OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 5 February 1998 *

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1. Is it contrary to Community law, and specifically to Directive 76/207/EEC [1] (hereinafter 'Directive 76/207'), for an employer to dismiss a pregnant worker on account of incapacity for work caused by her pregnancy, the period of such incapacity having exceeded that which, under the contract of employment, entails dismissal of workers on grounds of sickness? That, in general terms, is the question on which the House of Lords seeks a preliminary ruling in this case.

I — The dispute before the national courts

2. The facts, as described in the order for reference, are as follows: Mrs Brown, the appellant in the main proceedings, was employed as a driver for Rentokil Limited, which has now become Rentokil Initial UK Limited (hereinafter 'Rentokil'), the respondent in those proceedings. Her job was mainly to transport and change Sanitact units in shops and other centres. She became pregnant and informed Rentokil in August 1990.

Her pregnancy later became complicated through a number of interrelated causes, of which details are not given in the documents before the Court. As from 16 August 1990 she submitted a succession of four-week medical certificates mentioning various diagnoses such as 'symptoms of pregnancy', 'bleeding in pregnancy' or 'pregnant backache'. From that time, until her dismissal, the appellant remained unable to work.

3. The respondent included a clause in the contract of employment under which any employee, man or women, who was incapable of work for more than 26 weeks without interruption would be dismissed. On 9 November 1990 Mrs Brown had a meeting with two executives of the company, who informed her that half of the 26-week period had passed and reminded her that her employment contract would be terminated

1 — 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).

on 8 February 1991 if she was not back at work by that time, following an independent medical examination confirming that she was able to work. Those details were confirmed to her by letter of the same date.

The appellant did not go back to work after receiving that letter. The parties agree that there was never any question of her being able to return to work prior to the expiry of the 26-week period.

4. In accordance with the abovementioned clause, the appellant was dismissed while she was still pregnant, by letter dated 30 January 1991 with effect from 8 February 1991. She gave birth on 22 March 1991.

5. The national court states in its order for reference that, on the basis that 22 March 1991 was also the expected date of confinement, then, had the appellant been employed for two years on 30 December 1990, she would have been entitled to absent herself from work from the beginning of the 11th week before confinement [2] and would have had the right to return to work at any time in the 29 weeks following her confinement. Owing to the appellant's length of service, she was not so entitled, although, if she had not been dismissed, she would have been entitled to maternity pay from her employer.

6. The Industrial Tribunal dismissed the proceedings brought by the appellant, in which she alleged discrimination on grounds of sex, stating: 'It is plain that where as in this case an absence through illness related to reasons of pregnancy but beginning long before the applicability of the statutory maternity provisions and subsisting continuously thereafter followed by dismissal does not fall to be put into the automatic category of being discriminatory because the dismissal was due to pregnancy'.

7. The Employment Appeal Tribunal dismissed Mrs Brown's appeal by judgment of 23 March 1992. That tribunal considered itself bound by the decision of the Court of Appeal in *Webb* v *EMO Air Cargo UK Limited* and held that the industrial tribunal had, as the law stood at that time, reached the correct conclusion.

8. Lord Allanbridge, giving the judgment of the Extra Division of the Court of Session, dated 18 January 1995, held that a preliminary conclusion was that in Mrs Brown's

2 — Pursuant to section 33 of the Employment Protection (Consolidation) Act 1978.

case there was no discrimination under the Sex Discrimination Act 1975. He further held that the clear distinction established by the Court of Justice in the *Hertz* case [3] between pregnancy and illness attributable to pregnancy was applicable to Mrs Brown's appeal. Therefore, the appellant, whose absence was due to illness and who was dismissed on account of that illness in February 1991, could not succeed on the facts relevant to her case.

II — The preliminary questions

9. In order to determine the dispute, which came before it by way of appeal from the judgment of 18 January 1995, the House of Lords, after hearing submissions from the parties, referred the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Is it contrary to Articles 2(1) and 5(1) of Directive 76/207 of the Council of the European Communities ("the Equal Treatment Directive") to dismiss a female employee at any time during her pregnancy as a result of absence through illness arising from that pregnancy?

(b) Does it make any difference to the answer given to Question 1(a) that the employee was dismissed in pursuance of a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continuous absence?

2. (a) Is it contrary to Articles 2(1) and 5(1) of the Equal Treatment Directive to dismiss a female employee as a result of absence through illness arising from pregnancy who does not qualify for the right to absent herself from work on account of pregnancy or childbirth for the period specified by national law because she has not been employed for the period imposed by national law, where dismissal takes place during that period?

(b) Does it make any difference to the answer given to Question 2(a) that the employee was dismissed in pursuance of a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continued absence?'

3 — Case C-179/88 *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1990] ECR I-3979.

III — The Community legislation

The Community provisions of which an interpretation is needed for judgment to be given in this dispute are all contained in Directive 76/207, namely Article 2(1) and (3) and Article 5(1) and (2), which provide as follows:

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

(2) ...

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

'Article 5

(1) Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

(2) To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended.

(c) ...'

10. On 19 October 1992 the Council adopted Directive 92/85/EEC [4] in order to protect the health and safety of pregnant workers who have given birth or are breastfeeding (hereinafter 'Directive 92/85'), which requires the Member States to adopt, before 19 October 1994, among others provisions needed to ensure that female workers enjoy a continuous period of maternity leave of at least 14 weeks, allocated before and/or after confinement, including two weeks compulsory leave. It also prohibits dismissal of a pregnant worker, in the following terms:

'Article 10

...

(1) Member States shall take the necessary measures to prohibit the dismissal of workers [who are pregnant, have recently given birth or are breastfeeding] during the period from the beginning of their pregnancy to the end of the maternity leave ... save in exceptional circumstances 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.

...'

4 — 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).

11. However, since Mrs Brown was dismissed at the beginning of 1991, there is no need to interpret those provisions.

IV — The national legislation

12. The national provisions applicable to the main proceedings are contained in the Sex Discrimination Act 1975 (hereinafter 'the 1975 Act'), the Employment Protection (Consolidation) Act 1978 (hereinafter 'the 1978 Act') and the Social Security Act 1986 (hereinafter 'the 1986 Act').

Sections 1 and 5 of the 1975 Act provide that a woman is discriminated against on grounds of sex if, for the purposes of that act, she receives less favourable treatment than a man. A comparison must be made between the cases of persons of different sex or marital status such that the circumstances in the one case are the same, or not materially different, in the other.

As regards rights of employees in connection with pregnancy and maternity, the 1978 Act

provided, at the time of Mrs Brown's dismissal, that an employee who is absent from work because of pregnancy or confinement will be entitled to return to work, provided that the following conditions are met:

— she continues to be employed, whether or not at work, at the beginning of the 11th week before the expected date of confinement;

— at the beginning of that 11th week she has been employed for a period of not less than two years;

— she informs her employer in writing at least 21 days before stopping work:

— that her absence will be due to pregnancy or confinement;

— that she intends to return to work;

— of the expected week of confinement or, if the confinement has occurred, the date on which she gave birth;

— she submits, at the employer's request, a medical certificate indicating the expected week of confinement.

As regards dismissal, the 1978 Act provided at the material time that an employee was to be treated as unfairly dismissed if the direct or indirect reason for her dismissal was that she was pregnant, unless, on the date of the dismissal, she was incapable, because of her pregnancy, of adequately performing her work or if, because of her pregnancy, she could not continue to work after that date without contravention, either by her or her employer, of a duty or restriction imposed by or under any enactment. The national court makes it clear that, at the material time, Mrs Brown would have had to have completed two years' continuous employment in order to avail herself of the right not to be unfairly dismissed, a requirement which she did not meet.

The subsequent amendment of the provisions of that Act which govern unfair dismissal, made in order to incorporate the provisions of Directive 92/85, entered into force on 10 June 1994.

Finally, so far as is relevant here, the 1986 Act provides that a female employee will be entitled to maternity pay from her employer if she meets the following conditions:

— she has been in the employer's service for a continuous period of at least 26 weeks, ending with the week immediately preceding the 14th week before the expected date of confinement, but has ceased to work wholly or partly because of pregnancy or confinement;

— she has received weekly earnings for the period of eight weeks ending with the week immediately preceding the 14th week before the expected date of confinement which are not less than the lower earnings limit in force before the commencement of that 14th week;

— she has reached the beginning of the 11th week prior to the expected date of confinement or has given birth before that time;

— and she has notified her employer that she is ceasing work because of her pregnancy or confinement.

