JUDGMENT OF THE COURT (Second Chamber)

11 November 2010 *

In Case C-232/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Augstākās Tiesas Senāts (Latvia), made by decision of 13 May 2009, received at the Court on 25 June 2009, in the proceedings

Dita Danosa

v

LKB Līzings SIA,

THE COURT (Second Chamber),

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

* Language of the case: Latvian.

Advocate General: Y. Bot,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2010,

after considering the observations submitted on behalf of:

— Ms Danosa, by V. Liberte, zvērināta advokāte, and A. Rasa, zvērināta advokāta palīgs,

— LKB Līzings SIA, by L. Liepa, zvērināts advokāts, and by S. Kravale and M. Zalāns,

— the Latvian Government, by K. Drēviņa and Z. Rasnača, acting as Agents,

— the Greek Government, by M. Apessos, and by S. Trekli and S. Vodina, acting as Agents,

— the Hungarian Government, by R. Somssich, M. Fehér and K. Szíjjártó, acting as Agents,

— the European Commission, by A. Sauka and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

2 The reference has been made in the course of proceedings between Ms Danosa and LKB Līzings SIA ('LKB'), a limited liability company, concerning the decision taken at the LKB general meeting of shareholders to remove Ms Danosa from her post as a member of the company's Board of Directors.

Legal context

European Union ('EU') legislation

Directive 76/207/EEC

3 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 (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207'), provides that '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.'

4 Article 2(7) of Directive 76/207 provides that that directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'. In addition, it provides that less favourable treatment of a woman, related to pregnancy or maternity leave within the meaning of Directive 92/85, is to constitute discrimination within the meaning of Directive 76/207.

5 Under Article 3(1)(c) of Directive 76/207:

'Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals …'

Directive 86/613/EEC

6 Article 1 of Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ 1986 L 359, p. 56), provides:

'The purpose of this Directive is to ensure, in accordance with the following provisions, application in the Member States of the principle of equal treatment as between

men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 76/207/EEC and [Council Directive 79/7/EEC of 19 September 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)].'

7 Self-employed workers are defined in Article 2(a) of Directive 86/613 as all persons pursuing a gainful activity for their own account, under the conditions laid down by national law, including farmers and members of the liberal professions.

8 Under Article 3 of Directive 86/613, the principle of equal treatment implies the absence of all discrimination on grounds of sex, either direct or indirect, by reference in particular to marital or family status.

9 Article 8 of that directive is worded as follows:

'Member States shall undertake to examine whether, and under what conditions, female self-employed workers and the wives of self-employed workers may, during interruptions in their occupational activity owing to pregnancy or motherhood,

— have access to services supplying temporary replacements or existing national social services, or

— be entitled to cash benefits under a social security scheme or under any other public social protection system.'

Directive 92/85

10 The 9th and 15th recitals in the preamble to Directive 92/85 are worded as follows:

'… the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

…

… the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; … provision should be made for such dismissal to be prohibited.'

11 Article 2(a) of Directive 92/85 defines a pregnant worker as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.

12 Article 10 of the directive is worded as follows:

'In order to guarantee workers [who are pregnant or who have recently given birth or are breastfeeding], within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

(1) Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

(2) if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

(3) Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

National legislation

The Labour Code

13 Article 3 of the Latvian Labour Code (Darba likums, *Latvijas Vēstnesis*, 2001, No 105) defines a worker as any natural person who performs a particular job pursuant to an employment contract, under the direction of an employer and in return for an agreed wage.

14 Article 4 of that code defines an employer as any natural or legal person, or a partnership with legal capacity, employing at least one worker under an employment contract.

15 Article 44(3) of the Labour Code provides:

'An employment contract shall be concluded with the members of the executive body of a capital company only if they are not engaged under another civil contract. If the members of the Board of Directors of a capital company are engaged under an employment contract, the latter shall be concluded for a fixed term.'

16 Article 109 of the Labour Code, entitled 'Prohibitions and restrictions on dismissal', provides:

'(1) An employer is prohibited from terminating an employment contract with a woman while she is pregnant and in the year following the birth or, where applicable, during the whole of the period in which the woman is breastfeeding, unless the situations provided for in points 1, 2, 3, 4, 5 and 10 of Article 101(1) apply.'

