# OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 4 December 2008 [1]

1. Council Directive 96/34/EC [2] is intended to give both women and men the freedom to decide whether they want to leave the labour market definitively when children arrive, or whether they would like to be able to continue their careers after a temporary break. Inevitably, however, it leaves a number of issues unresolved.

2. In the present reference, the Juzgado de lo Social (Social Court) No 30, Madrid, Spain, asks the Court for clarification on clause 2, points 6 and 8 of the framework agreement on parental leave annexed to Council Directive 96/34/EC ('the framework agreement on parental leave'), as well as on Directive 79/7. [3]

3. The case before the national court was brought by Ms Evangelina Gómez-Limón Sánchez-Camacho ('Ms Gómez-Limón') against the Instituto Nacional de la Seguridad Social (National Institute for Social Security, 'the INSS'), the Tesorería General de la Seguridad Social (General Social Security Treasury, 'the TGSS'), and Alcampo SA. It concerns the amount of an invalidity pension, payable to her, calculated by taking into account the salary effectively received and the contributions effectively paid during her period of parental leave, when her working time was reduced, rather than the salary and contributions that would have corresponded to full-time employment.

4. Does that manner of calculating an invalidity pension infringe Community law?

1 — Original language: English.

2 — Directive of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4).

3 — Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

## Legal framework

*Community legislation*

5. Article 4 of Directive 79/7 provides:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of [social security] schemes and the conditions of access thereto,

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.

2. …'

6. Article 7 of Directive 79/7 provides:

'1 This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) …;

(b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;

…'

7. The purpose of Directive 96/34, as defined in Article 1, is to put into effect the framework agreement on parental leave concluded on

14 December 1995 between the general cross-industry organisations (UNICE, [4] CEEP [5] and the ETUC [6]), which is annexed to that directive.

8. That framework agreement contains the following general considerations:

‘…

8. … men should be encouraged to assume an equal share of family responsibilities, for example they should be encouraged to take parental leave by means such as awareness programmes;

…

11. … Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave;

…’

9. Clause 2, entitled ‘Parental leave’, provides as follows:

‘1. This agreement grants, subject to clause 2.2, [7] men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.

…

4 — Union of Industrial and Employers’ Confederations of Europe. Note that as from 23 January 2007, UNICE changed its name into BUSINESSEUROPE, the Confederation of European Business.

5 — European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest.

6 — European Trade Union Confederation.

7 — Providing that the right to parental leave should, in principle, be granted on a non-transferable basis.

6. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.

…

8. All matters relating to social security in relation to this agreement are for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.'

10. Clause 1 of the Framework Agreement on part-time work, annexed to Council Directive 97/81/EC [8] ('the Framework Agreement on part-time work') defines its purpose as follows:

'…

(a) to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work;

(b) …'

11. Clause 4, entitled 'Principle of non-discrimination', provides:

'1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.

8 — Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9). Although not specifically referred to in the national court's questions, this directive forms part of the Community law framework within which they are to be resolved.

2. Where appropriate, the principle of pro rata temporis shall apply.

…'.

*Spanish legislation*

12. Article 37(5) of the consolidated Workers' Statute (Texto Refundido de la Ley del Estatuto de los Trabajadores), [9] in the version applicable when Ms Gómez-Limón invoked the right to a reduction in her hours of work to care for her child, [10] provided that any person who, for reasons of legal custody, takes direct care of a child under the age of six is entitled to a reduction in his or her working day, with a proportionate reduction in salary, of a minimum of one third and a maximum of one half of the duration of that working day. [11]

13. Article 139(2) of the General social security law (Ley General de la Seguridad Social, 'LGSS') [12] provides that an employee who suffers from permanent invalidity which renders him or her incapable of working in his or her usual occupation is entitled to a life pension fixed at 55% of the sum arrived at by dividing by 112 the employee's 'contribution bases' during the 96 months before the event giving rise to the entitlement. [13]

14. Article 109(1) of the LGSS provides that the 'contribution base' for all the risks and situations benefiting from protection under the general scheme, including occupational accidents and diseases, consists of the total remuneration, regardless of its form or designation, that the worker has the right to receive every month, or by the remuneration that he or she effectively receives every month if the amount of the latter is higher, for work performed as a wage earner.