Maternity pay will be payable for a maximum period of 18 weeks, normally commencing in the 11th week preceding the expected confinement date, but no later than the sixth week. Provision is made for two types of maternity pay, referred to as the higher rate and the lower rate. The higher rate is equivalent to nine-tenths of a woman's normal weekly earnings for the period of eight weeks preceding the 14th week before the expected week of confinement; the lower rate, the amount of which is fixed, applies when it is found to exceed the higher rate. A woman who, for a continuous period of at least two years ending at the beginning of the 14th week prior to the expected confinement date, has worked for an employer who is liable to pay the allowance to her will receive it at the higher rate for the first six weeks and at the lower rate for the remaining period. A woman working for her employer under an employment contract involving employment for less than 16 hours weekly will not be entitled to receive the allowance at the higher rate. A woman entitled to maternity pay who is unable to claim the higher rate will receive the lower rate.

According to the documents before the Court, in 1996 the lower rate of maternity pay was, in 1996, UKL 54.55 per week. [5]

5 — Social Security Benefits Up-rating Order 1996, SI 1996/599, Arts 1(2)(c) and 10, as from 7 April 1996. The previous amount was UKL 52.50 (Social Security Benefits Up-rating Order 1995, SI 1995/559, Art. (10)). There is no indication of the amount payable at the time of the events in the main proceedings.

V — The observations submitted to the Court of Justice

13. Written observations were submitted within the period laid down by Article 20 of the EC Statute of the Court of Justice, and oral argument was presented at the hearing by the appellant, the respondent, the United Kingdom Government and the Commission.

14. The appellant, on the basis of the case-law of this Court, which I shall examine in due course, considers that the dismissal of a pregnant woman on account of incapacity for work attributable to pregnancy is contrary to Directive 76/207 and constitutes direct discrimination on grounds of sex, since pregnancy is a condition which affects only women. She considers that it is also contrary to that directive to dismiss a pregnant worker on account of incapacity for work attributable to her condition, when she is not entitled to absent herself from work on account of pregnancy or childbirth for the period specified by national law because of insufficient length of service, if the dismissal takes place during that period. Finally, she maintains that the fact that the dismissal occurred under a contractual rule enabling the employer to dismiss a worker, regardless of sex, for continuous absence for a given number of weeks has no bearing on that position.

15. The respondent states that it is necessary to go back to a date falling 11 weeks before the expected date of confinement in order to arrive at the date on which Mrs Brown's employment rights should be considered. Since on 30 December 1990 she had not worked for her employer for a continuous period of two years she was not entitled to the benefit of the right to return to work provisions, nor could she rely on the provisions concerning unfair dismissal intended to protect pregnant women against dismissal on account of their pregnancy. She was, however, entitled to maternity pay at the lower rate, payable by the State.

It submits that, in view of the circumstances in which Mrs Brown found herself, the reason for her being dismissed was not that she became pregnant but rather that her pregnancy was abnormal, preventing her from working from about the eighth week. The duration of her incapacity for work was longer than might normally be anticipated, falling entirely outside the period generally provided for on account of maternity. The reason for Mrs Brown's dismissal was that she became ill during her pregnancy and her unavailability for work exceeded 26 weeks.

On the basis of the same case-law as that relied on by the appellant to reach the opposite conclusion, it submits that the rule in the employment contracts concluded with its employees, which allowed Mrs Brown to be

dismissed after 26 weeks' absence, is not discriminatory. In support of that view, it gives the example of an employer who employs three pregnant women. The first, who is robust, has no time off until she is able to absent herself from work by reason of maternity; the second has some time off due to pregnancy-related health problems before the beginning of her absence; the third is Mrs Brown's case: her pregnancy-related incapacity for work exceeded 26 weeks and she was dismissed on the same terms as a male employee after absence through illness for precisely the same period. Why should such an approach be described as sex discrimination? On the contrary, if Mrs Brown were treated in a manner different from other pregnant women or male employees, that would be equivalent to introducing positive discrimination applicable only to a section of pregnant employees rather than in all cases of pregnant employees.

It maintains that a distinction must be drawn between an illness like that suffered by Mrs Brown, which led to her being unfit for work practically throughout the whole of her pregnancy, and the 'normal risks of pregnancy', such as morning sickness at the start of the pregnancy and tiredness towards the end, problems which, moreover, do not arise in all pregnancies. The answer to be given to the House of Lords must, in its opinion, be based on that distinction.

As regards the fact that Mrs Brown was dismissed when, if her length of service had been sufficient, she would have been entitled to absent herself from work on account of pregnancy, the respondent considers that, as the applicable Community law stood at that time, it was exclusively for the Member States to determine the conditions under which a woman would be entitled to such right of absence and to set the duration thereof. Exercising that prerogative, the United Kingdom imposed the legal requirement of two years' service. In any event, Mrs Brown was dismissed for being absent on sick leave for the number of weeks laid down in her contract of employment, and not for her absences in the short period for which, had she been entitled to absent herself from work on account of pregnancy, she could have done so.

16. The United Kingdom Government stresses that the period for which Mrs Brown was unfit for work, as a result of pregnancy, far exceeded the period for which a woman may absent herself on account of pregnancy and confinement under national law. It states that, in order to answer the preliminary questions, it is necessary to distinguish dismissal arising out of normal risks and disorders normally inherent in pregnancy and maternity, for example absence from work for routine ante-natal appointments, minor absences for morning sickness and absences during the period immediately preceding and following her confinement, from dismissal of a woman arising out of sickness, whether pregnancy-related or not. In the first case, the dismissal will constitute

direct sex discrimination, whereas in the second case it will be lawful, provided that a male employee who was unfit for work for a similar period would have been treated no more favourably. In its view, it is for the national court to determine whether the period for which Mrs Brown was absent was justified by a normal risk of pregnancy.

17. The Commission states that there is no objective justification for making a distinction during pregnancy, in order to apply different treatment to them, between the period before the worker can exercise the right to absent herself from work and the period from that time until the birth. Nor does it consider that there is any justification for distinguishing between dismissal for reasons of pregnancy and dismissal for reasons of pregnancy-related incapacity for work, provided that dismissal takes place when the worker is still pregnant, since health problems associated with pregnancy are due to a specifically female condition both before and during her absence. The application to women in Mrs Brown's situation of the rule applicable to workers in general, in case of illness, constitutes discrimination against women since the situations involved are different.

It adds that that view is confirmed by Article 10 of Directive 92/85, which prohibits dismissal of workers in the period from the beginning of their pregnancy to the end of their maternity leave. Despite the fact that the period within which the Member States were to incorporate the directive in their national law had not expired at the material time, its provisions must be taken into account in interpreting Directive 76/207.

VI — Examination of the preliminary questions

A. *Opening remarks*

18. Before considering the problems raised by the questions, I wish to make a number of observations.

19. The first concerns the order for reference, which is particularly laconic in its account of the facts of the main proceedings. There is no indication, for example, of how long Mrs Brown had been pregnant when she became unfit for work or of the expected date of confinement or whether her pregnancy was in any way subject to high risks. I also consider that the reasons which, it appears, were given in the successive medical certificates, namely 'symptoms of pregnancy', 'bleeding in pregnancy' and 'pregnant backache', if they were the only ones, seem, especially in the case of the first and

third, not to constitute very cogent reasons for a doctor to have repeatedly certified unfitness for work for a continuous period of 26 weeks. Nor are we told whether Mrs Brown underwent the independent medical examination scheduled for the end of the 26 weeks or, if so, what the result was.

I imagine that the purpose of that examination was for the company to obtain an independent opinion as to the worker's chances of recovery, with a view to her returning to work sooner or later, dismissal being the appropriate course if the result of the examination suggested that she would not return to work in the short or medium term. If that were not the case, the dismissal would appear to be a disciplinary dismissal on grounds of illness rather than dismissal justified by a situation in which the employer had to bear an excessive burden.

If Mrs Brown's unfitness for work was actually caused by her pregnancy, and there is no reason to think that the position was otherwise, it would seem logical to assume that she would cease to be unfit when she gave birth. Why, therefore, was she dismissed one-and-a-half months before she gave birth? Simply because she had by then been away for 26 weeks, or was it rather because national law gave her no right to be reinstated after her confinement because her length of service with the company was less than two years?

Those are, of course, matters of fact to be assessed by the national court in the light of the interpretation of Community law given by the Court of Justice. I must point out, however, that it would have been useful for those facts to have been disclosed.

20. The second observation relates to the need to define, once and for all, the respective fields of application of Directives 76/207 and 92/85, in the light of their provisions and their purposes. [6] The respondent states that the repercussions of the judgment to be given in this case will be very limited since Directive 92/85 requires the Member States to prohibit, with effect from no later than 19 October 1994, dismissal of a worker who is pregnant, has recently given birth or is breastfeeding. In its opinion, Mrs Brown was merely unlucky since, when she was dismissed, that directive had not been adopted.