The Commercial Code

17 Article 221 of the Latvian Commercial Code (Komerclikums, *Latvijas Vēstnesis*, 2000, No 158/160) is worded as follows:

'(1) The Board of Directors is the directorial body of a company, by which that company is managed and represented.

...

(5) The Board of Directors is under an obligation to provide information to the shareholders' meeting on transactions between the company and a shareholder, a member of the supervisory board or a member of the Board of Directors.

(6) The Board of Directors shall submit to the supervisory board, at least once in every quarter, a report on the company's business and financial situation, and shall inform the supervisory board without delay of any deterioration in the financial situation of the company or other essential circumstances in relation to the company's trading activities.

…

(8) The Board of Directors shall be entitled to remuneration commensurate with their responsibilities and the company's state of finance. The amount of the remuneration shall be determined by a decision of the supervisory board or, if no supervisory board has been established, by decision of the general meeting of shareholders.'

18 Article 224 of the Commercial Code, entitled 'Appointment and removal of Board Members', provides:

'(1) The members of the Board of Directors shall be appointed and removed by resolution of the general meeting of shareholders. It shall notify the commercial registry of the termination of the mandate of the members of the Board of Directors, the amendment of their rights of representation or the election of new members. A certified copy of the extract of the minutes of the general meeting at which the resolution concerned was passed shall be attached to that notification.

…

(3) The members of the Board of Directors shall be elected for a period of three years, unless the articles of association set a shorter period.

(4) The members of the Board of Directors may be removed by resolution of the shareholders. If the company has a supervisory board, that body may suspend the mandate of the members of the Board of Directors pending a general meeting, for a maximum period of two months.

…

(6) The articles of association may provide that members of the Board of Directors can be removed only if there are serious grounds. Such grounds shall include misuse of powers, failure to fulfil obligations, unfitness to manage the company, the prejudicing of the company's interests and loss of confidence.'

The Law on public social security

19 The Latvian law on public social security (Likums par valsts sociālo apdrošināšanu, *Latvijas Vēstnesis*, 1997, No 274/276), which lays down the fundamental principles of public social security and governs its financial and organisational structure, recognises members of the Board of Directors of a commercial company as workers (Article 1(c)).

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

20 By decision of 21 December 2006, relating to the establishment of LKB, Latvijas Krājbanka AS — a public limited company — appointed Ms Danosa as sole member of LKB's Board of Directors ('valde').

21 By decision of 11 January 2007, LKB's supervisory board ('padome') set the remuneration of the members of the company's Board of Directors, together with other related conditions, and entrusted the chairman of the supervisory board with concluding the agreements necessary to ensure implementation of that decision.

22 According to the order for reference, no civil contract governing the performance of the duties of a member of the Board of Directors was concluded. LKB challenges that assertion and maintains that a contract of agency had been concluded with Ms Danosa. Ms Danosa would have liked to have had an employment contract but LKB preferred agency as the basis on which to entrust her with the tasks of a Board Member.

23 The general meeting of shareholders ('dalībnieku sapulce') of LKB decided on 23 July 2007 to remove Ms Danosa from her post as a member of the Board of Directors. On 24 July 2007, she was sent a certified copy of the extract of the minutes of that general meeting.

24 Taking the view that she had been unlawfully dismissed from her position, Ms Danosa brought an action against LKB before the Rīgas pilsētas Centra rajona tiesa (Riga Central District Court) on 31 August 2007.

25 Ms Danosa submitted before that court that, after her appointment, she had correctly discharged her professional duties as provided for in LKB's articles of association and the rules governing its Board of Directors. She also argued that, since she had received remuneration for her work and had been granted the right to take holidays, it was reasonable to assume the existence of an employment relationship. Given that she was 11 weeks pregnant at the time, her dismissal was in breach of Article 109 of the Labour Code, under which the dismissal of pregnant workers is prohibited. According to Ms Danosa, Article 224(4) of the Commercial Code, which authorises the general meeting of shareholders to dismiss a member of the Board of Directors at any time, conflicts with Article 109(1) of the Labour Code, which grants certain welfare guarantees to pregnant women.

26 As Ms Danosa's action was dismissed both at first instance and on appeal, she brought an appeal on a point of law before the referring court.