15. In order to determine the contribution base in case of reduced working time applicable to workers who have legal custody and who are taking care of a child under the age of six, Royal Decree 2064/1995 regarding the contributions and the settlement of other social security rights (Reglamento General sobre cotización y liquidación de otros derechos de la Seguridad Social) [14] refers to the system of contributions for part-time work contracts. Article 65 of that Royal

9 — Adopted under Royal Legislative Decree (Real Decreto Legislativo) No 1/1995 of 24 March 1995 (Boletín Oficial del Estado (BOE) of 29 March 1995).

10 — The version adopted under the Law of 5 November 1999 to encourage the reconciliation of workers' family life and work life (Ley 39/1999 para promover la conciliación de la vida familiar y laboral de las personas trabajadoras) (BOE of 6 November 1999).

11 — Article 37(5) of the Workers' Statute was subsequently amended by the Basic Law of 22 March 2007 for the effective equality of women and men (Ley Orgánica 3/2007 para la igualdad efectiva de mujeres y hombres) (BOE of 23 March 2007). The amendment merely extends the scope for reducing the working day, which can now be between a minimum of one eighth and a maximum of one half of its previous duration.

12 — As consolidated by Royal Legislative Decree No l/1994 of 20 June 1994 (BOE of 29 June 1994).

13 — Article 140(1) of the LGSS.

14 — Royal Decree (Real Decreto) of 22 December 1995 (BOE of 25 January 1996).

Decree, in the version applicable to the facts of the case, provides that, with regard to wage earners who have concluded part-time work contracts and relief contracts, [15] the contribution base is determined on the basis of remuneration received for the hours worked.

16. Article 14 of the Order of 18 July 1991 of the Ministry of Work regulating the special agreement within the social security system, [16] which is applicable to persons who have legal custody of a minor, provides that workers who, by virtue of Article 37(5) of the Workers' Statute, benefit from a working-time reduction because they are taking care of a child under the age of six, accompanied by a proportionate reduction in salary, may conclude a special agreement to preserve the same contribution bases as before the reduction in their working time. The monthly contribution base [17] corresponds to the difference between the contribution bases derived from the reduction in working time and a contribution base that the interested party can choose, which includes the contribution base corresponding to full-time employment. The contributions due by virtue of that special agreement cover retirement, permanent invalidity and death and survival resulting from an ordinary disease or an accident other than an occupational accident.

## The main proceedings and the questions referred

17. From 17 December 1986, Ms Gómez-Limón worked full time for Alcampo SA. With effect from 6 December 2001, she agreed with her employer to reduce her working day in order to take care of a child under six years old, in accordance with the Workers' Statute. She accordingly worked two thirds of an ordinary working day. Her pay and the contributions made both by the employer and by the employee to the INSS were correspondingly reduced. It appears that she did not conclude the special arrangement provided for by Article 14 of the Order of 18 July 1991.

15 — 'Contrato de relevo'. The Spanish Ministerio de Trabajo e Inmigración's website on social security translates this as 'relief contract', defined there in English as '… the contract drawn up simultaneously with the part-time contract with a partially retired person, with an unemployed worker or one who has [entered] into a contract with the company for a specific duration, in order to cover [time not being worked] by the partially retired employee. The relief contract is required to replace workers who have partially retired prior to the age of 65 and is authorised if they have already reached that age. The contract must also meet certain legal [requirements].' http://www.seg-social.es/Internet_6/Masinformacion/Glosario/index.htm?ssUserText=R.

16 — Orden Ministerial de 18 de julio de 1991, por que se regula el convenio especial en el Sistema de la Seguridad Social (BOE of 30 July 1991). This order has been repealed and replaced by Order TAS/2865/2003 of 13 October 2003 (Orden de 13 octubre, por la que se regula el convenio especial en el Sistema de la Seguridad Social, BOE of 18 October 2003). The Spanish Ministerio de Trabajo e Inmigración's website on social security translates 'convenio especial' as 'special agreement', defined there in English as 'Agreement reached with the Social Security for [employees whose contracts have been terminated], or for those affiliated in other specific situations, in order to [preserve rights being accrued], without losing the [benefit] of the contributions [already made].'http://www.seg-social.es/Internet_6/Masinformacion/Glosario/index.htm?ssUserText=S.