I cannot agree with that view, since the provisions of the two directives differ and the aims which they pursue are also different.

21. Directive 76/207, whose legal basis is Article 235 of the EC Treaty, represents

6 — That need was pointed out when Directive 92/85 was merely planned, by J. Shaw: 'Pregnancy discrimination in sex discrimination', *European Law Review* 1991, pp. 313-320, in particular at p. 318.

Community action considered necessary, at the relevant time, in order to achieve the principle of equal treatment for men and women in respect of access to employment, vocational training and promotion and in respect of other working conditions. [7] The only exceptions allowed to the principle of equal treatment are to be found in Article 2(2), (3) and (4), specifically relating to occupational activities for which, by reason of their nature, the sex of the worker constitutes a determining factor; provisions relating to protection of women, particularly in relation to pregnancy and maternity; and measures to promote equal opportunity for men and women, in particular by removing any existing inequalities which affect women's opportunities in the areas covered by the directive. In all cases, the measures involved, as Community law stands at present, are a matter for the Member States.

22. Directive 92/85, on the other hand, has as its legal basis Article 118a of the Treaty, which requires the Council to adopt, by means of directives, minimum provisions to encourage improvements, especially in the working environment, as regards the health and safety of workers; it is the tenth individual directive adopted under Article 16(1) of Directive 89/391/EEC, [8] Article 15 of which provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them.

The purpose of Directive 92/85 is to apply measures to encourage improvements to health and safety at work for workers who are pregnant, have recently given birth or are breastfeeding. It is thus clearly concerned with protection, providing for different treatment for women in any of those situations. The legislature itself recognises, in the ninth recital in the preamble, that such protection should not treat women on the labour market unfavourably or work to the detriment of directives concerning equal treatment for men and women.

As the Court of Justice stated in its judgment in *Webb*, [9] in view of the effects which the risks 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, the Community legislature provided, pursuant to Article 10 of Directive 92/85, for special protection to be given to women by prohibiting dismissal during the period from the

7 — Third recital in the preamble.

8 — Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

9 — Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, paragraphs 21 and 22.

beginning of their pregnancy to the end of their maternity leave, and that there is to be no exception to that prohibition during that period save in exceptional cases not connected with the condition of the person concerned.

23. It is true that, once the prohibition of dismissal laid down in Article 10 of Directive 92/85 is incorporated in the domestic law of the Member States, it will become unnecessary to apply Article 5 of Directive 76/207, which lays down the principle of equal treatment for men and women with regard to working conditions, including the conditions governing dismissal, to cases in which a woman has been dismissed whilst pregnant.

However, the prohibition of dismissal in Article 10 of Directive 92/85 does not resolve the problem of a woman who, having returned to work on an entirely normal basis after her maternity leave, is then dismissed for having been intermittently unfit for work during the previous year for the number of weeks laid down by national legislation; in such circumstances, is the woman dismissed on the same terms as a man who has been ill for the same number of weeks, when for the female worker account is taken of the period for which she was confined to bed on doctor's orders because, for example, her pregnancy displayed a risk of miscarriage?

That is why Article 5 of Directive 76/207 and the Court's case-law interpreting it will continue to be essential in order to clarify the question whether the periods for which a pregnant woman has been prevented from working because of her pregnancy may be added to the periods preceding her pregnancy and following her maternity leave, for the purpose of calculating absences from work such as to justify dismissal.

24. My third observation relates to the case-law of this Court interpreting the principle of equal treatment laid down by Directive 76/207, where the employment rights of workers who are pregnant or have recently given birth are involved. It might not at first sight seem extraordinary that the only four judgments on this subject delivered before the expiry date of the period for submitting written observations in this case, namely the judgments in *Dekker*, [10] *Hertz*, [11] *Habermann-Beltermann*, [12] and *Webb*, [13] enabled the parties to the main proceedings, the United Kingdom Government and the Commission to defend such conflicting positions. What is surprising, and indeed worrying, is that all rely on the same paragraphs in support of their views.

I believe therefore that, as well as answering the preliminary questions from the House of

10 — Case C-177/88 *Dekker* [1990] ECR I-3941.

11 — Cited in footnote 3 above.

12 — Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657.

13 — Cited in footnote 9 above.

Lords, the Court must clarify the existing case-law, in order to ensure legal certainty. From my part, I shall review those judgments and suggest how I think they should be interpreted.

B. *The case-law of the Court of Justice on the application of employment rights governed by Directive 76/207 to workers who are pregnant or who have recently given birth*

(1) The *Dekker* and *Hertz* judgments, in which the Court held that it was discriminatory to refuse to engage a pregnant woman but not to dismiss her because of incapacity for work commencing after maternity leave, even though the illness was caused by the confinement

25. On 8 November 1990, this Court delivered two judgments which have had a considerable impact in the area of Community social law concerned with application of the principle of equal treatment for men and women in matters of employment. They were the first in which the interpretation of Directive 76/207 was in issue and, more specifically, the right of access to employment or the right to maintain a post in relation to situations as exclusive to women as pregnancy and maternity. Both illustrate well the thesis of Lucinda M. Finley, which can be summarised in the following statement:

'The fact that women bear children and men do not has been the major impediment to women becoming fully integrated into the public world of the workplace'. [14]

26. They are the *Dekker* [15] and *Hertz* [16] judgments. In the first, the Court gave a preliminary ruling on a question from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), dealing with a case in which Mrs Dekker, a candidate for a post of instructor in a training centre for young adults, who had informed the selection committee that she was three-months pregnant and who had been recommended by the committee as the most suitable candidate for the duties involved, objected to the employer's refusal to engage her on the ground that she was already pregnant when she submitted her application. That refusal came after the employer established that its insurer would not reimburse the daily benefit that it would have to pay the worker during her absence on account of pregnancy and confinement. The applicable national law allowed the insurer to refuse wholly or in part to refund daily benefits to the employer where the employee's incapacity for work had arisen within the six months following recruitment, provided that, at that time, the worker's state of health was such that the

14 — Lucinda M. Finley, 'Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate', *Columbia Law Review*, Vol. 86: 1118, p. 1119.

15 — Cited in footnote 10 above.

16 — Cited in footnote 3 above.

emergence of incapacity within that period could be foreseen. Since no exception was made for pregnancy, incapacity for work by reason of maternity was treated in the same way as incapacity for work because of a foreseeable sickness.

The national court's question, so far as relevant to this case, was whether the employer's refusal to engage the worker in those circumstances was contrary to the principle of equal treatment laid down in Directive 76/207.

27. In the second case, the preliminary ruling was sought by the Højesteret (Supreme Court), Denmark, to enable it to give judgment in the proceedings before it, brought by Mrs Hertz against her former employer, Aldi-Marked K/S. Mrs Hertz had been recruited in July 1982 as a part-time cashier and saleswoman. In June 1983, after a pregnancy marked by complications, for most of which, with the consent of her employer, she was on sick leave, she gave birth to a son. Towards the end of 1983, at the end of her maternity leave, Mrs Hertz returned to work and did not take any more sick leave until June 1984. In the course of the next year she was on sick leave for 100 working days, for which reason she was dismissed: the company claimed that it was normal practice to dismiss workers who were ill frequently. It was common ground between the parties that the plaintiff's absences between June 1984 and June 1985 were a consequence of her confinement in 1983.

The national court asked whether Article 5(1), in conjunction with Article 2(1), of Directive 76/207 covered dismissals as a consequence of absences due to illness attributable to pregnancy or confinement and, if so, whether protection against dismissal due to illness caused by pregnancy or confinement was unlimited in time.

28. Advocate General Darmon, who delivered an Opinion covering both cases, carried out a general and invaluable review of the question of motherhood and the place which it should occupy, in the light of the principle of equal treatment for men and women, in the economic and social life of European societies, [17] which is still up to date today. After considering whether there was any event more closely connected to the specific nature of womanhood, and whether it was conceivable to treat female workers on an equal footing with their male counterparts without taking account of motherhood, he took the view, in the *Dekker* case, that the refusal to employ the candidate on account of forthcoming motherhood, thereby taking into consideration an event which affected only female workers, constituted direct discrimination on grounds of sex.

