*Hertz*' judgment), there was no need to seek such a ruling.

In written observations, the defendant accepted that view; the plaintiff, however, in a written submission dated 6 July 1995, reiterated the request for the case to be referred to the Court of Justice, arguing that the judgment cited requires a distinction to be drawn between illnesses which arise during the period of maternity leave and those which arise subsequently and are attributable to the pregnancy or confinement.

8. By decision of 16 August 1995, the Sø- og Handelsret rejected the request for a reference for a preliminary ruling, on the ground that there was no reason to suppose that in its answer the Court of Justice would take a different approach from that which it had adopted in *Hertz*. The plaintiff appealed against that decision to the Højesteret (Supreme Court), which upheld the appeal.

As a result of the Højesteret's ruling, the Sø- og Handelsret made a new order on 19 December 1995, referring the following

2 — *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* [1990] ECR I-3979.

question to the Court of Justice for a preliminary ruling:

'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?'

9. Article 1 of Directive 76/207 provides:

'1. The purpose of this directive is to 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, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".

2. ...'

10. Under Article 2:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. ...

3. This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

4. ...'

11. Finally, according to Article 5:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaran-

teed the same conditions without discrimination on grounds of sex.'

12. The plaintiff and the defendant in the main proceedings, the United Kingdom, the Netherlands Government and the Commission all submitted written observations within the period prescribed by Article 20 of the EC Statute of the Court of Justice, and the plaintiff, the defendant, the Danish Government, the United Kingdom and the Commission made oral submissions at the hearing.

13. The plaintiff submits that the Court must be considered to have drawn a distinction in the *Hertz* judgment between illnesses attributable to pregnancy or confinement which arise during pregnancy or maternity leave, although recovery does not take place until later, and those which arise after the expiry of the maternity leave. Were that not so, whether the protection enjoyed by a woman in the event of illness complied with the principles of Community law would depend solely on the length of the maternity leave determined by each Member State.

In the present case, moreover, the only period of absence on medical grounds which can be taken into account is that which began in mid-October 1992, after the period of protection comprising Ms Larsson's pregnancy and maternity leave and once her annual leave had come to an end. On 10 November, when she was notified of her dismissal, she had been absent on medical grounds for less than four weeks — a very short period from any point of view and one which would never have led to dismissal in the case of a man.

14. The defendant asserts that, when it notified the plaintiff of her dismissal, it was unaware of the precise reasons for her absence on medical grounds during her pregnancy and after the expiry of her maternity leave. It submits that, in the light of the provisions of Directive 76/207 whose interpretation is sought by the national court, of the drafting history of that measure, of the *Hertz* judgment and of the Opinion of Advocate General Darmon in that case, the answer to the question should be in the negative. It maintains that the fact that Ms Larsson suffered, during her pregnancy and maternity leave and after the expiry of that leave, from a complaint attributable to her pregnancy does not place her in a different legal position from that of the plaintiff in the *Hertz* case, both having been dismissed after the expiry of their maternity leave in accordance with Danish law, which grants women protection against dismissal for absence attributable to pregnancy and confinement for a period ending, at the latest, 24 weeks after childbirth.

15. At the hearing, the Danish Government concentrated on two aspects of the case. First, it stressed the differences between the facts which led to Ms Hertz's dismissal and the circumstances in which Ms Larsson was dismissed: the former did not fall ill until several months after resuming work and was absent on medical grounds for 100 working days in the course of a year, whereas Ms Larsson fell ill during her pregnancy, did not have an opportunity to resume work after her confinement and was dismissed less than four weeks after she should have done so. Second, it explained the need to divide Ms Larsson's absence from work into four separate periods: her absence on grounds of illness attributable to the pregnancy before confinement; her maternity leave; her annual leave; and her absence subsequently accorded on medical grounds because she was suffering from an illness attributable to her pregnancy, this last period of absence being the only one which could be taken into account for the purpose of her dismissal.

It suggests that the Court should answer the question referred to it by declaring that Directive 76/207 precludes a woman from being dismissed after the expiry of her maternity leave where that dismissal is based on periods of absence from work during pregnancy as a result of an illness attributable to that pregnancy and/or on absence during maternity leave.

