OPINION OF ADVOCATE GENERAL TESAURO
delivered on 27 January 1994 *

Mr President,
Members of the Court,

1. The questions referred to this Court for a preliminary ruling by the Arbeitsgericht (Labour Court), Regensburg, concern the interpretation of certain provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1] (hereinafter referred to as 'the directive').

The national court wishes to ascertain in particular whether, according to and for the purposes of that directive, the application of national legislation which, by prohibiting night-time work during pregnancy, allows a contract of employment concluded between an employer and a pregnant employee, both unaware of the pregnancy at the time the contract was made, to be considered invalid or to be terminated, is incompatible with the principle of equal treatment.

2. A brief summary of the relevant provisions of Community and national law is necessary for an understanding of the question.

According to Article 2(1) of the directive, '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'. The implementation of that principle concerns in particular 'the conditions, including selection criteria, for access to all jobs or posts' (Article 3(1)), and also 'working conditions, including the conditions governing dismissal' (Article 5(1)). Finally, it must be borne in mind that Article 2(3) provides that the directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

Among the relevant provisions of German law, Paragraph 8(1) of the Mutterschutzgesetz (Law on the protection of mothers), according to which 'it is prohibited to assign to pregnant women night-time work between 8 p. m. and 6 a. m. (...)', must be mentioned first. Next, for the purposes of this case, reference must be made to Paragraph 119 of the German Civil Code, according to which 'any person who, in concluding a contract, is mistaken as to its con-

* Original language: Italian.
1 — OJ 1976 L 39, p. 40.

tent (...) may avoid the contract where it is clear that he would not have concluded it if he had been aware of the actual circumstances and had appraised the matter with full knowledge of the facts' (Paragraph 119 (1)) and 'a mistake as to personal characteristics (...) deemed by custom to be essential also constitutes a mistake as to the content of the contract' (Paragraph 119 (2)). Finally, I would refer to Paragraph 134, according to which 'any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law'.

3. I now turn to the facts of the case. On 23 March 1992 Mrs Habermann, a nurse qualified in the care of the elderly, was engaged by the Arbeiterwohlfahrt, Bezirksverband Niederbayern/Oberpfalz (Regional Federation of the employees' social security organization, hereinafter referred to as 'the Arbeiterwohlfahrt') as a night attendant in a home for the elderly. The relevant employment contract, under which Mrs Habermann was to perform night-time duties only, took effect from 1 April. From a medical certificate dated 29 May 1992 it was apparent that Mrs Habermann, who had stopped work on 29 April because of illness, was pregnant. According to the findings of the national court, her pregnancy had begun on 11 March 1992, that is to say 12 days before the employment contract was signed.

Referring to Paragraph 8(1) of the Law on the protection of mothers, which prohibits night work for pregnant women, the Arbeiterwohlfahrt informed Mrs Habermann in a letter of 4 June 1992 that it considered the employment contract concluded on 23 March 1992 to be void.

4. It is apparent from the order for reference that in German theory and case-law there is agreement in considering that, in the absence of exemption, the contravention of the prohibition of night-time work renders the contract void in accordance with Paragraph 134 of the German Civil Code. It is also apparent from that order that the abovementioned letter of 4 June 1992 could also be interpreted as terminating the contract, given that, under Paragraph 119(2) of the German Civil Code, the contract may be challenged by the employer, with the result that it is terminated on account of the mistake as to the existence of pregnancy at the time when it was concluded, being a mistake concerning an essential personal characteristic.

In view of its doubts as to the compatibility of the principle of equal treatment, as laid down by the Community directive, with the practice in the case-law whereby the prohibition of night-time work for pregnant women renders a contract of employment invalid or in any case allows it to be terminated, the national court considered it appropriate to refer certain questions to the Court for a preliminary ruling.

5. Those questions are as follows:

'Question 1

Are the principles laid down by the Court of Justice in its judgment in Case C-177/88 *Dekker* [1990] ECR I-3941, concerning the interpretation of Council Directive 76/207/EEC of 9 February 1976 (OJ 1976 L 39, p. 40) 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, contained in Article 2(1) of that directive, to be interpreted in such a way that a contract of employment concluded between an employer and a pregnant employee, where both are unaware of the pregnancy, is not rendered invalid by the prohibition on certain work (night-time work) existing by virtue of the pregnancy?