29. The *Hertz* case, he said, involved in a perhaps more pressing way the difficult task

17 — Opinion of Advocate General Darmon in the *Hertz* and *Dekker* cases, cited in footnotes 3 and 10 above, [1990] ECR I-3956, in particular point 21 et seq., at I-3960.

of reconciling the principle of equal treatment with the demands of economic life. And he added 'How are periods of sickness occurring after maternity leave but directly attributable to pregnancy and confinement to be viewed? Should it or should it not be subject to what might be termed "the ordinary rules" governing absences for reasons of health?' [18] The conclusion which he reaches in that case is the opposite of that in *Dekker*, namely that the dismissal of a worker outside periods of maternity leave because of absences due to illness attributable to pregnancy or confinement does not constitute discrimination directly based on sex.

30. I must make it clear, however, that that bare statement is the consequence of reasoning which incorporates throughout the idea that the worker's absences were justified by illness originating from pregnancy or confinement, which occur *after the expiry* of the maternity leave. In fact, in point 43, he says 'I have to confess that I was tempted to propose a solution whereby medical conditions which were directly, definitely and preponderantly due to pregnancy or confinement would enjoy ... "immunity", in the sense that the principle of equality of treatment would restrain the employer *from dismissing his employee for a reasonable period after the event in question.*' [19]

In paragraph 45, he says '*If complications resulting from a confinement* are severe, a female worker may remain unable to work for several years, without her employer's being able to dismiss her ...'. In point 46, he explains that '... an expedient protecting a few *women affected by severe post-natal problems* — in statistical terms, fortunately a minute percentage of cases — may jeopardise the chances of all women wishing to enter the labour market'.

In the next point, when he considers what criteria the Court could adopt in order to decide in which cases a medical condition must fall within the protection demanded by maternity and what the duration of such protection should be, the underlying idea continues to be that the principle of equal treatment applies once the woman has come to the end of her maternity leave.

And, in point 48, the solution he suggests is to draw a distinction between the normal risks of pregnancy and confinement, which he defines as 'the common attendant complications sometimes leading to the grant of additional maternity leave' — risks which, in his opinion, should qualify for Community protection inasmuch as they are specific to motherhood — and medical conditions which are not associated with the ordinary risks of pregnancy and should therefore be treated on the same footing as 'ordinary'

18 — Point 40.

19 — Emphasis added in all cases.

sickness, adding that '... in the absence of national legal provisions conferring special protection on women, the employer must be able to dismiss his employee *at the end of maternity leave* ... Thus, *once a female worker has exhausted her entitlement to the various types of maternity leave, periods of absence for reasons of sickness, even if those reasons can be traced back to pregnancy or confinement, cannot be attributed to the normal risks of maternity and must accordingly be viewed in the same light as the absences of any other worker*, unless the national legislature provides special protection pursuant to Article 2(3) of the Directive'.

31. Both judgments were delivered by the full Court, which adopted the solution proposed by the Advocate General. The hearings were held on 3 October 1989 and the Opinion was delivered on 14 November of the same year. The fact that the judgments came a year later is indicative, in my opinion, of the difficulties involved in those cases, in particular *Hertz*, as the Court itself acknowledges in paragraph 7 of its judgment, which may account for the sparse nature of the reasoning of both judgments.

32. In the *Dekker* judgment, the Court took the view that only women can be refused employment on account of pregnancy and such refusal therefore constitutes direct discrimination on grounds of sex, that a refusal of employment on account of the financial consequences of absence due to pregnancy is essentially based on the fact of pregnancy, and that 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. [20]

33. The grounds and operative part of the *Hertz* judgment, however, deserve special attention. It should be remembered that the positions of the parties, as set out in paragraphs 8 and 9 of the judgment, were that some claimed that the dismissal of a woman on account of pregnancy, confinement or repeated periods of absence due to an illness attributable to pregnancy or confinement is, irrespective of the time when the illness occurs, contrary to the principle of equal treatment, since a male worker is not subject to such disorders and hence cannot be dismissed on that ground. The others maintained that an employer cannot be prohibited from dismissing a female worker on account of her frequent periods of sick leave solely because her illness is attributable to pregnancy or confinement. Such a prohibition, which would affect the employer for many years after the confinement, would be liable to entail not only administrative difficulties and unfair consequences for employers but also negative repercussions on the employment of women.

34. That judgment is of fundamental importance when it comes to reconciling the principle of equal treatment for men and women in matters of employment with the role of women in the reproductive process. Indeed, paragraph 13 states: 'It follows from the provisions of the directive ... that the dismissal

20 — Cited in note 10 above, paragraph 12.

of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman ...'; in paragraph 14, the Court states that 'the dismissal of a female worker on account of repeated periods of sick leave which are not attributable to pregnancy or confinement does not constitute direct discrimination on grounds of sex, inasmuch as such periods of sick leave lead to the dismissal of a male worker in the same circumstances' and, in paragraph 15, that '... directive [76/207] does not envisage the case of an illness attributable to pregnancy or confinement. It does, however, admit of national provisions guaranteeing women's specific rights on account of pregnancy and maternity, such as maternity leave. During the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence. It is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur.'

35. It is paragraphs 16 and 17 which, in my opinion, indicate the direction to be taken in interpreting that judgment. In them, the Court expressly states that

'In the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness. Such a pathological condition is therefore covered by the general rules applicable in the event of illness.

Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.'

36. However, the difficulty which arises in interpreting the scope of that judgment lies in the fact that the clarification concerning the time at which the illness emerges does not appear in the operative part, in which an answer is given that corresponds precisely to the question, as submitted — and the Court adopts the exact wording thereof — in the following terms: 'Without prejudice to the provisions of national law adopted pursuant to Article 2(3) of Council Directive 76/207/EEC ..., Article 5(1) of that directive, in conjunction with Article 2(1) thereof, does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.'

That apparent incongruity, which is easily accounted for by the fact that, in paragraphs

16 and 17, the Court is very mindful of the circumstances in which the dispute before the national court arose, whereas, in the operative part, the answer strictly matches the preliminary question, as phrased by the national court, [21] is what has given rise to the divergent interpretations underlying the views of the parties in these proceedings.

37. I am in no doubt whatsoever that that judgment cannot be interpreted solely by reference to the operative part: it must be borne in mind that, in paragraph 16, the Court states in absolutely clear terms that, if the illness manifests itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness.

That is certainly the construction adopted by academic authors commenting on that judgment: all the commentaries I have read stress, more or less disapprovingly, the fact that the Court, when stating that Article 5(1), in conjunction with Article 2(1), of Directive 76/207 does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement, is referring to absences occurring *after* maternity leave. [22]

38. That is also the interpretation of the *Hertz* judgment adopted by Advocate General Tesauro in his Opinion in the *Webb* case. [23] In the second paragraph of point 13, he states that the Court of Justice considered, in that judgment, that the dismissal of a female employee on account of repeated absences through illness, attributable to pregnancy or confinement, does not constitute direct discrimination on grounds of sex if those absences occur after the period of maternity leave [24] and he adds, in footnote No 12, which relates to that statement, that 'the judgment may certainly not be construed as meaning that the Court has

21 — The question is worded as follows: Do the provisions of Article 5(1), in conjunction with Article 2(1), of ... Directive 76/207/EEC ... encompass dismissal as a consequence of absence due to illness which is attributable to pregnancy or confinement?

22 — Jacqmain, J.: *Chroniques de droit social*, 1991, pp. 49-50, paragraph 4; Devos, D.: *Journal des tribunaux du travail*, 1991, pp. 121-122, paragraph 3; Shaw, J., op cit., pp. 313-320, particularly p. 317; Traversa, E.: *Revue trimestrielle de droit européen* 1991, pp. 425-439, particularly p. 436; Kilpatrick, C.: 'How long is a piece of string? Regulation of the Post-Birth Period' in *Sex Equality Law in the European Union*, Wiley & Sons 1996, p. 81 et seq., particularly p. 84; Burrows, N. & Mair, J.: *European Social Law*, Wiley & Sons 1996, p. 155; Nielsen, R.: *Common Market Law Review*, 1992, pp. 160-169, particularly p. 164; More, G.: 'Reflections on pregnancy discrimination under European Community Law' in *The Journal of Social Welfare and Family Law*, 1992, pp. 48-56, particularly pp. 53 and 54; Bolger, M.: 'Discrimination on Grounds of Pregnancy as Sex Discrimination' in *Gazette of the Incorporated Law Society of Ireland*, p. 383; Rodríguez-Piñero, M.: 'Discriminación por razón de sexo y embarazo de la trabajadora' in *Relaciones Laborales*, volume I, 1991, p. 3 et seq., particularly p. 8; Flynn, L.: 'Pregnancy and Dismissal: Rejecting the "Sick Male" comparison' in *Irish Law Times*, November 1994, p. 257; Van Kraay, F.: 'The Difference Between Pregnant Women and Sick Men' in *Law Teacher*, 1995, Vol. 29, p. 92 et seq., particularly p. 93; McGlynn, C. M. S.: 'Webb v EMO: a hope for the Future' in *Northern Ireland Legal Quarterly*, 1995, p. 50 et seq., particularly p. 54; Boch, C.: *Common Market Law Review*, 1995, p. 547 et seq., particularly p. 558; Hervey, T.: *Justifications for Sex Discrimination in Employment*, Butterworths 1993, p. 67; Szyszczak, E.: 'Community Law on Pregnancy and Maternity' in *Sex Equality Law in the European Union*, Wiley & Sons 1996, p. 51 et seq., particularly p. 54 and Bolger, M.: *Irish Law Times and Solicitor's Journal* 1994, pp. 65-66.