17 — I.e., pursuant to the special agreement: in other words, the 'top-up' contribution base that is to be added to the standard contribution base for part-time employment.

18. As a result of an illness unrelated to her work, Ms Gómez-Limón initiated administrative proceedings culminating in an INSS decision of 30 June 2004. That decision found that, because of her pathological myopia, she suffered from permanent total invalidity rendering her incapable of working in her usual occupation and entitling her to a pension of 55% of a base amount of EUR 920.33 per month, calculated using the total amount of contributions actually paid by the employer from 1 November 1998 to 30 April 2004. Those sums included both the percentages payable directly by the employer and the deductions required to be made on the employee's behalf for subsequent payment to the TGSS, which is the collection agency for the INSS. [18]

19. Ms Gómez-Limón has brought an action before the Juzgado de lo Social on the basis that although those were the contributions actually paid, the amount was decreased as a result of the reduction in her working day and in her pay during the period of partial leave when she was looking after her child. She therefore argues that her invalidity pension ought to be calculated on the basis of the amount corresponding to a full working day. Otherwise, a measure intended to promote equality before the law and to eliminate discrimination on grounds of sex would be deprived of practical effect.

20. The Juzgado de lo Social has referred the following questions to the Court:

'(1) Bearing in mind that the granting of parental leave must be a measure intended to promote equality, in the manner and to the extent freely fixed by each Member State within the minimum limits imposed by Directive [96]/34/EC, is it possible that the enjoyment of that period of parental leave, in the case of a reduction in the working day and in salary by reason of taking care of children, should affect rights in the process of being acquired by the worker, male or female, taking such parental leave, and may individuals rely before the public institutions of a State on the principle of the protection of rights acquired or in the process of being acquired?

(2) In particular, does the expression "rights acquired or in the process of being acquired" in clause 2(6) of Directive 96/34 include only rights related to working conditions and affect only the contractual relationship with the employer or, on the contrary, does it also affect the maintenance of rights acquired or in the

18 — Paragraph 12 of the Eighteenth Additional Provision of Basic Law 3/2007 amended Article 180 of the LGSS so that Article 180(3) now provides that contributions paid during the first two years of the period of a reduction in the working day to care for a child referred to in Article 37(5) of the Workers' Statute are to be increased up to 100 per cent of the amount which would have been paid if the working day had not been thus reduced, for the purposes of the benefits referred to in Article 180(1), which include permanent invalidity allowances such as that claimed by the applicant in the present case. However, that new Basic Law expressly provides (see paragraph 3 of the Seventh Transitional Provision) that this is not applicable to benefits entitlement to which arose before that law's entry into force on 24 March 2007 (the day after publication in the BOE).

process of being acquired in matters of social security, and is the requirement for "continuity of the entitlements to social security cover under the different schemes" in clause 2(8) of Directive 96/34 satisfied by the formulation under consideration and applied by the national authorities and, if applicable, is the right to continuity of entitlements to social security cover sufficiently certain and precise to be relied upon before the public authorities of a Member State?

(3) Are the provisions of Community law compatible with national legislation which, during the period of reduction in the working day by reason of parental leave, reduces the amount of invalidity pension to be paid in relation to what it would have been before that leave and reduces the accrual and consolidation of future benefits in proportion to the reduction in working hours and in salary?

(4) Given the duty of the national courts to interpret national law in the light of the obligations imposed by the Directive, in order to enable the objectives of the Community legislation to be achieved to the greatest possible extent, must that requirement apply equally to the continuity of social security entitlements during the period of parental leave and, specifically, in the circumstances of the case to a form of part-time leave or reduction in the working day such as was used on this occasion?

(5) In the specific circumstances of the case, does the reduction in the grant and accrual of social security entitlements during the period of parental leave constitute direct or indirect discrimination contrary to the provisions of Directive 79/7 … and is it contrary to the requirements of equality and non-discrimination between men and women, in accordance with the tradition common to all the Member States, to the extent that this principle must apply not only to conditions of employment but also to the public activity of social protection of workers?'