Question 2

In particular, is the principle of equal treatment contained in Articles 3(1) and 5(1) of Directive 76/207/EEC infringed in the event of:

(a) the contract of employment concluded with the pregnant employee being held to be void by reason of the infringement of the prohibition on certain work (night-time work) applying during pregnancy for the protection of pregnant employees;

(b) the employer being able, by reason of his mistake regarding the existence of pregnancy at the time when the contract was concluded, to avoid the contract of employment and thus bring it to an end?'

As is quite clear from their wording, the two questions set out above do not require two separate answers, given that the first puts in more general terms the queries then specified in the second. Hence I need only consider the second question, in so far as it raises the issue whether the possibility of treating the contract of employment (concluded with a pregnant woman who at the time the contract was entered into was unaware of her pregnancy) as void in accordance with Paragraph 134 of the Civil Code (Question 2 (a)), or the possibility for the employer of repudiating the contract in question and seeking its termination in accordance with Paragraph 119 of the Civil Code (Question 2(b)), is compatible with the principle of equal treatment.

6. That said, it is necessary to deal first of all with a matter of principle raised by the Arbeiterwohlfahrt, which points out that the outcome of the main dispute cannot be made to depend on Directive 76/207/EEC, given that it is a dispute between two private individuals and that the Court has until now held that directives do not have direct horizontal effect.

Since, as has already been said, the possibility of pleading that the contract of employment is invalid in a case such as this depends on the interpretation given by the higher German courts (also) of the rules adopted in implementation of Directive 76/207/EEC (which, so far as I can see, has been correctly transposed into national law), it does not seem right to me to view the problem in terms of the directive's 'horizontal effects'.

In short, in such a case as this, there is no problem with respect to the 'horizontal' effects of the directive concerned, since the national court is bound, when applying the relevant national rules, and in particular Paragraph 8 of the Law on the protection of mothers, to interpret them in the light of the wording and the aims of the directive.

I would point out that in the present case the national court has been asked to establish whether or not there exists a right for women to retain their employment by virtue of the principle of equal treatment, as laid down by Directive 76/207/EEC, and thus by virtue of the national provisions adopted in implementation thereof. In this kind of situation, as the Court explained some time ago, 'regardless of the effects of the directive, (...) an interpretation of the directive may be helpful to the national court so as to ensure that the law adopted for the implementation of the directive is interpreted and applied in a manner which conforms to the requirements of Community law'. [2]

7. I now turn to the substance. The national court points out that to consider a contract of employment concluded with a pregnant employee invalid on the ground that for the duration of the pregnancy she cannot perform the work contractually required of her, could deny women access to certain occupations by reason of their sex, since pregnancy existing (although not established) at the time the contract was concluded would render it invalid. Women would, therefore, be denied access to certain jobs because of pregnancy, even though they were only temporarily unable to perform the work.

In addition, as the Court has stated, in applying national law 'the national court called upon to interpret it is required to do so (...) in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty'. [3]

From that point of view, a declaration of invalidity, since it operates retroactively and thus has precisely the same effect as if the contract had never been concluded, would amount to a refusal to engage her. However, termination of the contract by reason of a mistake as to the existence of pregnancy would, by bringing the employment relationship to an end with immediate effect as from that date, be comparable to dismissal.

2 — Judgment in Case 111/75 *Mazzalai* [1976] ECR 657, paragraph 10/11.

3 — Judgment in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8.

8. It is quite true that, beyond the formal legal distinction, both situations would in fact cause the woman concerned to lose her employment. I consider it necessary, however, to consider the question with regard to both possibilities, as requested by the national court.

With regard to the possibility of her being refused employment, the relevant rule is Article 3(1) of the directive, which sets out the principle of equal treatment as regards the conditions, including selection criteria, for access to all jobs. In the *Dekker* judgment to which the national court refers in its first question, the Court gave a ruling on the interpretation of that provision in which it confirmed that 'only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex', [4] as such incompatible with the directive. Pregnancy may not, therefore, be a ground for refusing employment and that, plainly, is so, regardless of the type of activity involved.