23 — The Opinion preceding the *Webb* judgment, cited in footnote 9 above, [1994] ECR I-3569 et seq.

24 — Advocate General Tesauro expresses the same view in his Opinion preceding the *Habermann-Beltermann* judgment, cited in footnote 12 above, [1994] ECR I-1659 et seq.

recognised as permissible (or even justifiable) the dismissal of a woman who is absent from work for a reason (illness) connected with pregnancy. Closer examination reveals that the Court's decision turned on the fact that Mrs Hertz's illness began after her return to work at the end of her maternity leave. ...'. And he lays stress, in point 14, on the fact that, 'to the extent to which that judgment holds that it is not discriminatory to dismiss an employee on account of absences through an illness which, while it may be attributable to pregnancy or confinement, began after the end of the maternity leave, it follows *a fortiori* that the pregnancy may not be equated with illness ...'.

39. The contradiction between the *Dekker* and *Hertz* judgments, emphasised by some authors, [25] lies in the fact that, in the former, the Court described as direct discrimination a refusal to make an appointment owing to pregnancy, since that can apply only to women, whereas, in the latter, it stated that, for the purposes of dismissal, if an illness manifests itself after maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness — when it is clear that only women can suffer an illness which is attributable to pregnancy or confinement — and that contradiction can be resolved in my opinion only if it is concluded that the reason for that distinction lies in the fact that, once a woman has given birth and returned from maternity leave, her physiological state is no different from that of male workers and, from that time, it is inappropriate to draw a distinction by reference to the origin of the illness. If, as a result of having given birth at any time in their lives, women could claim what amounted to a sort of insurance against dismissal for the rest of their working life, as a result of which no account would be taken for such purposes of periods of incapacity for work following maternity leave, whose origin might be attributable to their pregnancy or confinement, that would amount to a privilege contrary to the principle of equal treatment.

25 — Jacqmain, J., op. cit., p. 50; More, G., op. cit., p. 55; Shaw, J., op. cit., p. 320; Traversa, E., op. cit., p. 436; McGlynn, C. M. S., op. cit., p. 54-55; Boch, C., op. cit., p. 559; Kilpatrick C., op. cit., p. 85; Szyszczak, E., op. cit., p. 54, and Burrows, N. & Mair, J., op. cit., p. 155.

(2) The Habermann-Beltermann judgment, in which the Court considered it discriminatory for a contract of employment to be declared void or avoided by virtue of the legal prohibition of night work for pregnant women

40. In its judgment of 5 May 1994 in *Habermann-Beltermann*, [26] the Court answered preliminary questions from the Arbeitsgericht (Labour Court) Regensburg concerning an employment contract of indeterminate duration entered into by an employer and a pregnant employee. When they signed the contract, which required

26 — Cited in footnote 12 above.

night work, both parties were unaware of the pregnancy. The national court wished to know whether Article 2(1), in conjunction with Article 3(1) and Article 5(1), of Directive 76/207 precluded that contract from being declared void as a result of the prohibition of night work which applied, under national law, during pregnancy and breast-feeding, and from being avoided by the employer on account of a mistake as to the essential personal characteristics of the other contracting party when the contract was concluded.

The Court observed that, in the case of a contract of indeterminate duration, the prohibition of night work by pregnant women takes effect only for a limited period in relation to the total length of the contract, and reached the conclusion that, in those circumstances, it would be contrary to the objective of protection pursued by Article 2(3) of Directive 76/207 and would deprive that provision of its effectiveness to allow a contract to be declared void or be avoided because the pregnant worker was temporarily prevented from performing the night work for which she was taken on. The specific answer which it gave to the national court was that the provisions of Directive 76/207 preclude an employment contract for an indefinite period for the performance of night-time work concluded between an employer and a pregnant employee, both of whom were unaware of the pregnancy, from being held to be void on account of the statutory prohibition on night-time work which applies, by virtue of national law, during pregnancy and breast-feeding, or from being avoided by the employer on account of a mistake on his part as to the essential personal characteristics of the woman at the time when the contract was concluded.

(3) The *Webb* judgment, in which the Court held that the situation of a pregnant woman, who is unfit to carry out work for which she was recruited, cannot be compared with that of a man who suffers the same incapacity for medical or other reasons

41. On 14 July 1994 the Court gave judgment in *Webb*, [27] in response to a request submitted by the House of Lords for a preliminary ruling on the interpretation of Directive 76/207 to resolve a dispute before it between an employer and a female worker, recruited for an indeterminate period, who had been dismissed when the employer discovered she was pregnant on the ground that he had engaged her for the specific purpose — initially — of replacing another employee during the latter's maternity leave. In that judgment the Court stated that it was not appropriate to consider, as requested by the national court, whether the situation of a woman who is incapable of performing the task for which she was recruited, owing to a pregnancy of which she became aware very soon after signing the employment contract, can be compared with that of a man who suffers the same incapacity for medical or

27 — Cited in footnote 9 above.

other reasons. In paragraph 25, it states: '... pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations which may justify the dismissal of a woman without discriminating on grounds of sex. Moreover, in the *Hertz* judgment ... the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy *but manifests itself after the maternity leave*.'

The conclusion reached by the Court in paragraph 27 was that, in circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on account of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged.

(4) The *Larsson* judgment, in which the Court appears to have taken the view that it is not discriminatory to take account, for the purposes of dismissal, of a woman's incapacity for work, attributable to pregnancy before commencement of maternity leave

42. Against that background, on 29 May 1997 [28] the Court gave judgment in the *Larsson* case. [29] The Court was again asked, this time by the Sø- og Handelsretten (Maritime and Commercial Court), Denmark, to interpret Article 5(1) and Article 2(1) of Directive 76/207, as applied to a worker who had been dismissed after her maternity leave owing to relatively long periods of sick leave attributable to her condition, most of which occurred during pregnancy and were covered by medical certificates. I shall consider that judgment in some detail.

Mrs Larsson had been employed by Føtex Supermarked A/S in March 1990. In August the following year she informed her employer that she was pregnant. During her pregnancy she took sick leave twice. The first absence was for 18 days. The second was on account of a pelvic prolapse attributable to the pregnancy, and lasted about four-and-a-half months. The birth took place on 2 April 1992. Her maternity leave, of 24 weeks, ended on 18 September 1992. She then took annual leave until 16 October. During her maternity leave and holidays, Mrs Larsson continued to receive treatment for the pelvic prolapse. She remained on sick leave at the end of her holidays and was not declared fit for work until 4 January 1993. On 10 November 1992 — less than a month after the end of her annual holidays — her employer informed her by letter that she was to be dismissed with effect from the end of December. The reason for dismissal was 'the

28 — At which time the period for submitting observations in the present case had expired.

29 — Case C-400/95 *Larsson* [1997] ECR I-2757.

long periods of absence from work, together with the fact that it is highly unlikely — for health reasons — that in the future you will recover the ability to perform your work in a satisfactory manner'.

43. The national court asked whether the abovementioned provisions of Directive 76/207 covered dismissals on account of absence following the end of maternity leave if the absence was attributable to an illness which arose during pregnancy and after maternity leave, it being assumed that the dismissal took place after the end of the maternity leave. It should be noted that the national court's question concerned dismissals for absences *following the end of maternity leave*.

44. In the Opinion which I delivered in that case [30] I suggested that the Court declare, on the basis of the *Hertz*, *Webb* and *Habermann-Beltermann* judgments, that, for application of the principle of equal treatment for men and women in relation to conditions of employment, including those governing dismissal, laid down in Article 5(1) of Directive 76/207, a line should be drawn at the end of the maternity period. Thereafter, any illness suffered by a woman, whether or not obstetric in origin, will be covered by the general regime applicable to all workers. Conversely, periods of sick leave for health problems attributable to pregnancy, before confinement, cannot be equated, for the purposes of dismissal, with a man's absences through sickness.

30 — Opinion delivered on 18 February 1997, [1997] ECR I-2759.