16. The United Kingdom submits that no distinction is to be drawn according to whether the illness first arose during the maternity leave or later. It considers that the principle underlying the Court's judgment in *Hertz* is that the Directive requires that women be protected against adverse treatment for reasons linked to pregnancy or its inherent risks and consequences. Such protection includes the recognition by the Member States of a sufficient period of maternity leave to accommodate the normal consequences of pregnancy; Directive 76/207 goes no further, although the Member States may, if they wish (and they are not obliged to do so), establish more extensive protection on the basis of Article 2(3).

Thus, a woman suffering from a pregnancy-related illness outside the period of maternity leave established by national law is to be treated in the same manner as any other sick employee, irrespective of sex, it being irrelevant in that regard whether the woman's illness arose during her maternity leave or outside it. The United Kingdom proposes that the answer to the national court's question should be that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of Directive 76/207, Articles 5(1) and 2(1) of that directive do not preclude the

dismissal of a woman as a result of absence outside the period of maternity leave provided for by national legislation, even if the absence is attributable to an illness which arose as a result of pregnancy, if the maternity leave period is sufficient to accommodate the normal consequences of pregnancy and a man who was absent on sick leave for a similar period, excluding the maternity leave period, would also have been dismissed.

17. The Netherlands Government considers that, where the periods of absence were due to illness attributable to pregnancy or confinement and took place after the expiry of maternity leave, dismissal cannot be contrary to Articles 5(1) and 2(1) of Directive 76/207. It points out that, on the basis of Article 2(3) of the Directive, Member States may, but are not obliged to, establish measures giving women special protection as regards pregnancy and maternity. It adds that Article 10(1) of Directive 92/85/EEC [3] requires Member States to take the necessary measures, by 19 October 1994, to prohibit the dismissal of workers who have given birth or are breastfeeding during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases not connected with their condition which are permitted under national legislation, and, where applicable, provided that the competent authority has given its consent.

That would appear, on the face of it, to be the period considered by the Community legislature to be sufficient to protect women against dismissal for absence from work attributable to pregnancy and confinement, without there being any obligation on the Member States to provide more extensive protection. The Netherlands Government therefore submits that the national court's question should be answered in the negative.

18. The Commission regrets the absence of detailed information concerning both the national legislation and the contract terms applicable to the employment relationship and in particular the absence of information as to whether the periods of absence on medical grounds during pregnancy may be added to those occurring after maternity leave for the purpose of calculating the duration of the absence from work due to illness.

It considers that the answer to the question on which a preliminary ruling is sought involves a decision on two aspects: it is necessary to determine, first, whether the ruling in *Hertz* applies also when the illness had

3 — 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).

already arisen during pregnancy and continued during maternity leave, with recovery taking place only subsequently; and, second, whether it is contrary to Community law for an employer to take account, when calculating the duration of the absence from work forming grounds for dismissal under national law, both of absences between the beginning of pregnancy and the beginning of maternity leave and of the duration of that leave itself. In that regard, it would appear that the reason for Ms Larsson's dismissal was her 'lengthy period of absence'; however, taking account of the fact that her maternity leave ended on 18 September 1992 and that she then took one month's paid leave, she had been absent on account of illness for less than one month when she was notified of her dismissal.

19. In the Commission's view, if the employer counted the length of the maternity leave for the purposes of the dismissal, it was guilty of direct discrimination on grounds of sex, since the dismissal must thus have been based on a circumstance which affects only women. As regards dismissal for absence due to illness during pregnancy, Community law did not, prior to the entry into force of Directive 92/85, preclude dismissal of a woman, provided that men would be dismissed in comparable circumstances. Where the illness concerned is attributable to pregnancy and arises before the beginning of maternity leave, however, the Commission, after examining the various possible solutions, inclines to the view that, according to the Court's case-law, it is contrary to Directive 76/207 for the employer to take account, in justification of a dismissal, of a pregnant woman's periods of absence on medical grounds, where the illness is attributable to the pregnancy. In that regard, it considers that the prohibition of dismissal of a woman between the beginning of her pregnancy and the end of her maternity leave, laid down in Article 10(1) of Directive 92/85, is no more than the legislative embodiment of a pre-existing legal situation.

The Commission proposes that the Court should give the answer that Article 5(1) and Article 2(1) of Directive 76/207 do not preclude the dismissal of a woman on grounds of illness attributable to pregnancy or confinement, after the end of maternity leave, unless that dismissal is based entirely or in part on absence from work during her pregnancy or maternity leave.