9. It is true that the case in point differs from the *Dekker* case, at least at first sight, in that the refusal of employment is not a direct and immediate result of the pregnancy but rather of the prohibition on night-time work for pregnant women, which is imposed on account of pregnancy. Non-compliance with the prohibition on night-time work would therefore lead to a fundamental defect in the employment relationship.

Since to perform night-time work would constitute an offence contrary to criminal law, therefore, it has been maintained in the proceedings that in a case of this sort there is no direct discrimination on grounds of sex, especially as Article 2(3) of the directive leaves to Member States the right to adopt or maintain in force measures aimed at protecting women, particularly as regards 'pregnancy and maternity'.

10. At this point it should be stated that, with respect to Article 2(3) of the directive, the legality of the German legislation prohibiting night-time work for pregnant women is beyond dispute. That legislation accords special protection to female workers in such circumstances and is clearly covered by the derogations provided for in the directive.

For the purposes of this case, however, the question to be asked is whether the derogation in question may lawfully be applied in such a way as to allow an employment contract concluded with a pregnant worker to be declared void or in any event terminated. That is the question of principle raised by the present case.

4 — Judgment in Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12.

11. In that connection, I note first of all that, as pointed out by the Court, [5] it is a woman's specific condition in the period before and immediately after childbirth that is the subject of special protection and may therefore lay her open to unequal treatment. On closer inspection then, the provisions adopted in implementation of Article 2(3) of the directive cannot properly be called derogations from the principle of equality, in that they seek rather to ensure that that principle operates in substance, by permitting such 'inequalities' as are necessary in order to achieve equality. In short, different treatment is allowed or imposed, in favour of and to protect female workers, in order to arrive at material and not formal equality, since that would constitute a denial of equality.

That being indubitably the *ratio* of the provision, it seems to me, at least in principle, that 'discrimination' permitted in order to take account of maternity, and therefore to protect women, cannot be practised in such a way as to exclude women from the labour market. It is only too clear that if such a conclusion were to be reached, both the object of the directive (ensuring equal treatment for men and women) and that of the derogation (allowing different treatment *in favour* of pregnant women to protect the special nature of their condition) would be completely undermined. Material equality between men and women in the field of employment requires that an event, which — by definition — affects women alone, should not be taken into consideration, even at the time of access to employment. And, it is worth repeating, it would be paradoxical if recognition of the social function of maternity, and consequent protection of pregnant women, should come about through their exclusion from the labour market.

12. The foregoing considerations lead me to the conclusion that the prohibition on night-time work, while in itself lawful, may be applied not in such a way as to jeopardize the validity of a contract for night-time work entered into by a pregnant woman, but only so as to bar her from actually carrying out such work. [6] In other words, temporary inability to perform night-time work, as a result of the special protection granted to pregnant women, may not be relied on to justify a refusal to engage a woman and may not have the effect of preventing the valid formation of an employment relationship.

In short, the principle of equal treatment, as laid down by Article 3(1) of the directive, precludes reliance on pregnancy as a ground for refusing to engage a woman, even in the case of night-time work. This also implies that awareness of the condition, at the time when the employment relationship is

5 — Judgment in Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25.

6 — That national law, moreover, lays down a prohibition on 'assigning' to pregnant women night-time work and not on engaging such women.

formed, is quite irrelevant, and that *a fortiori* the termination of a contract of employment entered into when the woman concerned was *not* aware of her condition cannot be considered lawful.

13. With regard to the possibility of the contract being terminated, reference must also be made to Article 5(1) of the directive, according to which there must not be any discrimination on grounds of sex with regard to the conditions governing dismissal. In that connection, the Court stated in the *Hertz* case that 'the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman'. [7] Dismissal by reason of the worker's pregnancy has, therefore, been treated by the Court as direct discrimination on grounds of sex and thus as incompatible with the directive.

The termination of an employment contract for the sole reason that the worker in question is pregnant cannot but constitute, at least in principle, direct discrimination on grounds of sex, as is particularly clear in the case in point. In that regard, it is sufficient to point out that to allow a contract to be terminated because of a mistake as to an essential personal characteristic, where the characteristic in question is the condition of pregnancy, necessarily implies that this can only be true of women. [8] Moreover, as the national court pointed out in the order for reference, the German Law on the protection of mothers precludes the possibility of dismissal on grounds of pregnancy (Paragraph 9).