27 Before that court, Ms Danosa argued that she should be treated as a worker for the purposes of EU law, regardless of whether she is considered as such for the purposes of Latvian law. Also, in light of the prohibition on dismissal set out in Article 10 of Directive 92/85 and the main interest which that provision seeks to protect, the Latvian State should — in all types of legal relationships where the characteristics of an

employment relationship can be identified — endeavour to ensure by all means, including judicial remedies, that pregnant workers enjoy the legal and social guarantees laid down for their benefit.

28 LKB, on the other hand, argues that members of a capital company's Board of Directors do not perform their tasks under the direction of another person and cannot therefore be treated as workers for the purposes of EU law. It is entirely justifiable that different levels of protection be provided for workers, on the one hand, and members of a company's Board of Directors, on the other, in view of the relationship of trust necessary for the performance of the tasks entrusted to Board Members. EU law makes an express distinction between persons who carry out their tasks under the direction of an employer and those who have power to direct and are fundamentally representatives of the employer rather than subordinates.

29 According to the referring court, both the case-law of the Court on the concept of 'worker' and the objective pursued by Directive 92/85 of protecting pregnant women from dismissal support the inference that, where a member of a company's Board of Directors comes within the scope of that concept, Article 10 of Directive 92/85 applies to that person, notwithstanding the fact that Article 224(4) of the Latvian Commercial Code places no restriction on the dismissal of persons covered by that provision, whether or not the Board Member holds a contract of employment. According to the referring court, both Directive 76/207 and Directive 92/85 prohibit termination of the employment relationship in the case of a pregnant woman.

30 On the view that the case before it raised questions concerning the interpretation of EU law, the Augstākās Tiesas Senāts decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Are the members of the directorial body of a capital company to be regarded as covered by the concept of “worker” within the meaning of Community law?

(2) Is Article 224(4) of the Latvian Commercial Code, under which a member of the Board of Directors of a capital company may be dismissed without any restriction, no account being taken specifically of the fact that she is pregnant, incompatible with Article 10 of Directive 92/85 … and the case-law of the Court of Justice?’

The questions referred to the Court

Preliminary observations

31 It should be noted at the outset that, at the hearing before the Court, the background to the dispute before the referring court gave rise to some controversy concerning, in essence, the reasons which led LKB to dismiss Ms Danosa from her position as a member of the Board of Directors of that company and the question whether LKB had been informed of Ms Danosa’s pregnancy and, if so, on what date it had been so informed.

32 While LKB maintained that Ms Danosa's pregnancy had not in any way influenced the decision by which she was dismissed and argued that Ms Danosa herself had not claimed that she had been dismissed because of her pregnancy, Ms Danosa contested LKB's version of the facts, claiming that she had been dismissed because of her pregnancy and seeking to clarify the circumstances surrounding the adoption of the dismissal decision.

33 It is for the national court to ascertain the facts which have given rise to the dispute before it and to establish the consequences which they have for the judgment which it is required to deliver (see, inter alia, Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 32).

34 In the division of jurisdiction between the Courts of the European Union and the national courts, it is in principle for the national court to determine whether the factual conditions triggering the application of a rule of EU law are satisfied in the case pending before it, while the Court, when giving a preliminary ruling, may, where appropriate, provide clarification to guide the national court in its interpretation (see, to that effect, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 58, and Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 23).

35 In the present case, as is apparent from the order for reference, the questions are based on the premiss that the removal of Ms Danosa from her post as a member of LKB's Board of Directors took place, or may have taken place, essentially because of her pregnancy. The referring court is uncertain as to the compatibility with EU law of national legislation which prohibits dismissal for reasons linked to pregnancy and yet does not attach any restriction to the dismissal of a member of a company's Board of Directors.

36 In these circumstances, it falls to the Court to answer the questions concerning the interpretation of EU law which have been referred for a preliminary ruling, whilst leaving to the referring court the task of establishing the specific elements of the case before it and, in particular, of determining whether the contested dismissal decision was adopted essentially because of Ms Danosa's pregnancy.

37 In so far as the position taken by the Latvian Government and the European Commission, in relation to the facts of the main proceedings, challenges the relevance of the questions to the outcome of the case before the referring court, it need merely be observed that there is nothing in the order for reference to suggest that the questions — the relevance of which, moreover, the referring court has explained — are manifestly hypothetical or unrelated to the actual facts of the main action or its purpose.

