JUDGMENT OF THE COURT (First Chamber)

18 November 2004 *

In Case C-284/02,

REFERENCE for a preliminary ruling under Article 234 EC, from the Bundesarbeitsgericht (Germany), made by decision of 21 March 2002, received at the Court on 2 August 2002, in the proceedings:

Land Brandenburg

v

Ursula Sass,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas, (Rapporteur), R. Silva de Lapuerta, K. Lenaerts and S. von Bahr, Judges,

Advocate General: L.A. Geelhoed,
Registrar: F. Contet, Principal Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 11 March 2004,

after considering the observations submitted on behalf of:

— Land Brandenburg, by J. Borck, Rechtsanwalt,

— Mrs Sass, by T. Becker, Rechtsanwalt,

— the Commission of the European Communities, by B. Martenczuk and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 141 EC and 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).

2 The reference was made in the course of proceedings between Mrs Sass and her employer, the Land of Brandenburg ('Land Brandenburg'), regarding the latter's failure to take account, in calculating the qualifying period (Bewährungszeit) for classification in a higher salary grade, of the entire period of maternity leave taken by Mrs Sass under the legislation of the former German Democratic Republic ('the former GDR').

I — **Legal background**

A — *The Community legislation*

3 Article 141 EC lays down the principle of equal pay for male and female workers for equal work or work of equal value.

4 Directive 76/207 is intended to ensure the elimination of any discrimination on grounds of sex, both as regards working conditions and as regards access to employment at all levels of the professional hierarchy, without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

5 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 (OJ 1992 L 348, p. 1) lays down certain minimum requirements for the protection of such workers.

6 As regards maternity leave, Article 8 of Directive 92/85 provides for a right to a continuous period of maternity leave of at least 14 weeks including compulsory maternity leave of at least two weeks. Moreover, Article 11 of that directive provides for maintenance of a payment to, and/or entitlement to an adequate allowance for, workers, in addition to the other rights arising from the employment contract during the period of leave under Article 8.

7 However, it must be observed that the Member States were not required to implement Directive 92/85 in their national law until 19 October 1994 at the latest, that is to say, by a date after the events at issue in the case in the main proceedings.

B — *The national legislation*

8 The position of women following confinement was governed in the former GDR by the Arbeitsgesetzbuch der Deutschen Demokratischen Republik (Labour Code of the German Democratic Republic, 'AGB-DDR') of 16 June 1977 (GBl. I, p. 85).

9 Under Paragraph 244 of the AGB-DDR, women were entitled to maternity leave for a period of 20 weeks after confinement. For the duration of that leave women received a maternity allowance equivalent to their net average earnings from the social insurance fund.

10 The position of women following confinement in the Federal Republic of Germany is governed by the Mutterschutzgesetz ('MuSchG').

11 The first sentence of Paragraph 6(1) of the MuSchG prohibits the employment of women in the eight weeks following confinement. During that period of maternity leave working mothers receive an allowance from their employers as well as a maternity allowance.

12 Paragraph 23a of the Bundes-Angestelltentarifvertrag-Ost (collective agreement for civil servants on a contractual basis in the public sector in East Germany) of 10 December 1990 ('BAT-O') provides as follows regarding promotion following a qualifying period:

'Employees ... shall be classified in the next higher salary grade after completing the prescribed qualifying period.

The following shall apply to the completion of the qualifying period:

1. The qualification requirement shall be satisfied when employees show themselves capable of meeting the requirements occurring during the activity entrusted to them during the prescribed qualifying period. The relevant activity in this context is that which corresponds to the salary grade in which employees are classified. ...

4. The qualifying period must be completed without interruption. Interruptions of not more than six months in each case shall not be detrimental; irrespective of this, interruptions on the following grounds shall also not have a detrimental effect:

...

(c) periods of protection pursuant to the [MuSchG];

...

However, the duration of interruptions, with the exception of

...

(e) periods of protection pursuant to the the [MuSchG]

shall not count towards the qualifying period.'

13 The BAT-O was amended on 8 May 1991 by the first collective agreement amending the BAT-O, which provides, in Paragraph 2, for the incorporation of the BAT salary scale according to the following criteria:

'1. Where job descriptions require qualifying periods, periods of activity, periods in which an occupation is pursued, etc., account shall be taken of those periods completed before 1 July 1991 and recognised as periods of employment pursuant to Paragraph 19(1) and (2) of the BAT-O and the pertinent transitional provisions which would have had to be taken into account if section VI and the BAT-O salary scale had already been in force before 1 July 1991. ...

Where job descriptions permit account to be taken of periods completed outside the scope of the BAT-O, account shall be taken of such periods if they would have had to be taken into account pursuant to the first subparagraph had they been completed within the scope of the BAT-O.'