My proposed answer to the question from the national court was as follows:

Article 5(1), in conjunction with Article 2(1), of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, does not preclude a woman from being dismissed as a result of periods of absence subsequent to her maternity leave, where those periods of absence are due to an illness which arose during pregnancy and has continued both during and after the maternity leave, unless, when calculating the periods of absence for the purposes of dismissal, account is taken of periods of absence on medical grounds for health problems attributable to pregnancy prior to childbirth.

45. In response to the arguments of the plaintiff in the main proceedings, who maintained that, in the *Hertz* judgment, a distinction had been established by reference to the moment of onset or first appearance of the illness, the Court of Justice stated in *Larsson* that on that occasion '[i]t merely held that, in the factual situation submitted to it on that occasion, there was no reason to distinguish, from the point of view of the principle of equal treatment enshrined in the directive, between an illness attributable to pregnancy or confinement and any other illness. That interpretation is confirmed, moreover, by the absence of any reference in the operative part

of the *Hertz* judgment to the moment of onset or first appearance of the illness'. [31]

46. Later on in the judgment, details are given of the position of the plaintiff in the main proceedings, the Danish Government and the Commission, to the effect that it was contrary to Community law for an employer, in calculating the period justifying dismissal under national law, to be able to take account both of absences occurring between the beginning of the pregnancy and the beginning of maternity leave and also the duration of the maternity leave. Indeed, it was apparent from the documents in the main proceedings that, if those periods and the four weeks which she took as leave were discounted, Mrs Larsson had been unfit for work for less than four weeks when she was dismissed.

47. As regards maternity leave taken under national law, the Court considered that a woman is protected against dismissal due to absence and to allow absence during such a period to be taken into account as grounds for a subsequent dismissal would be contrary to the objective of permitting national measures concerning the protection of women, particularly as regards pregnancy and maternity, pursued by Article 2(3) of the Directive. [32] Outside the period of maternity leave provided for by the Member States and in the absence of national or Community provisions affording women specific protection, female workers do not enjoy, under Directive 76/207, protection against dismissal for absence due to an illness originating in pregnancy.

48. The Court inferred from those statements that '[t]he principle of equal treatment enshrined in the Directive does not, therefore, preclude account being taken of a woman's absence from work between the beginning of her pregnancy and the beginning of her maternity leave when calculating the period providing grounds for her dismissal under national law' and stated in reply to the national court that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of the Directive, Article 5(1), in conjunction with Article 2(1), of that Directive does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement, even where that illness arose during pregnancy and continued during and after maternity leave. [33]

49. I confess that I find it rather difficult to reconcile those statements with the line taken in the case-law developed by the Court of Justice up to the time of that judgment, as set out in the foregoing paragraphs. The Court appears not only to maintain in

31 — *Larsson*, cited in footnote 29 above, paragraph 17.

32 — Ibid., paragraph 22.

33 — Ibid., paragraphs 24 and 26.

Larsson a position contrary to what is to be inferred from a brief examination of its earlier judgments, but also directly to contradict the reading of those judgments which has been propounded over time both by its Advocates General and by the numerous authors who have commented on the judgments.

I note, once again with a degree of preoccupation, that in paragraph 20, where it states that the directive does not preclude dismissal on the ground of periods of absence due to an illness attributable to pregnancy or confinement, even where such illness first appeared during pregnancy and continued during and after the period of maternity leave, the Court does not indicate at what time the absences occurred.

Furthermore, where in paragraph 23 it states that, outside the period of maternity leave, in the absence of national Community provisions, a female worker does not enjoy under Article 76/207 any protection against dismissal due to absences attributable to an illness arising during pregnancy, the Court likewise fails to make clear at what time the absences occurred.

Similarly, in paragraph 24, when it concludes that the principle of equal treatment enshrined in the directive does not preclude account being taken, for calculation of the period justifying dismissal, of absences occurring between commencement of the pregnancy and commencement of maternity leave, the Court does not say that the absences were caused by an illness attributable to pregnancy.

Finally, the operative part of the judgment does not give a complete answer to the question from the national court, which was concerned with dismissals arising as a result of *absence following the end of maternity leave* if the absence is attributable to an illness which arose during pregnancy and continued during and after maternity leave, it being assumed that *the dismissal took place after the end of the maternity leave*, whereas the Court answered that the provisions of the directive do not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement, even where the illness arose during pregnancy and continued during and after maternity leave. Thus, the answer does not mention either the time at which the absences occurred or the time at which the dismissal occurred.

50. I consider that, in view of its shortcomings, the *Larsson* judgment does not provide a sufficient basis for the view that the Court of Justice wished to make a U-turn in its case-law. I believe, therefore, that there is very good reason, for the sake of legal certainty, for the Court to give a clear ruling on the principle of equal treatment for men and women in relation to dismissals of female workers occurring during pregnancy or after maternity leave, where account was taken of periods of unavailability for work caused by

pregnancy, before the commencement of maternity leave. That was precisely what happened in Mrs Brown's case.

51. What is involved here, ultimately, is the duty incumbent upon us all of progressively removing all traces of the discrimination which women have suffered over the centuries, [34] a duty to which the institutions of the European Union are so deeply committed.

C. *The first question from the House of Lords: dismissal of a pregnant woman through incapacity for work attributable to pregnancy*

52. By this question, the national court wishes to ascertain whether it is contrary to the principle of equal treatment laid down by Directive 76/207 to dismiss a worker, while she is pregnant, for absence due to incapacity for work attributable to pregnancy and whether the answer to the question is affected by the fact that the dismissal is based on a contractual provision entitling the employer to dismiss employees, irrespective of gender, after a stipulated number of weeks of continued absence.

53. There is no doubt that the application of Community law would have precluded Mrs Brown's dismissal if, when complications arose in her pregnancy, the period prescribed for transposition of Directive 92/85 into national law had ended. However, that directive had not even been adopted. As a result, Directive 76/207 contains the only applicable Community law.

54. It will be remembered that Article 5 of Directive 76/207 provides that application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex.

Starting from the premiss that equality, as defined by the Constitutional Court of one of the Member States, '... is not a reality or an abstract mathematical concept but rather unequal treatment of that which is unequal or equal treatment of that which is similar or alike' [35] and having regard to the settled case-law of the Court of Justice to the effect that 'discrimination can arise only through the

34 — For example, Miguel de Cervantes Saavedra, in Chapter LI of the first part of his work *The Adventures of Don Quijote of la Mancha*, has the goatherd refer, when relating the story of Leandra, to 'frivolity and failings natural to woman-kind, who are generally ill-balanced and unsteady'. He then takes an easier and, according to him, more proper course, which is 'to curse the fickleness of women, their inconstancy, their double-dealing, their unkept promises, their broken faith, and last of all, the lack of judgment they show in their choice of objects for their desires and affections' (Penguin, London 1950, translation by J. M. Cohen, pp. 449 and 450).

35 — Judgment of the Spanish Constitutional Court 29/1987 of 6 March, paragraph 5(b) (BOE of 24 March 1987).

application of different rules to comparable situations or the application of the same rule to different situations', [36] I shall now consider whether the dismissal of a pregnant woman on grounds of incapacity for work arising from her condition occurs under the same conditions as dismissal of a man for incapacity for work of the same duration, arising from an illness.

55. By contrast with the situation of Mrs Hertz, whose unfitness for work, which was of obstetric origin, commenced some time after the end of her maternity leave, the complications attendant upon Mrs Brown's pregnancy, which prevented her from working for much of that period, became apparent at a very early stage. It is clear from the documents before the Court that she was unfit for work for the period of 26 weeks which allowed her to be dismissed pursuant to the condition included by Rentokil in employment contracts and that she did not give birth until six weeks later. In view of the fact that the average term of human gestation is 38 weeks, I calculate that she was able to work for only the first five or six.

56. I wonder whether it is still necessary, at this stage, to repeat the self-evident fact that pregnancy is a situation which affects only women, since only they can become pregnant. Pregnancy, besides being a biological situation pertaining exclusively to women, is a period limited in time, during which there may occur not only the well-known phenomenon of morning sickness but also complications such as risks of miscarriage or premature contractions associated with stress, which may compel the woman to rest absolutely for periods which may extend from two or three months to the whole of the period of pregnancy.

57. This Court emphatically stated, in the *Hertz* judgment cited so extensively above, that 'the dismissal of a female worker on account of repeated periods of sick leave *which are not attributed to pregnancy or confinement* does not constitute direct discrimination on grounds of sex, inasmuch as such periods of sick leave would lead to the dismissal of a male worker in the same circumstances'. [37]

58. Can it be said, however, that the dismissal of a pregnant woman on account of repeated periods of sick leave *attributable to pregnancy* occurs under the same conditions as the dismissal of a man who has been on sick leave for the same period? In my opinion the answer is no.