20. In their observations to the Court, the parties to the main proceedings, the United Kingdom, the Netherlands Government and the Commission all stress the similarity between the question raised and answered in *Hertz* and that raised in the present case. I agree that similar points arise in both cases, but they are distinguished by a fundamental difference, which I shall consider in detail.

21. The facts in *Hertz* were as follows: Ms Hertz was engaged by a supermarket as a part-time cashier and saleswoman on 15 July 1982. One year later, after a pregnancy marked by complications for most of which, with the consent of her employer, she was on sick leave, she gave birth to a child. On the expiry of her maternity leave which ran for 24 weeks after the birth, Ms Hertz resumed her work in late 1983 and had no health problems until June 1984. Between then and June 1985, however, she was once more on sick leave, for 100 working days. It was common ground between the parties that the illness was a consequence of her pregnancy and confinement.

In June 1985, her employer informed her that it was terminating her contract of employment with the statutory four months' notice, stating that her periods of absence were the ground for her dismissal and that it was normal practice to dismiss workers who were often absent owing to illness.

22. The national court hearing the case sought a preliminary ruling by the Court of Justice on whether the provisions of Article 5(1), in conjunction with Article 2(1), of Directive 76/207 encompassed dismissal as a consequence of absence due to illness attributable to pregnancy or confinement and, if so, whether protection against dismissal due to such illness was unlimited in time.

23. In its judgment, the Court stated: '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. Such a pathological condition is therefore covered by the general rules applicable in the event of illness.' [4] In answer to the national court's questions, it held that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of Directive 76/207, 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.

24. Comparing the two cases, I can see a number of similarities, since both Ms Hertz and Ms Larsson were dismissed by their respective employers after the end of their maternity leave and the reason given in both cases was absence from work on account of an illness attributable to pregnancy or confinement.

4 — Cited in footnote 2 above, paragraph 16 of the judgment.

25. If the only difference between the two cases had been the fact that Ms Hertz's illness arose after the end of her maternity leave while Ms Larsson's had already arisen during her pregnancy, the answer to be given would, in my view, have to be the same again. As the Court said in *Hertz*, '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.' [5]

26. But I consider that the Court should not confine itself to answering the present question in those terms, but should carry its examination further, since, in my view, that is not the only difference. On a further comparison of the two cases, it is apparent that in Ms Hertz's case the absence on medical grounds which gave rise to her dismissal came to a total of 100 working days over a year, all of which were taken after the end of her maternity leave; Ms Larsson, however, was notified of her dismissal less than one month after the date on which she should have resumed work, once she had taken her maternity leave and annual leave.

I therefore consider it necessary to look at the possibility that, when establishing the reasons for Ms Larsson's dismissal, account was taken not only of that period but also of the period of nearly five months during which she was absent on medical grounds during her pregnancy and to examine whether that would be compatible with the principle of equal treatment for men and women with regard to working conditions, including the conditions governing dismissal, laid down in Article 5(1) of Directive 76/207.

27. It would have been preferable had the national court referring the question provided more details as to the Danish law applicable to dismissal for absence from work and, more particularly, dismissal for absence on medical grounds. In any event, whatever the content of that legislation, which it is for the national court to apply, it is clear that, in the event of their dismissal from work, men and women must be treated in the same way, without discrimination on grounds of sex.

28. To ensure that the answer given to the national court is as complete as possible, I shall examine first the situations in which a woman worker who has given birth may find herself, in relation to absences from work justified on medical grounds.

5 — *Ibidem*, paragraph 17.

Then, in view of the possibility that account was taken, when Ms Larsson was dismissed, of the period of nearly five months during which she was absent on medical grounds during her pregnancy, I shall analyse — in the light of this Court's judgments interpreting Directive 76/207 and of the view, which I share, of Advocate General Darmon [6] and Advocate General Tesauro [7], that substantive equality between men and women at work requires that no account be taken, either as regards access to employment or during the employment relationship, of a circumstance which, by definition, affects only women — whether that dismissal meets the requirements of the principle of equal treatment or whether, on the contrary, her employer was guilty of direct discrimination on grounds of sex by taking account of a circumstance which can apply only to women.