II — Factual background and the main proceedings

14 Mrs Sass, a German national, has been employed since 1 July 1982 as a production manager at the Hochschule für Film und Fernsehen 'Konrad Wolf' (Konrad Wolf Film and Television College) in Potsdam.

15 According to the case-file, Mrs Sass' employment relationship was governed by the AGB-DDR at the time of the birth of her second child in January 1987. Following her confinement and in accordance with Paragraph 244 of that law, Mrs Sass took maternity leave from 27 January 1987 to 16 June 1987, in other words for a period of 20 weeks.

16 Again according to the case-file, following the reunification of Germany, responsibility for Mrs Sass' employment relationship was transferred to Land Brandenburg. By virtue of an agreement between the parties to that effect the employment relationship was therefore governed by the BAT-O. The period of employment completed by Mrs Sass since the date she took up employment, that is to say, since 1 July 1982, was taken into account at the time of that transfer.

17 Until 7 May 1998 Mrs Sass received the salary commensurate with salary grade IIa of the BAT-O. With effect from 8 May 1998 she was reclassified in the higher salary grade, namely grade Ib, case 2. Land Brandenburg counted the first 8 weeks of the

maternity leave which Mrs Sass had taken under Paragraph 244 of the AGB-DDR towards the qualifying period of 15 years required for classification in a higher salary grade under the BAT-O, but not the subsequent 12 weeks. According to the case-file, that was because the relevant provision, namely Paragraph 23a(4), third sentence, of the BAT-O only referred to the periods of protection provided for by the MuSchG, that is to say, 8 weeks, but not the period of maternity leave provided for by the AGB-DDR.

18 Mrs Sass brought an action before the national court of first instance claiming that the whole of the maternity leave, in other words 20 weeks, should have been taken into account. She claims that Land Brandenburg's interpretation of Paragraph 23a of the BAT-O gave rise to unlawful discrimination against women. She claimed that it should be ordered to pay her the difference in salary for the 12 weeks between 12 February 1998, the date on which she would have been entitled to an increase in salary if the whole of the period of maternity leave were included in the qualifying period, and 7 May 1998, that is to say DEM 1 841.16, with interest at 4% on the net amount from 16 March 1999.

19 Land Brandenburg contends that the claim should be dismissed. Under the BAT-O only the protected periods provided for by the MuSchG, and not the longer maternity leave provided for by Paragraph 244 of the AGB-DDR, should be included in the qualifying period.

20 The lower courts granted the claim. The referring court, while taking the view that the BAT-O was consistent with Community law, accepts that Mrs Sass is in a worse position than a male colleague because, having taken maternity leave which is exclusively available to women, she will not attain the higher salary grade until 12 weeks later than that male colleague does.

21 Against that background, the referring court decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 119 of the EC Treaty (now Article 141 EC) and Directive 76/207/EEC prohibit, in a provision of a collective agreement under which periods during which an employment relationship is in abeyance do not count towards the qualifying period, the exclusion of the period during which the employment relationship was in abeyance because the employee concerned, on the expiry of the eligible eight-week period of protection pursuant to Paragraph 6 of the [MuSchG] ..., claimed maternity leave pursuant to Paragraph 244(1) of the [AGB-DDR], until the end of the 20th week after confinement?'

III — **Findings of the Court**

22 By its question, the referring court is essentially asking whether Article 141 EC and/or Directive 76/207 preclude a collective agreement such as the BAT-O from excluding from a qualifying period the part of the period for which a female worker took maternity leave which was longer than the protected period of eight weeks provided for by the legislation of the Federal Republic of Germany to which that agreement refers.

23 Mrs Sass proposes that that question should be answered in the affirmative. Land Brandenburg and the Commission of the European Communities contend that it should not. The Commission, in particular, takes the view that Community law is not applicable to the case.

24 In that connection, it must be pointed out first that, since the treaty of 31 August 1990 on the establishment of German unity came into force on 3 October 1990 (BGBl. 1990 II, p. 889), Community law was applicable on 10 December 1990 when the BAT-O was adopted. Therefore, the provisions adopted following German reunification to regulate the position of workers who were now subject to the legislation of the Federal Republic of Germany must be in line with the relevant Community legislation.

25 Second, it must be borne in mind that the Court has already ruled, in connection with Article 141 EC, that since it is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals (see, in particular, Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, paragraph 39; Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 11; and Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 26). As the BAT-O is intended to govern the relations of contract staff with public authorities, the same must apply in the context of Directive 76/207 (see, to that effect, Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 18).

26 Thus the draughtsmen of the BAT-O would have been able to consider the position of women undergoing a transition in their employment relationship because of the reunification of Germany as compared with that of male workers also from the former GDR.