21. Written observations were submitted by the INSS, the Spanish and United Kingdom Governments, and the Commission.

22. No hearing was requested and none has been held.

**Assessment**

*Admissibility*

23. The INSS and the Spanish Government have raised doubts about the admissibility of the first question asked by the referring court which, in their submission, is purely hypothetical and has no bearing on the main proceedings.

24. While the first question (on whether a period of parental leave could affect rights in the process of being acquired by the worker taking such parental leave) is general, the second (on whether clause 2(6) applies to social security rights) is more specific.

25. If the second question is answered in the negative, the first question ceases to be relevant and (whether admissible or not) no longer requires an answer.

26. It therefore seems appropriate to start by considering the second question, which logically precedes the first.

*The second question*

27. By its second question, the referring court seeks clarification regarding three matters. First, does the expression 'rights acquired or in the process of being acquired' in clause 2(6) of the framework agreement on parental leave attached to Directive 96/34 include only rights related to working conditions and affect only the contractual relationship with the employer or does it also affect social security? Secondly, does the Spanish legislation satisfy the requirement for 'continuity of the entitlements to social security cover under the different schemes' in clause 2(8) of the framework agreement on parental leave? Thirdly, if clause 2(8) is applicable, is it sufficiently certain and precise to be relied upon against the public authorities of a Member State?

28. The answer to the first part of this question is reasonably straightforward. It is true that neither clause 2(6) of the framework agreement on parental leave nor any other provision of Directive 96/34 or of the framework agreement on parental leave contains a

definition of 'rights acquired or in the process of being acquired'. It is nevertheless clear that this expression does not refer to social security rights, such as Ms Gómez-Limón's invalidity pension, [19] as the latter are the subject of clause 2(8). That clause expressly leaves 'all matters relating to social security in relation to [the framework agreement on parental leave] for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care'.

29. The expression 'rights acquired or in the process of being acquired' in clause 2(6) cannot therefore cover social security rights. As the INSS points out in its observations, the purpose of Directive 96/34, as defined in Article 1, is to put into effect the framework agreement on parental leave concluded between the general cross-industry organisations, in other words between organisations representing employers and employees respectively. [20] The framework agreement is intended to enable both parties to an employment contract to organise working time in such a way that employees are able to take parental leave, not to regulate matters pertaining to social security.

30. As regards the second and third issues raised by the referring court, it is settled case-law that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State. [21] A Community provision is unconditional where it lays down an unqualified obligation and is not made subject, in its implementation or effects, to the adoption of any measure either by the Community institutions or by the Member States. It is sufficiently precise to be relied on by an individual and applied by the courts where it lays down an obligation in unequivocal terms. [22]

19 — Invalidity benefits are a traditional branch of social security. They are for example mentioned as such in Article 4(1)(b) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and to their families moving within the Community (OJ, English Special Edition, 1971(II) p. 416, amended on numerous occasions). It is settled case-law that a benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, inter alia, Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 37; Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 63; and Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 19). In the present case, it is not disputed that the invalidity benefit at issue in the main proceedings is a social security benefit.

20 — See also general consideration 13 to the framework agreement: 'Whereas management and labour are best placed to find solutions that correspond to the needs of both employers and workers and must therefore have conferred on them a special role in the implementation and application of the present agreement'.

21 — See for example Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraph 58, and the case-law cited there.

22 — Case C-389/95 *Klattner* [1997] ECR I-2719, paragraph 33.

31. Clause 2(8) of the framework agreement on parental leave does not satisfy those requirements. Rather, it explicitly leaves social security matters 'for consideration and determination by Member States according to national law', merely reminding them to take 'into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care'. This reflects the Court's case-law to the effect that, in the current state of Community law, social policy is a matter for the Member States. It is for the Member States to choose the measures to promote their social and employment policy objectives. In exercising that competence, the Member States have a broad margin of discretion. [23]

32. Clause 2(8) of the framework agreement on parental leave does not, therefore, impose a clear obligation on Member States. [24] It follows, as a matter of logic, that it is not sufficiently certain, precise and unconditional to be relied on by individuals against the State before the national courts.