The periods of absence following the maternity leave

29. As I have already said at point 25 above, I consider that the ruling in *Hertz* must be applied to periods of absence on medical grounds after the end of maternity leave, irrespective of the moment of onset of the illness or even whether it originated in pregnancy. In Ms Larsson's case, her period of absence on medical grounds after the end of her annual leave must be taken into account, for the purposes of her dismissal, in the same way as for a male worker.

The maternity leave

30. As we know, prior to 19 October 1994, when the period allowed for the transposition of Directive 92/85 into national law came to an end, the adoption of measures to protect women as regards pregnancy and maternity was a matter for the Member States under Article 2(3) of Directive 76/207, which concerns — and we must not lose sight of this — the principle of equal treatment for men and women as regards, *inter alia*, working conditions. Maternity leave, which, in Ms Larsson's case, was 24 weeks under Danish employment legislation, is the most typical example of a measure to protect women adopted by the Member States on the basis of that provision.

This being an exception to the principle of equal treatment, the purpose of which is to

6 — Opinion in Case C-177/88 *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-3941, especially at p. I-3961, point 26.

7 — Opinion in Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, especially at p. I-3573, point 8.

free a woman who has given birth from the obligation to work for a specified period, I consider that not only may she not be dismissed during that period but also that her absence from work cannot be taken into account for the purposes of a subsequent dismissal. That interpretation is inevitable in the light of this Court's statement in *Hertz* that the directive 'admit[s] of national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave. *During the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence.* ...'. [8]

The periods of absence on medical grounds during pregnancy

31. This aspect has not been regulated by Community legislation or decided by the Court of Justice. Consequently, failing regulation by an individual Member State establishing a differentiation in treatment on the basis of Article 2(3) of Directive 76/207, the governing rule must be Article 5(1), which guarantees application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal.

32. Whilst it is certainly true that Article 10 of Directive 92/85 requires the Member States to prohibit the dismissal of women during the period from the beginning of their pregnancy to the end of their maternity leave, that provision does not, in my opinion, resolve the problem I am considering, for a number of reasons.

First, because Ms Larsson was dismissed not during her pregnancy or her maternity leave but after the end of the latter period (leaving aside the fact that the period allowed for transposing the provisions of Directive 92/85 into national law came to an end after the material time in the present case).

Second, because Directive 92/85, the content of which clearly favours protection, establishes a differentiation in treatment in favour of women who are pregnant, have recently given birth or are breastfeeding, with a specific view to improving their safety and health at work. In the ninth recital in the preamble to that directive, it is considered that such protection should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women.

8 — *Hertz*, cited in footnote 2 above, paragraph 15 of the judgment (emphasis added).

Finally, because even if the prohibition of dismissal covering a limited period, on the ground that the risk of dismissal for reasons associated with their condition might have harmful effects on the physical and mental state of pregnant workers, [9] were applicable in the present case, it would still not be clear whether periods of absence on medical grounds during pregnancy can be included with absences before and/or after pregnancy when calculating the periods of absence from work justifying a dismissal taking place after the end of maternity leave.

33. In order to decide whether absence on medical grounds during pregnancy may constitute absence giving grounds for dismissal in accordance with the requirements of the principle of equal treatment for men and women, it is necessary to draw a distinction depending on the cause of the illness. I see no objective reason for not taking a pregnant woman's absence from work, due to illness, into account for the purposes of dismissal in the same way as a man's absences although, since 19 October 1994, an employer must wait until the end of the maternity leave before dismissing a woman. Indeed, I consider that the application of the principle of equal treatment for men and women requires them to be taken into account in the same way.

34. So, where a pregnant woman is absent on medical grounds, may such absences be treated in the same way when the illness is attributable to her pregnancy?

The answer must be no, for two reasons.