The first question

38 By its first question, the referring court essentially asks whether a member of the Board of Directors of a capital company who provides services to the company must be regarded as a worker within the meaning of Directive 92/85.

39 It is settled case-law that the concept of 'worker' for the purposes of Directive 92/85 may not be interpreted differently according to each national law and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives

remuneration (see, by analogy, in the context of freedom of movement for workers and the principle of equal pay for men and women, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-256/01 *Allonby* [2004] ECR I-873, paragraph 67; and, in the context of Directive 92/85, Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 25).

40 The *sui generis* nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law (see *Kiiski*, paragraph 26 and the case-law cited). Provided that a person meets the conditions specified in paragraph 39 above, the nature of that person's legal relationship with the other party to the employment relationship has no bearing on the application of Directive 92/85 (see, by analogy, in the context of freedom of movement for workers, Case 344/87 *Bettray* [1989] ECR 1621, paragraph 16, and Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10).

41 Similarly, formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker for the purposes of Directive 92/85 if that person's independence is merely notional, thereby disguising an employment relationship within the meaning of that directive (see, by analogy, *Allonby*, paragraph 71).

42 It follows that, contrary to the assertions made by LKB, neither the way in which Latvian law categorises the relationship between a capital company and the members of its Board of Directors nor the fact that there is no employment contract between the company and the Board Members can determine how that relationship falls to be treated for the purposes of applying Directive 92/85.

43 As is clear from the observations submitted to the Court, it is not disputed in the present case that Ms Danosa provided services to LKB, regularly and in return for remuneration, by performing the duties assigned to her, under the company's statutes and the rules of procedure of the Board of Directors, as sole Board Member. Contrary to the assertions made by that company, it is irrelevant in that regard that Ms Danosa was herself responsible for the establishment of those rules.

44 On the other hand, those observations differ on the question whether between Ms Danosa and LKB there exists the relationship of subordination, or even the degree of subordination, required under the case-law of the Court of Justice relating to the concept of 'worker' within the meaning of EU law in general and Directive 92/85 in particular.

45 LKB maintains, as do the Latvian and Hellenic Governments, that, in the case of members of the Board of Directors of a capital company, there is no relationship of subordination as required under the case-law of the Court of Justice. LKB and the Latvian Government argue that, as a general rule, a Board Member such as Ms Danosa performs his or her duties on the basis of a contract of agency, independently and without instructions. They state that the relationship between, on the one hand, the members of a capital company and/or, where appropriate, the supervisory board and, on the other hand, the members of the Board of Directors, must be based on trust, which means that it must be possible to terminate the working relationship between the parties if ever that trust is no longer forthcoming.

46 The answer to the question whether a relationship of subordination exists within the meaning of the above definition of the concept of 'worker' must, in each particular case, be arrived at on the basis of all the factors and circumstances characterising the relationship between the parties.

47 The fact that Ms Danosa was a member of the Board of Directors of a capital company is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company: it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company; and the circumstances under which the person could be removed.

48 First of all, as the Advocate General points out at points 77 to 84 of his Opinion, an examination of those factors in the case before the referring court shows, first and foremost, that Ms Danosa was appointed sole member of LKB's Board of Directors for a fixed period of three years; that she was made responsible for managing the company's assets, directing the company and representing it; and that she was an integral part of the company. It has not been possible to tell, from the reply given to a question raised by the Court during the hearing, by whom or by what body Ms Danosa had been appointed.

49 Next, even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to cooperate with that board.

50 Lastly, according to the documents placed before the Court, a member of a Board of Directors may, under Latvian law, be removed from his or her duties by a decision of the shareholders, in some circumstances following suspension from those duties by the supervisory board. The dismissal decision in Ms Danosa's case was therefore adopted by a body which, by definition, she did not control and which was able at any time to take decisions contrary to her wishes.

51 While it cannot be ruled out that the members of a directorial body of a company, such as a Board of Directors, are not covered by the concept of 'worker' as defined in paragraph 39 above, in view of the specific duties entrusted to them, as well as the context in which those duties are performed and the manner in which they are performed, the fact remains that Board Members who, in return for remuneration, provide services to the company which has appointed them and of which they are an integral part, who carry out their activities under the direction or control of another body of that company and who can, at any time, be removed from their duties without such removal being subject to any restriction, satisfy prima facie the criteria for being treated as workers within the meaning of the case-law of the Court, as referred to above.