33. Moreover, as argued by the Commission, the expression 'continuity of the entitlements to social security cover' in that clause implies continuity in the *enjoyment* of social security rights, but does not mention the need for Member States to guarantee the right to acquire *new* rights during the period of parental leave. The information in the case-file indicates that Spain did in fact take that issue into account, even though clause 2(8) of the framework agreement on parental leave did not legally oblige it to do so.

34. I add that Article 14 of the Order of 18 July 1991 would have allowed Ms Gómez-Limón to obtain an invalidity pension at the same level as if she had continued working full time. [25] It appears from the case-file that she did not, however, avail herself of that possibility. [26]

35. In summary: first, clause 2(6) of the framework agreement on parental leave attached to Directive 96/34 does not apply to matters of social security; and secondly, clause 2(8) of the framework agreement on parental leave cannot be relied upon against the public authorities of a Member State before a national court.

23 — See, for example, Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 33; and Case C-322/98 *Kachelmann* [2000] ECR I-7505, paragraph 30 and the case-law cited there.

24 — See further general consideration 11 to the framework agreement on parental leave, which provides that the Member States are to *consider*, where appropriate under national conditions and taking into account the budgetary situation, the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave (emphasis added).

25 — By virtue of Article 37, paragraph 5 of the Workers' Statute. See point 16 above, where this is explained.

26 — See point 17 above.

36. It is therefore unnecessary to answer the first question.

*The third and fifth questions*

37. By its third question, the referring court asks whether Community law is compatible with national legislation which, during the period of reduction in the working day by reason of parental leave, reduces the amount of the invalidity pension to be paid and reduces the accrual and consolidation of future benefits in proportion to the reduction in working hours and in salary.

38. The jurisdiction of the Court is confined to considering provisions of Community law only, while it is for national courts to assess the scope of national provisions and the manner in which they must be applied. [27] I therefore understand the national court to be asking whether national legislation such as that at issue in the main proceedings is compatible with Community law.

27 — Case C-453/04 *innoventif* [2006] ECR I-4629, paragraph 29 and the case-law cited there.

39. By its fifth question, the referring court asks whether the reduction in the grant and accrual of social security entitlements during the period of parental leave (a) constitutes direct or indirect discrimination contrary to the provisions of Directive 79/7 and (b) is contrary to the principle of equality and non-discrimination between men and women, to the extent that that principle applies not only to conditions of employment but also to social protection of workers.

40. Both questions essentially ask whether legislation under which an invalidity benefit for a person in part-time employment is calculated pro rata temporis on the basis of the time actually spent at work is compatible with the Community law prohibition on discrimination between women and men, when the reason for the reduction in working time is a period of parental leave.

41. If the provisions at issue grant the right to parental leave to both women and men and if the consequences of the exercise of that right are the same there can be no question of direct discrimination. The Spanish legislation as described in the order for reference, in particular Article 37(5) of the Workers' Statute, appears to satisfy those requirements. The system that it sets out does not therefore discriminate directly on grounds of sex.

42. As regards indirect discrimination, it is settled case-law that national provisions discriminate indirectly against women where, although worded in neutral terms, they work to the disadvantage of a much higher percentage of women than men, unless that difference in treatment is justified by objective factors unrelated to any discrimination on grounds of sex. [28]

43. A useful parallel can be drawn with the facts that gave rise to *Grau-Hupka*. [29] Mrs Grau-Hupka claimed that insufficient account had been taken, for the purposes of calculating her retirement pension, of the period which she had spent bringing up children. The referring court started from the assumption that more women than men spend a period of time at home to raise children, and that as a result more women than men see their pension 'reduced' in application of the relevant national rules. It suggested that, where such a 'reduced' pension is regarded as income from a person's main occupation, thus allowing his or her employer to pay him a lower remuneration in respect of his or her part-time employment, there is indirect discrimination with respect to such remuneration. [30]

44. In his Opinion, Advocate General Jacobs refuted that suggestion. While Mrs Grau-Hupka's total income was less, that was due to the 'reduction' of her pension, not to any inequality in her pay. As to the suggestion that the reduction of her pension was not in accordance with the Community's equal treatment rules, Advocate General Jacobs considered that there was clearly no discrimination in her pension award that was incompatible with the provisions of Directive 79/7. [31]

45. The Court agreed, holding that Directive 79/7 in no way obliges the Member States to grant advantages in respect of old-age pension schemes to persons who have brought up children or to provide benefit entitlements where employment has been interrupted in order to bring up children. It continued: 'Since Community law on equal treatment in matters of social security does not oblige Member States to take into account

28 — See Case C-226/98 *Jørgensen* [2000] ECR I-2447, paragraph 29; *Kachelmann*, cited in footnote 23, paragraph 23; Case C-25/02 *Rinke* [2003] ECR I-8349, paragraph 33; and Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 43.