35. The first derives from the case-law of this Court, which, although it has not yet given a specific ruling in that regard, has none the less very clearly shown how dismissal of a woman on grounds of pregnancy is to be categorized. The Court's decisions interpreting Directive 76/207 may be summarized, for present purposes, as follows:

— dismissal of a woman on account of pregnancy constitutes direct discrimination on grounds of sex, whereas dismissal on account of repeated periods of sick leave which are not attributable to pregnancy or confinement does not constitute direct

9 — Fifteenth recital.

discrimination on grounds of sex, inasmuch as such periods of sick leave would lead to the dismissal of a male worker in the same circumstances; [10]

— pregnancy is not in any way comparable with a pathological condition or with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex; [11] and

— termination of a contract for an indefinite period on grounds of the employee's pregnancy cannot be justified by the fact that she is temporarily prevented, by a statutory prohibition imposed because of pregnancy, from performing night-time work or by her inability to fulfil a fundamental condition of her employment contract. [12]

36. In the light of that case-law, it would, I feel, be contradictory to say that dismissal of a woman on account of pregnancy constitutes direct discrimination on grounds of sex, that pregnancy cannot be compared with an illness or that dismissal of a pregnant woman cannot be justified by the fact that she is prevented from fulfilling a fundamental condition of her employment contract, whilst at the same time accepting that periods during which the woman has had to be absent on medical grounds on account of an illness attributable to her pregnancy may be taken into account for the purposes of her dismissal once her maternity leave is over.

37. The second reason derives from the principle of equal treatment laid down in Article 5(1), which requires that, in the event of dismissal, men and women are to be guaranteed the same conditions without discrimination on grounds of sex.

38. As I have stated above, Ms Larsson was dismissed once her maternity leave was over on the ground, in the words of her employer, of her 'lengthy period of absence'. It is, however, not disputed that she was notified of her dismissal less than one month after the date on which she should have resumed work on the expiry of her maternity leave and annual leave.

At the time of that notification, her period of absence can be qualified as lengthy only if, when calculating it, account is taken at least of the period of nearly five months during which she was absent on medical grounds

10 — *Hertz*, cited above in footnote 2, paragraphs 13 and 14 of the judgment.

11 — *Webb*, cited above in footnote 7, paragraph 25 of the judgment.

12 — Case C-421/92 *Habermann-Beltermann* v *Arbeiterwohlfahrt Bezirksverband* [1994] ECR I-1657, paragraph 25, and *Webb*, cited above in footnote 7, paragraph 26 of the judgment.

before her maternity leave began, which includes four and a half months of absence due to the loosening of her pelvic ring attributable to her pregnancy and perhaps, although not necessarily, also of her period of maternity leave. I do not believe that her period of annual leave was taken into account.

39. When considering whether dismissal in such circumstances meets the requirements of the principle of equal treatment for men and women or whether it constitutes discrimination, it must be borne in mind, as I have stated at point 28 above, that substantive equality between men and women at work requires that no account be taken of a situation which, by definition, affects only women.

40. Pregnancy is a condition, of limited duration, which affects only women, and does so not in abstract terms but in a very practical manner, with effects which may range from slight discomfort to serious problems affecting health, making it necessary for some women to be absent from work for periods of varying length and with varying degrees of suffering in order to enable their pregnancy to proceed to a successful conclusion.

41. It seems to me to be obvious that, as pregnancy is a situation which can only affect women, problems of health attributable to it cannot be covered by the general rules applicable to both men and women in the event of illness.

If, when reasons are given for a dismissal, periods of absence on medical grounds accorded to a pregnant woman on account of health problems attributable to her pregnancy were to be treated in the same way as a man's absences on account of illness, that would amount to applying the same rule for the calculation of the periods of absence on medical grounds which can give rise to dismissal to two different situations — pregnancy and illness — and would thus constitute direct discrimination on grounds of sex against the woman.

42. For both those reasons, I consider that, for the purposes of applying the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, laid down in Article 5(1) of Directive 76/207, it is necessary to draw a line at the point when the maternity leave comes to an end. From that point on, any illness from which a woman suffers, whether or not occasioned by pregnancy, will fall under the general rules applicable to all workers. Periods of absence on medical grounds due to health problems attributable to pregnancy, up to the moment of childbirth, however, cannot be treated in the same way, for the purposes of dismissal, as a man's absences on grounds of illness.

Conclusion

In the light of the foregoing considerations, I therefore propose that the Court should answer the Sø- og Handelsret's question as follows:

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, does not preclude a woman from being dismissed as a result of periods of absence subsequent to her maternity leave, where those periods of absence are due to an illness which arose during pregnancy and has continued both during and after the maternity leave, unless, when calculating the periods of absence for the purposes of dismissal, account is taken of periods of absence on medical grounds for health problems attributable to pregnancy prior to childbirth.