52 As regards the concept of 'pregnant worker', it should be borne in mind that this is defined in Article 2(a) of Directive 92/85 as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.

53 With a view to the implementation of that directive, the EU legislature intended to give the concept of 'pregnant worker' its own independent meaning in EU law, even though, in respect of one element of that definition — namely that relating to the details of the procedure for informing the employer of her condition — it refers back to national legislation and/or national practice (*Kiiski*, paragraph 24).

54 With regard to the question as to whether, in the case before the referring court, LKB had been informed of Ms Danosa's pregnancy, it should be pointed out that, as is clear from paragraph 33 above, it is for the referring court to ascertain the relevant facts, not the Court of Justice.

55 Secondly, even though Article 2(a) of Directive 92/85 refers to national legislation and/or national practice so far as concerns the details of the procedure by which the worker is to inform the employer of her condition, the fact remains that those procedural requirements cannot divest of its substance the special protection for women provided for in Article 10 of that directive, which prohibits the dismissal of pregnant workers and workers who have recently given birth or are breastfeeding, save in exceptional cases for reasons unrelated to the condition of the worker in question. If, without having been formally informed by the worker in person, the employer learns of her pregnancy, it would be contrary to the spirit and purpose of Directive 92/85 to interpret the provisions of Article 2(a) of that Directive restrictively and to deny the worker concerned the protection against dismissal provided for under Article 10.

56 In view of the foregoing considerations, the reply to the first question is that a member of a capital company's Board of Directors, who provides services to that company and is an integral part of it, must be regarded as having the status of worker for the purposes of Directive 92/85, if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the Board Member receives remuneration. It is for the national court to undertake the assessments of fact necessary to determine whether that is so in the case pending before it.

The second question

57 By its second question, the referring court essentially asks whether Article 10 of Directive 92/85 is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits the dismissal of a member of a capital

company's Board of Directors without restriction, and specifically without account being taken of the fact that the person concerned is pregnant.

58 As regards the scope of the prohibition on dismissal laid down in Article 10 of Directive 92/85, it should first be recalled that the objective of Directive 92/85 is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

59 Before Directive 92/85 came into force, the Court had already held that, by virtue of the principle of non-discrimination and, in particular, under the provisions of Directive 76/207, protection against dismissal must be granted to women not only during maternity leave, but also throughout pregnancy. According to the Court, a dismissal occurring during those periods affects only women and therefore constitutes direct discrimination on grounds of sex (see, to that effect, Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13; Case C-394/96 *Brown* [1998] ECR I-4185, paragraphs 24 to 27; and Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 29).

60 It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity leave (see *Paquay*, paragraph 30 and the case-law cited).

61 During that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition on dismissing pregnant workers, save in exceptional cases not connected with their condition, provided that the employer gives substantiated grounds for the dismissal in writing (Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 22; *Brown*, paragraph 18; Case C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 27; and *Paquay*, paragraph 31).

62 In the event that the national court were to decide that, in the case before it, Ms Danosa falls within the concept of 'pregnant worker' for the purposes of Directive 92/85 and that the dismissal decision at issue in the main proceedings was taken for reasons essentially connected with her pregnancy, it should be pointed out that such a decision, whilst taken in accordance with provisions of national law permitting the unrestricted dismissal of a Board Member, is incompatible with the prohibition on dismissal laid down in Article 10 of that directive.

63 On the other hand, a dismissal decision taken during the period from the beginning of pregnancy to the end of the maternity leave for reasons unconnected with Ms Danosa's pregnancy would not be contrary to Article 10 of Directive 92/85, provided, however, that the employer gives substantiated grounds for dismissal in writing and that the dismissal of the person concerned is permitted under the relevant national legislation and/or practice, in accordance with Article 10(1) and (2) of that directive.

64 In the event that the referring court decides that, in the case before it, given the nature of the activity pursued by Ms Danosa and the context within which that activity is pursued, protection against the dismissal of a member of a capital company's Board of Directors cannot be inferred from Directive 92/85, since the person concerned is

not a 'pregnant worker' for the purposes of that directive, it would be necessary to consider whether Ms Danosa could possibly rely on the protection against discrimination on grounds of sex granted under Directive 76/207, a legislative act which the referring court did not mention in its questions but to which the referring court and certain interested parties which submitted observations to the Court alluded.