29 — Case C-297/93 [1994] ECR I-5535.

30 — See the Opinion of Advocate General Jacobs, point 15.

31 — See point 17 of his Opinion. Advocate General Jacobs pointed out, in particular, that Article 7(b) of Directive 79/7 is a permissive, not a mandatory, provision.

in calculating the statutory pension years spent bringing up children, it is not possible to regard as incompatible with the principle of equal pay for men and women, which is laid down in Article [141 EC] and in the equal pay directive, the possibility of giving pay lower than the normal rate to a person who is in receipt of a pension and who thus enjoys social security, but whose pension has been reduced by loss of earnings as a result of time spent bringing up a child'. [32]

46. I see no relevant difference between retirement pensions and invalidity pensions that would justify a different approach as regards applying the pro rata temporis principle to calculating invalidity pensions.

47. Subsequent case-law does not suggest that the framework agreement on parental leave has changed that analysis. [33]

48. Rather, the Court is not inclined to consider the consequences that parental leave may have on the calculation of certain rights as an infringement of the prohibition on sex discrimination.

49. The Court has held, for example, that Article 141 EC and Council Directive 75/117/EEC [34] do not preclude the calculation of a termination payment in a way that takes account, as qualifying service, of the duration of periods of military service or the civilian equivalent (performed mainly by men) but not of parental leave (taken usually by women). [35] In so holding, the Court pointed out that while performance of national service corresponds to a civic obligation laid down by law and not governed by the individual interests of the worker, parental leave is taken voluntarily by a worker in order to bring up a child. [36]

50. The Court has also held that a worker who takes parental leave is in a special situation, which cannot be assimilated to

32 — *Grau-Hupka*, cited in footnote 29, paragraphs 27 and 28. See also Joined Cases C-4/02 and C-5/02 *Schönheit* [2003] ECR I-12575, paragraphs 90 and 91, where the Court held that Community law did not preclude a retirement pension being calculated pro rata temporis in the case of part-time employment. The fact that the actual period of service, as compared with that of a person who has worked on a full-time basis throughout his career, is also taken into account is an objective criterion unrelated to any discrimination on grounds of sex, allowing a pension entitlement to be reduced proportionately. See also the Opinion of Advocate General Geelhoed, point 102.

33 — Under Article 2(1) of Directive 96/34, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 3 June 1998 at the latest or were to ensure by that date at the latest that management and labour had introduced the necessary measures by agreement, the Member States being required to take any necessary measure enabling them at any time to be in a position to guarantee the results imposed by the Directive.

34 — Directive 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).

35 — Case C-220/02 *Österreichischer Gewerkschaftsbund* [2004] ECR I-5907, paragraph 65.

36 — *Österreichischer Gewerkschaftsbund*, paragraphs 60 and 61.

that of a man or woman at work since it involves suspension of the contract of employment and, therefore, of the respective obligations of the employer and the worker. [37] The Court therefore concluded that Article 141 EC, Article 11(2)(b) of Council Directive 92/85/EEC [38] and clause 2(6) of the framework agreement on parental leave do not preclude an employer, when granting a Christmas bonus to a female worker who is on parental leave, [39] from taking such periods of leave into account so as to reduce the benefit pro rata. [40]

51. Both those judgments concerned the contractual relationship between employer and employee. Since the Court considers that the consequences parental leave may have on the calculation of certain rights in the relationship between employer and employee do not infringe the prohibition on sex discrimination, it seems to me that it would be inconsistent to hold otherwise in relation to social security. Whereas the relationship between employer and employee comes within the scope of the framework agreement on parental leave and of EC law in general, matters pertaining to social security remain largely within the competence of the Member States. Thus, they fall outwith the scope of the framework agreement on parental leave, as clause 2(8) of that agreement makes clear.