36 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30.

37 — Cited in footnote 3 above, paragraph 14.

59. Without wishing to meddle in matters which are the province of doctors, I should make it clear that, although, as this Court stated in *Webb*, pregnancy is not in any way comparable with a pathological condition, [38] no one is unaware of the existence of 'high-risk pregnancies' which occur — the following being examples, not an exhaustive list — when there is a history of premature or still-births, when the placenta is lower than normal, when the woman has undergone *in vitro* fertilisation treatment, and in cases where the woman suffers from a heart condition or diabetes. The main characteristic of such pregnancies is not that they cause the woman to be 'ill' but that, normally, they require her to remain under strict medical supervision and, in some of the cases mentioned above, to rest absolutely for several months or, sometimes, throughout her pregnancy. [39]

I cannot share the view that, in situations of that kind, where the woman is not suffering from any illness but is simply pregnant, it can be said that, in the event of dismissal for repeated absences, she is dismissed under the same conditions as a man who has been absent through illness for the same period of time. The same reasoning will apply where the incapacity for work derives from the fact that pregnancy has aggravated an existing illness or brought about conditions which may be classified as real illness.

38 — Cited in footnote 9 above, paragraph 25.

39 — Women whose pregnancy causes unfitness for work of such a duration are, fortunately, few in number: it is calculated that they represent 10% to 15% of cases.

60. Whilst the situation of a pregnant worker whose pregnancy prevents her from working and that of a male worker who is ill coincide in so far as neither of them can, for a period, carry out the tasks involved in her or his employment, important differences distinguish them: only women may find themselves at some time during their working life in a situation where they are prevented from working because of incapacity arising from a pregnancy; and, in most cases, a woman's incapacity for work arising from pregnancy will end on a date known in advance with more or less accuracy, when she gives birth.

61. These factors appear to have been taken into account by the domestic law applicable in most Member States at the time of the material events in this case, which was fairly similar — only the legislation in the United Kingdom and Ireland differed radically.

Thus, in Germany there was specific protection for women from the start of pregnancy until after confinement, whereby in that period dismissal was subject to administrative authorisation; in Denmark, the Ministry of Employment considered it discriminatory to take account, for the purposes of dismissal, of absences due to incapacity for work attributable to pregnancy, before a woman gave birth; in France, the employer could not dismiss a woman during pregnancy, during maternity leave or during the four weeks thereafter; in Greece, it was prohibited to dismiss a worker during

pregnancy or within a year after she gave birth and she could not be dismissed for absences due to unfitness for work attributable to pregnancy or confinement; in Italy, the prohibition of dismissal extended from the start of the pregnancy until the end of the first year of the child's life, the rule having been interpreted by case-law to the effect that, during that period, a woman likewise could not be dismissed for exceeding the maximum permitted number of days' sick leave; in the Netherlands, it was prohibited to dismiss a woman during pregnancy or maternity leave or within six weeks thereafter; in Portugal, it was only possible to dismiss a worker through incapacity for work in cases of absolute and definitive incapacity and, as regards the rules applicable to pregnant women, dismissal was prohibited where their incapacity for work was attributable to pregnancy or an illness associated with it. Finally, although in Spain there was no specific legislation for the protection of pregnant women against dismissal, the effect of the case-law was that a woman could not be dismissed for absences arising from unfitness for work attributable to difficult pregnancies or illnesses associated with pregnancy.

As regards the three new Member States, in Austria specific protection existed for women from the start of the pregnancy until after confinement, whereby during that period dismissal was subject to judicial authorisation; in Finland, for a worker to be dismissed on account of incapacity for work, there had to be a substantial and permanent reduction of her ability to work; finally, in Sweden, incapacity for work through illness did not justify dismissal if it was probable that the worker would recover and a woman could not be dismissed on account of unfitness for work resulting from pregnancy.

62. The respondent in the main proceedings contends that Mrs Brown's dismissal was due to the 'abnormal' nature of her pregnancy. It maintains that to treat her, on account of the origin of her unfitness for work, differently from pregnant women whose pregnancy did not prevent them from working or from other employees who were ill would constitute positive discrimination applicable only to a particular section of women.

I cannot agree with that assertion for two reasons. First, because it must be borne in mind that Directive 76/207 establishes the principle of equal treatment for men and women regarding working conditions, including conditions governing dismissal, and that, in seeking a basis of comparison, it is inappropriate to draw parallels or distinctions between two pregnant women experiencing more or less easy or problematical pregnancies — the point of reference continues to be the male worker. Secondly, because, as I indicated in the foregoing paragraph, for the purposes of dismissal the situation of a pregnant woman whose pregnancy prevents her from working and that of a man who is unwell are not comparable, in the light of the principle of equal treatment laid down by that directive.

63. Nor do I agree with the position of the United Kingdom, which proposes distinguishing between, on the one hand, dismissal on account of ordinary risks and disorders normally inherent in pregnancy and confinement, the examples given by it being absence from work for routine medical examinations and minor absences for ailments such as morning sickness, and, on the other hand, dismissal of a woman on account of an illness, whether or not linked with pregnancy. I think the origin of that suggested differentiation is points 47 and 48 of Advocate General Darmon's Opinion in the *Dekker* and *Hertz* cases, where he considered, in the *Hertz* case, the possibility of determining the duration of protection linked with maternity. [40]

64. In my opinion, quite apart from the fact that it is doubtful whether a woman would be dismissed on account of absences from work attributable to routine medical examinations or minor absences due to morning sickness, [41] the position taken by the United Kingdom was arrived at by interpreting that part of the Opinion out of context. As I have already stated in point 30 above, Mr Darmon in fact suggested distinguishing between, on the one hand, normal risks of pregnancy and confinement, namely the usual complications accompanying such events, which sometimes result in the grant of an additional period of maternity leave, and should qualify for Community protection inasmuch as they are specific to motherhood, and, on the other, medical conditions which are not associated with the ordinary risks of pregnancy and should be treated in the same way as 'ordinary' sickness.

Now, it must not be forgotten that Mrs Hertz had been dismissed on account of incapacity for work which, although caused by her confinement, did not prevent her from working until one year after the end of her maternity leave. To my mind, that is why the Advocate General adds, at a later stage, that, where a female worker has exhausted her entitlement to all legally prescribed types of maternity leave, periods of absence through sickness, even though they may be traced back to her pregnancy or confinement, cannot be regarded as included among the normal risks of maternity.

65. I consider, therefore, that, if one wishes to draw a distinction between the normal risks of pregnancy and confinement and medical conditions which do not reflect the ordinary risks of pregnancy, it is necessary to take a chronological approach: the former will, necessarily, be those which arise while the woman is in one of those situations, that is to say whilst she is pregnant or on maternity leave, whereas the latter will be all those which arise after maternity leave, even though their cause may be traceable back to the pregnancy or confinement.

40 — Cited in footnote 17 above.

41 — Morning sickness may be violent and extend beyond the first three months, requiring hospitalisation in some cases.

66. For the reasons given above, I consider that the dismissal of a woman whilst she is pregnant, on account of unfitness for work caused by her pregnancy, by taking into consideration a situation in which only women can find themselves, constitutes direct discrimination contrary to Article 5(1) of Directive 76/207.

67. I wish to make it clear that the interpretation I propose is, in my opinion, the only possible interpretation of Article 5(1), in conjunction with Article 2(1), of Directive 76/207 and of the line followed in the case-law of the Court of Justice until the judgment in *Larsson*. If that were not the case, and the future of an employed woman, on becoming pregnant, could depend on whether or not her pregnancy involved excessive complications, I would be obliged to state, paraphrasing Papinian, that despite the passage of the centuries 'there are many points in our [Community] law in which the condition of females is inferior to that of males'. [42]

68. The national court also asks whether that answer is affected by the fact that the dismissal is based on a contractual provision entitling the employer to dismiss a worker, regardless of gender, after a specific number of weeks of continued absence.

69. I believe it can be inferred from the foregoing reasoning that the fact that the dismissal is based on a contractual provision entitling the employer to dismiss a worker, regardless of gender, after a specific period of sick leave, has no impact on the foregoing answer.

That contractual provision, which applies to men and women alike, by simply assimilating incapacity for work attributable to pregnancy to incapacity for work attributable to an illness, introduces direct discrimination on grounds of sex, by applying the same rule to different situations, in that it takes into consideration, for calculation of periods of incapacity for work justifying dismissal, an obstacle to work which can affect only women.