14. 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, [9] is also important in this connection. It provides that pregnant women carrying out night-time work are to be given the right to be transferred to daytime work or allowed a period of leave (Article 7), without the loss of employment in any circumstances (Article 10).

Although that directive has not yet come into force (its transposition into national law is to be completed by October 1994), the aforesaid provisions support the interpretation given here of Article 5(1) of the directive, which is that a contract of employment may not be terminated on account of pregnancy, even where there is a statutory prohibition on night-time work.

7 — Judgment in Case C-179/88 *Handels-og Kontorfunktionaerernes Forbund* [1990] ECR 3979, paragraph 13.

8 — In that connection, it might be helpful to bear in mind that, referring to the *Hertz* judgment, the Bundesarbeitsgericht considered, thereby reversing its earlier decisions, that an employer may not have a contract of employment entered into with a pregnant woman terminated on the basis of Paragraph 119(2) of the Civil Code, that is by claiming to have been intentionally misled as to the existence of the pregnancy (judgment of 15 October 1992, 2 AZR 227/92).

9 — OJ 1992 L 348, p. 1.

15. It has also been argued during the proceedings that a declaration that a contract is invalid or a dismissal should not, in a case such as this, be regarded as direct discrimination on grounds of sex, in that the operative factor (statutory prohibition on a certain kind of employment) would lead to the same results if a male worker were in the same situation.

Let me state at once that such a contention appears to be groundless and that, in my view, the *Hertz* [10] judgment cannot usefully be relied on in that regard; in that judgment, the Court considered that the dismissal of a female worker on account of repeated periods of absence due to illness, even illness attributable to pregnancy or confinement, does not constitute direct discrimination on grounds of sex, if those absences take place after the period of maternity leave and would, in the same circumstances, lead to the dismissal of a male worker. In that case, the same conditions (a given number of absences over a given period of time) applied to workers of both sexes. In this case, on the other hand, the termination of the employment relationship is due to a condition (pregnancy) that clearly applies only to women.

16. It is scarcely necessary to point out, moreover, that in order to justify discrimination which has been established, the financial loss suffered by an employer in employing a person who is on leave throughout her pregnancy may not be put forward either, while it must be acknowledged that to maintain the employment relationship, in a situation like the one in point, produces increased financial burdens which may be especially heavy for small businesses.

The Court, which has already ruled on that point in the *Dekker* case, decided that 'a refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.' [11] Those considerations are equally valid in the present case, given the irrelevance, from that point of view, of the fact that the longer the period of absence from work, the greater the financial outlay.

17. Finally, the argument of the Arbeiterwohlfahrt, according to which the solution adopted here could lead to abuse by women, does not seem to me to have the least relevance either. It is self-evident that there is no question of abuse if it is recognized that pregnant women do not lose the right to be

10 — Judgment cited above at footnote 7, especially paragraphs 14-17.

11 — Judgment cited at footnote 4, paragraph 12.

engaged and to keep their jobs, solely because they are pregnant.

Moreover, if we start from the premise that a woman may actually 'programme' the birth of a child on the basis of the possibility of night-time work, she should also have the right to plan it in such a way as to become pregnant only *after* signing the contract, which would enable her to avoid the problems encountered by Mrs Habermann. It is scarcely necessary to draw attention to the fact that had the pregnancy commenced not on 11 but on 24 March, the day after the contract was entered into, it would have been enough to provide a defence to any challenge. In other words, it does not seem to me that the point at issue can be settled on the basis of the remote and unlikely possibility of abuse.

18. In the light of the foregoing considerations, therefore, I propose that the Court reply to the questions submitted by the Arbeitsgericht Regensburg as follows:

(1) Articles 2(1) and 3(1) of Directive 76/207/EEC preclude an interpretation of national law that renders a contract of employment concluded with a pregnant woman invalid, where such invalidity is the result solely of the prohibition on night-time work imposed for the protection of pregnant women.

(2) Articles 2(1) and 5(1) of Directive 76/207/EEC must be interpreted as precluding the termination of a contract of employment concluded with a pregnant woman, on account of a mistake as to the existence of pregnancy.