27 Mrs Sass is therefore quite right to rely on Community law to assert her rights.

28 In order to give a valid answer to the question raised in this case to the referring court it must first be ascertained whether the failure to take into account the whole of a period of maternity leave taken under the legislation of the former GDR in calculating the qualifying period laid down by the BAT-O, is covered by Article 141 EC or, rather, by Directive 76/207.

29 It is clear from the case-file that the dispute in the main proceedings concerns the qualifying periods to be completed in order to be classified in a higher salary grade and the types of interruptions which can be included in such periods by way of derogation from the general rule that the qualifying period must be uninterrupted and that authorised periods of interruption are not, in any event, included in it.

30 The outcome desired by Mrs Sass is an early promotion to the higher salary grade. The key question, for the purposes of achieving that outcome, is whether the whole of her maternity leave can be included in the qualifying period for classification in a higher grade, in this case a higher salary grade. Thus, it must be held that, in the present case, the higher salary is simply a consequence of the inclusion of that maternity leave in the qualifying period.

31 Accordingly, the provisions at issue in the dispute in the main proceedings lay down the rules concerning a worker's passage to a higher grade following a qualifying period. It follows that the question referred in the case seeks to clarify the conditions of access to a higher level of the professional hierarchy and, therefore, falls within the scope of Directive 76/207.

32 It must be observed that, having regard to the principle of equal treatment, that directive recognises the legitimacy of both the protection of a woman's biological

condition during and after pregnancy and the protection of the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, and Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 32).

33 To that end, Article 2(3) of the directive allows national provisions which guarantee women specific rights on account of pregnancy and maternity. Maternity leave is covered by that article (see Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 24).

34 Moreover, the exercise of rights granted to a woman under that Article cannot be made subject to unfavourable treatment regarding conditions to be fulfilled in order for her to attain a higher grade in the professional hierarchy. From that point of view, Directive 76/207 is intended to bring about equality in substance rather than in form (see, to that effect, *Merino Gómez*, paragraph 37, and *Thibault*, paragraph 26).

35 It follows from the foregoing that a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave.

36 A woman who is treated unfavourably because of absence on maternity leave suffers discrimination on the ground of her pregnancy and of that leave. Such conduct constitutes discrimination on the grounds of sex within the meaning of Directive 76/207 (Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 22; *Thibault*, paragraphs 29 and 32; and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 47).

37 Against that background, it must be held that Mrs Sass is in a worse position than a male colleague who started work in the former GDR on the same day as she did because, having taken maternity leave, she will not attain the higher salary grade until 12 weeks after he does.

38 However, the referring court takes as the premiss for its reasoning that the disadvantage suffered by Mrs Sass is not based on sex but on the fact that her employment relationship was in abeyance for the 12 weeks in question.

39 In that regard, it must be pointed out that a woman is still linked to her employer by a contract of employment during maternity leave (see *Gillespie and Others*, paragraph 22; *Thibault*, paragraph 29, and *Alabaster*, paragraph 47). The way in which a female worker is paid during such leave does not affect that conclusion.

40 The Commission, however, relies on Directive 92/85, in cases where the issue is discrimination on the ground of sex, in order to consider the possible effects on rights deriving from a contract of employment of a period of maternity leave longer than the minimum period laid down by that directive. In that connection it cites Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 79, and appears to draw the conclusion that, as the rights of a female worker are liable to be affected by a period of maternity leave longer than the minimum laid down by Article 8 of the directive, the 20 weeks which Mrs Sass freely decided to take under Paragraph 244 of the AGB-DDR were simply a benefit available to her.

41 That argument cannot be upheld.

42 First, it must be borne in mind that Directive 92/85 did not have to be implemented by the Member States in their national law until 19 October 1994 at the latest, in other words by a date after the time of the events in the main proceedings.

43 Second, even if it were permissible to base an argument on that directive, it must be observed that, under its Article 11, it provides that, in order to guarantee the protection of pregnant workers, workers who have recently given birth or are breastfeeding, the rights connected with the employment contract must be ensured 'in the case referred to in Article 8'. Article 8 provides for 'a continuous period of maternity leave of a least 14 weeks'.

44 Therefore, the fact that a piece of legislation grants women maternity leave of more than 14 weeks does not preclude that leave from being considered to be maternity leave as referred to in Article 8 of Directive 92/85 and, therefore, a period during which the rights connected with the employment contract must, under Article 11, be ensured.

45 Moreover, the question referred in this case cannot be decided on the basis of whether or not such leave is mandatory. In that regard it must be pointed out that, according to Directive 92/85, the prohibition on working relates only to a period of at least 2 weeks out of a maternity leave of at least 14 weeks.

46 Accordingly, the fact that Mrs Sass chose to take the whole 20 weeks' leave provided for by the AGB-DDR, while the 8 weeks' leave provided for by the MuSchG entails a prohibition on working, does not preclude her entire maternity leave from being considered to be statutory leave intended to protect a women who has given birth.