70. The fact that the provision is contained in the employment contract is irrelevant for the present purposes. First, Article 5(2)(b) of Directive 76/207 requires the Member States to ensure that any provisions contrary to the principle of equal treatment which are included, *inter alia*, in individual contracts of employment are, or may be, declared null and void. Secondly, the Court of Justice has held that 'when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned'. [43] Finally, the

42 — *Papinianus libro trigensimo primo quaestionum. 'In multis iuris nostri articulis deterior est condicio feminarum quam masculorum.'* The Digest of Justinian, University of Pennsylvania Press, Vol I, Book One (Human Status), p. 16.

43 — Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20.

Member States' obligation, by virtue of a directive, to achieve the result pursued by it, and its duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, apply to all the authorities of the Member States, including, within their jurisdiction, judicial authorities. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, 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. [44]

71. In view of the answer which I propose be given to the national court in response to the first question, it is unnecessary to answer the second. I shall nevertheless examine it, in case the Court does not share my view.

D. *The second question from the House of Lords: dismissal of a pregnant woman during the period in which, had she fulfilled the requirements laid down by national law, she could have absented herself from work on account of pregnancy and confinement*

72. By its second question, the national court asks whether it is contrary to the principle of equal treatment laid down by Directive 76/207 to dismiss a female employee as a result of absence through illness arising from pregnancy who does not qualify for the right to absent herself from work on account of pregnancy or confinement for the period specified by national law because of insufficient length of service, where dismissal takes place during that period, and whether it makes any difference to the answer to be given to that question that the employee was dismissed under a contractual provision entitling the employer to dismiss any employee, irrespective of gender, after a stipulated number of weeks of continued absence.

73. From the information in the order for reference, I infer that what the national court wishes to ascertain, by asking that question, is whether Directive 76/207 must be construed as having imposed on Member States the obligation to provide, in domestic law, that female workers must be entitled to a period of absence from work merely because they have given birth, and that no other conditions may be imposed on them in that regard.

74. The purpose of Directive 76/207 is to apply in the Member States the principle of equal treatment for men and women regarding access to employment, vocational training and promotion and working conditions. However, by virtue of Article 2(3) of the directive, its provisions are to be without

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

prejudice to the grant by Member States of specific rights for women as regards pregnancy or maternity. It thus only contemplates the adoption of measures for the protection of women in such circumstances as an exception to that principle; it does not oblige the Member States to legislate to that effect, nor does it specify what the rights in question must be or the conditions which may be imposed for them to be exercised.

75. The course followed by this Court has been to take the view that Article 2(3) of Directive 76/207, by reserving to Member States the right to retain or introduce provisions intended to protect women in connection with 'pregnancy and maternity', recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman's biological condition during pregnancy and thereafter, and of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth. [45]

76. It is also important to bear in mind that the Court held in *Hertz* that Directive 76/207 'does not envisage the case of an illness attributable to pregnancy or confinement. It does, however, admit of national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave. During the maternity leave accorded to her pursuant to a national law, a woman is accordingly protected against dismissal due to absence. It is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur'. [46]

77. The United Kingdom legislation applicable at the material time gave a worker the right to absent herself from work from the beginning of the 11th week before confinement and the right to return to work within the 29 weeks following childbirth, if she fulfilled certain conditions, namely, that she had been employed in the company until the beginning of that eleventh week; that at that time she had been continuously employed for a period of not less than two years; that she had observed the prescribed procedure for notification to her employer; and, at the latter's request, that she had supplied a medical certificate indicating the expected week of confinement. [47]

45 — Case 184/83 *Hofmann* v *Barmer Ersatskasse* [1984] ECR 3047, paragraph 25; *Habermann-Beltermann*, cited in footnote 12 above, paragraph 21, and *Webb*, cited in footnote 9 above, paragraph 20.

46 — Cited in footnote 3 above, paragraph 15.

47 — The legislation concerned is extraordinarily complex, so much so that the Employment Appeal Tribunal exclaimed, in *Lavery* v *Plessey Telecommunications Ltd* [1982] ICR 373, at 379: 'These statutory provisions [on maternity rights] are of inordinate complexity exceeding the worst excesses of a taxing statute; we find that especially regrettable bearing in mind that they are regulating the every-day rights of ordinary employers and employees. We feel no confidence that, even with the assistance of detailed arguments from skilled advocates, we have now correctly understood them: it is difficult to see how an ordinary employer or employee is expected to do so.'

According to the documents before the Court, if Mrs Brown had been working for Rentokil for two years at the beginning of the eleventh week before the expected week of her confinement, she would have been able to absent herself from work on account of her approaching maternity before accumulating an absence totalling 26 weeks which, in her case, gave rise to dismissal. It must therefore be assumed that if her right to absent herself had not been conditional upon fulfilment of the requirements mentioned above, she would have given birth and, within the 29 weeks following her confinement, would have been able to return to work.

Moreover, it has become apparent in the course of the proceedings that Mrs Brown was entitled to receive maternity benefit from the State at the lower rate.

78. I wonder whether it must be considered that a woman who is close to giving birth is protected from dismissal on account of absence because, under national legislation, her contract is suspended for a specific period of time, which necessarily implies that she is entitled to return to her previous job, or whether it is sufficient that she can cease working and be entitled to receive a benefit from the State, without any entitlement to re-engagement.

79. In my opinion, the only period that can be regarded as 'maternity leave' within the meaning of the case-law of the Court, that is to say the period in which a woman is in a specific situation requiring her to be afforded special protection, which is not comparable either with that of a man or with that of a woman who is actually working [48] and in which she is protected against dismissal on account of absence, is the period laid down by national law as a specific employment right enabling the woman to cease working for a period of a specified duration, during which she is entitled to receive all or part of her remuneration or to receive certain income in the form of a social security benefit, without thereby losing her job.

80. However, the simple right available to Mrs Brown or to any other female worker who, like her, did not fulfil the necessary conditions to secure suspension of her employment contract, to receive for a maximum period of 18 weeks a maternity benefit from the State if she stopped work in order to give birth, without the possibility of re-engagement, does not constitute, in relation to the principle of equality, a specific employment right intended to protect the biological condition of a woman or the relationship between mother and child in the period following confinement.

48 — Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Board and Others* [1996] ECR I-475, paragraph 17.

Indeed, the right to cease working for an indefinite time, receiving for a limited period a financial benefit from the State, is not reserved to women, nor is it necessary to be pregnant or to have given birth in order to exercise it.

81. Therefore, the eleven-week period preceding the expected date of confinement, in which, had she fulfilled the requisite conditions, Mrs Brown could have exercised her right to absent herself from work, cannot in my view be regarded as a period during which she was protected against dismissal on account of absence.

82. Furthermore, Directive 92/85, which lays down specific measures of protection within the Community for workers who are pregnant, have recently given birth or are breast-feeding, and requires the Member States to provide in their legislation for a continuous period of maternity leave of at least 14 weeks, of which at least two weeks must be compulsory, being allocated before or after confinement, had not been adopted at the material time.

83. For those reasons, in the event of this Court considering that it is not discriminatory to dismiss a pregnant woman on account of absences arising from an illness attributable to pregnancy, it will have to be concluded that Directive 76/207 does not preclude dismissal of such a person when she is not entitled to absent herself from work on account of pregnancy or confinement for the period specified by national law because of insufficient length of service, where dismissal takes place during that period.

84. Finally, the fact that the woman's dismissal is based on a contractual provision entitling the employer to dismiss any worker, regardless of gender, after a stipulated number of weeks of continued absence makes no difference to the answer which I suggest for the second question.

VII — Conclusion

In view of the foregoing considerations, I propose that the Court of Justice answer the first question from the House of Lords as follows:

(1) (a) Dismissal of a woman whilst she is pregnant, on account of her incapacity for work as a result of pregnancy, is contrary to Article 5(1) in conjunction

with Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

(b) The fact that the dismissal is based on a contractual provision entitling the employer to dismiss an employee, regardless of gender, after a stipulated number of weeks of continued absence does not affect the foregoing answer in any way.

In the event that, on the contrary, the Court of Justice considers that it is not discriminatory to dismiss a pregnant woman on account of incapacity for work attributable to her pregnancy, I suggest the following answer to the second question:

(2) (a) Article 5(1), in conjunction with Article 2(1), of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions does not preclude dismissal of a pregnant woman who is not entitled to absent herself from work on account of pregnancy or confinement for the period specified by national law because of insufficient length of service where dismissal takes place during that period.

(b) The fact that the dismissal is based on a contractual provision entitling the employer to dismiss an employee, regardless of gender, after a stipulated number of weeks of continued absence does not affect the foregoing answer in any way.