65 In that respect, it should be noted that, under Article 3(1)(c) of Directive 76/207, '[a]pplication of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to … employment and working conditions, including dismissals …'.

66 As is clear from paragraph 59 above, by virtue of the principle of non-discrimination and, in particular, under the provisions of Directive 76/207, protection against dismissal must be afforded to women not only during maternity leave, but also throughout the period of pregnancy. According to the Court, the dismissal of a worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex (see *Paquay*, paragraph 29 and the case-law cited).

67 Clearly, where an agency agreement is unilaterally terminated by the principal, before the agreed expiry date, on account of the agent's pregnancy, or essentially on account of her pregnancy, only women can be affected. Even supposing that Ms Danosa was not a 'pregnant worker' in the broad sense used by Directive 92/85, to accept that a company can remove from her post a member of its Board of Directors perform-

ing tasks such as those described in the main proceedings would be contrary to the protective aim of Article 2(7) of Directive 76/207, to the extent that the removal was essentially on account of her pregnancy.

68 As the Court has already pointed out, the objective pursued by the rules of EU law governing equality between men and women is, with regard to the rights of pregnant women and women who have given birth, to protect those women before and after they give birth (see Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 42).

69 That objective, which informs both Directive 92/85 and Directive 76/207, could not be achieved if the protection against dismissal granted to pregnant women under EU law were to depend on the formal categorisation of their employment relationship under national law or on the choice made at the time of their appointment between one type of contract and another.

70 As is stated in paragraph 33 above, it is for the national court to determine the relevant facts of the dispute before it and to ascertain whether, as is assumed in the questions referred, the dismissal decision was brought about essentially on account of Ms Danosa's pregnancy. If so, it is of no consequence whether Ms Danosa falls within the scope of Directive 92/85 or of Directive 76/207, or — to the extent that the referring court categorises her as 'a self-employed person' — within the scope of Directive 86/613, which applies to self-employed persons and which, as is stated in Article 1 of that directive, supplements Directive 76/207 as regards the application of the principle of equal treatment for those workers, prohibiting, like Directive 76/207, any discrimination whatsoever, whether direct or indirect, on grounds of sex. Whichever directive applies, it is important to ensure, for the person concerned, the protection

granted under EU law to pregnant women in cases where the legal relationship linking her to another person has been severed on account of her pregnancy.

71 That conclusion is supported, moreover, by the principle of equality between men and women enshrined in Article 23 of the Charter of Fundamental Rights of the European Union, in accordance with which that equality must be ensured in all areas, including employment, work and pay.

72 Lastly, it should be borne in mind, as regards the burden of proof applicable in circumstances such as those at issue in the main proceedings, that it is a matter for the referring court to apply the relevant provisions of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6) which, in accordance with Article 3(1)(a) of that directive, applies to situations covered by Directive 76/207 and to situations covered by Directive 92/85 in so far as discrimination on grounds of sex is concerned.

73 In that regard, it is apparent from Article 4(1) of Directive 97/80 that, where persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the other party to prove that there has been no breach of the principle of equal treatment.

74 In the light of the foregoing, the answer to the second question is that Article 10 of Directive 92/85 is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits a member of a capital company's Board of Directors to be removed from that post without restriction, where the person concerned is a 'pregnant worker' within the meaning of that directive and the decision to remove her was taken essentially on account of her pregnancy. Even if the Board Member concerned is not a 'pregnant worker' within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a Board of Directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and (7) and Article 3(1)(c) of Directive 76/207.

Costs

75 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **A member of a capital company's Board of Directors who provides services to that company and is an integral part of it must be regarded as having the status of worker for the purposes of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the**

safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the Board Member receives remuneration. It is for the national court to undertake the assessments of fact necessary to determine whether that is so in the case pending before it.

2. **Article 10 of Directive 92/85 is to be interpreted as precluding national legislation, such as that at issue in the main proceedings, which permits a member of a capital company's Board of Directors to be removed from that post without restriction, where the person concerned is a 'pregnant worker' within the meaning of that directive and the decision to remove her was taken essentially on account of her pregnancy. Even if the Board Member concerned is not a 'pregnant worker' within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a Board of Directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Article 2(1) and (7) and Article 3(1)(c) 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.**

[Signatures]