47 As regards the judgment in *Boyle and Others* it must be held that, contrary to the contentions of the Commission, that judgment does not in any way prejudge the answer to the question referred in the present case since *Boyle* concerned additional leave granted by an employer rather than statutory leave.

48 It follows from all the foregoing that, although the national legislation provides for maternity leave to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, Community law requires that taking such statutory protective leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it and cannot lead to discrimination against that woman.

49 The BAT-O took as its sole reference point the national legislation of the Federal Republic of Germany while the leave at issue was taken under the legislation of the former GDR.

50 Finally, therefore, the nature of the leave actually taken by Mrs Sass must be considered in order to determine whether it can be regarded as equivalent to a period of protection like that provided for by the MuSchG, intended to protect a woman who has given birth.

51 If so, that leave should have been taken into account in the calculation of the qualifying period in the same way as a period of protection would be, that is to say, in its entirety. If it were not taken into account, Mrs Sass would be subject to unfavourable treatment because of her absence on maternity leave and, therefore, would suffer discrimination on the grounds of sex within the meaning of Directive 76/207 in that she will not attain the higher salary grade until 12 weeks after a male colleague who started work in the former GDR on the same day as she did.

52 In that connection, it is significant that it is clear from the answers of the German Government to the written questions of the Court that the purpose of the 8 weeks' maternity leave provided for by Article 6 of the MuSchG and that of the 20 weeks' maternity leave provided for by Paragraph 244 of the AGB-DDR taken by Mrs Sass are largely the same. According to that government, both of those regimes were intended to ensure the physical recovery of the mother following the birth and to allow her to care for her child herself.

53 As the Court has repeatedly held, the objective of Directive 76/207 and Article 2(3) thereof in particular, is precisely that two-fold protection for women (see, in particular, the case-law cited in paragraph 34 of this judgment).

54 Accordingly, it appears that the 20 weeks' maternity leave provided for by Paragraph 244 of the AGB-DDR had the same objectives and the same purpose as the period of protection of 8 weeks, provided for by Article 6 of the MuSchG, and, therefore, the 20 weeks' leave must be considered to be statutory leave intended for the protection of women who have given birth and must also count towards a qualifying period for access to a higher salary grade.

55 However, it must be borne in mind that it is not for the Court of Justice to interpret national legislation, as only the national court has jurisdiction to do so. In the case of a breach of Directive 76/207 by legislative provisions introducing discrimination contrary to that directive, the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage (Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 75, and Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 72).

56 Accordingly, it is for the national court to ascertain whether, in the light of the facts of the main proceedings, the leave taken by Mrs Sass and the period of protection provided for by the BAT-O are equivalent to each other, in terms of their objectives and their purpose, so that the whole of the statutory leave taken under the legislation of the former GDR can be counted towards the qualifying period required by the BAT-O.

57 However, it must be made clear that neither the mandatory nature of the leave nor the way in which a woman is paid during that leave can be a decisive criterion in an examination of the objectives and purpose of each of the two regimes.

58 Accordingly, if the national court reaches the conclusion that the maternity leave provided for by Paragraph 244 of the AGB-DDR is such statutory leave intended to protect women who have given birth, the whole of that leave must be counted towards the qualifying period to be completed in order to be classified in a higher salary grade, to prevent a women who has taken such leave from being placed in a worse position, because of her pregnancy and her maternity leave, than a male colleague who started work in the former GDR on the same day as she did.

59 Having regard to the foregoing considerations, the answer to the question referred should be that Directive 76/207 precludes a collective agreement such as the BAT-O from excluding from a qualifying period the part of the period for which a female worker took maternity leave, under the legislation of the former GDR, which exceeds the protected period of eight weeks provided for by the legislation of the Federal Republic of Germany to which that agreement refers, where the objectives and purpose of both periods of leave are the protection of women as regards pregnancy and maternity, as provided for by Article 2(3) of that directive. It is for the national court to ascertain whether those conditions are fulfilled.

Costs

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

On those grounds, the Court (First Chamber), rules as follows:

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 precludes a collective agreement such as the Bundes-Angestelltentarifvertrag-Ost (collective agreement for civil servants on a contractual basis in the public sector in East Germany) from excluding from a qualifying period the part of the period for which a female worker took maternity leave, under the legislation of the former German Democratic Republic, which exceeds the protected period of eight weeks provided for by the legislation of the Federal Republic of Germany to which that agreement refers, where the objectives and purpose of both periods of leave are the protection of women as regards pregnancy and maternity, as provided for by Article 2(3) of that directive. It is for the national court to ascertain whether those conditions are fulfilled.

Signatures.