52. Moreover, as the Commission observes, neither Directive 96/34 nor any other Community directive contains explicit provisions addressing the question of remuneration during parental leave. Regulation of that question therefore belongs to the competence of the Member States.

53. It is true that in accordance with the principle of non-discrimination contained in clause 4(1) of the Framework Agreement on part-time work, part-time workers are not to be treated less favourably in respect of employment conditions than comparable full-time workers solely because they work part time, unless the difference in treatment is justified on objective grounds. However, clause 4(2) of that agreement explicitly provides that, where appropriate, the principle of pro rata temporis is to apply. [41]

54. An attractive argument can of course be made that taking parental leave should be encouraged [42] by *not* reducing the entitlement to social security benefits in accordance with

37 — Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 37.

38 — Directive 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).

39 — The judgment in *Lewen*, cited in footnote 37, uses 'parental leave' and 'parenting leave' interchangeably (see, for example, paragraph 10).

40 — *Lewen*, cited in footnote 37, paragraph 50.

41 — See also the Opinion of Advocate General Kokott in Case C-268/06 *Impact* [2008] ECR I-2483, point 101.

42 — The objective of the Framework Agreement on part-time work, as defined in Clause 1(a), is 'to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work'.

the amount of time actually spent at work, but instead allowing persons on parental leave to go on acquiring rights as if they were still working full time. Such an approach would bolster substantive equality between the sexes [43] by taking into account the fact that women, as noted in the order for reference, are significantly more likely to take parental leave to care for their children. It would also encourage men to do the same. [44]

55. I cannot, however, read the existing legislative provisions as imposing any obligation on Member States to provide such inducements towards taking parental leave. On the contrary, they make explicit provision for applying the pro rata temporis principle and retain substantial discretion for Member States to make whatever arrangements they deem appropriate. In this regard, it appears that the Spanish legislator had made provision, at the material time, for workers to conclude a special agreement to preserve their previous contribution bases [45] and that a scheme has now been put in place [46] to enable persons who reduce their hours of work in order to take care of a child to maintain their original level of social security cover for the first two years in which they do so.

43 — See, for example, C. Barnard, *EC Employment Law* (3rd ed., 2006), pp. 333 to 338.

44 — See, for example, general consideration 8 to the framework agreement on parental leave, which states that 'men should be encouraged to assume an equal share of family responsibilities, for example they should be encouraged to take parental leave by means such as awareness programmes'.

45 — See point 16 above.

46 — See footnote 18 above.

56. If inducements towards taking parental leave are deemed socially desirable — as they may well be — it is for the Member States and/or the Community legislator to put in place the necessary legislative measures to attain that objective. As matters stand, however, Community law contains no obligation requiring entitlement to social security benefits during a period of parental leave to accrue as though the person concerned were not on parental leave, but still working full time.

57. I therefore consider that legislation under which an invalidity benefit is calculated pro rata temporis on the basis of the time actually spent at work in case of part-time employment is compatible with Community law, even when the reason for the reduction in working time is a period of parental leave.

*The fourth question*

58. By its fourth question, the referring court asks whether the duty of national courts to interpret national law in the light of the obligations imposed by Directive 96/34 applies equally to the continuity of social security entitlements during the period of parental leave and, specifically, in the circumstances of the case to a form of part-time leave or reduction in the working day such as was used on this occasion.

59. If I am right that clause 2(8) of the framework agreement on parental leave does not impose obligations on Member States, who retain competence in social security matters, it becomes unnecessary to answer this question.

## Conclusion

60. For the reasons given above, I am of the view that the questions referred by the Juzgado de lo Social should be answered as follows:

— Clause 2(6) of the framework agreement on parental leave annexed to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC does not apply to matters of social security;

— Clause 2(8) of that framework agreement does not impose a clear, precise, and unconditional obligation on Member States and cannot therefore be relied upon against the public authorities of the Member State before the national courts;

— Legislation under which an invalidity benefit is calculated pro rata temporis on the basis of the time actually spent at work in case of part-time employment is not incompatible with Community law, even when the reason for the reduction in working time is a period of parental leave.