JUDGMENT OF THE COURT (Third Chamber)

1 July 2010 *

In Case C-471/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Helsingin käräjäoikeus (Finland), made by decision of 30 October 2008, received at the Court on 4 November 2008, in the proceedings

Sanna Maria Parviainen

v

Finnair Oyj,

THE COURT (Third Chamber),

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

* Language of the case: Finnish.

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 September 2009,

after considering the observations submitted on behalf of:

— Ms Parviainen, by M. Penttinen, asianajaja,

— Finnair Oyj, by P. Verronen and A. Kujala, varatuomarit,

— the Italian Government, by I. Bruni, acting as Agent, and W. Ferrante, avvocato dello Stato,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the Commission of the European Communities, by M. van Beek, M. Huttunen and P. Aalto, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

2 The reference was made in the course of proceedings between Ms Parviainen, employed as a purser by Finnair Oyj ('Finnair'), an airline company, against the latter concerning the pay she received following her temporary transfer to ground work during her pregnancy.

Legal background

European Union law

3 The 9th and 16th recitals in the preamble to Directive 92/85 are worded as follows:

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

…

… measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance'.

4 Article 2 of Directive 92/85 states:

'For the purposes of this Directive:

(a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

(b) *worker who has recently given birth* shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;

(c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

5 Article 4 of Directive 92/85, entitled 'Assessment and information', provides in paragraph 1:

'For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services referred to in Article 7 of [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)], in order to:

— assess any risks to the safety or health and any possible effect on the pregnancies or breastfeeding of workers within the meaning of Article 2,

— decide what measures should be taken.'

6 Article 5 of Directive 92/85, entitled 'Action further to the results of the assessment', states in paragraphs 1 to 3:

'1. Without prejudice to Article 6 of Directive 89/391/EEC, if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.

2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.

3. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health.'

7 Article 8 of Directive 92/85, entitled 'Maternity leave', provides in paragraph 1:

'Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

8 Article 11 of Directive 92/85, entitled 'Employment rights', reads as follows:

'In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:

1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;

2. in the case referred to in Article 8, the following must be ensured:

   (a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

3. the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;

4. Member States may make entitlement to pay or the allowance referred to in points 1 and 2(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.'

9 Annex I to Directive 92/85, to which Article 4 thereof refers, includes as physical agents which may cause foetal lesions and/or be likely to disrupt placental attachment, in particular, ionising and non-ionising radiation.

National law

10 According to Paragraph 7(1) of the Law on equality between men and women (naisten ja miesten välisesta tasa-arvosta annettu laki (609/1986)), as amended by Law 232/2005 ('Law 609/1986'), direct and indirect discrimination based on sex is prohibited. Under Paragraph 7(2), direct discrimination means treating a person differently for reasons of pregnancy or childbirth.

11 Under the second subparagraph of Paragraph 8(1) of Law 609/1986, the action of an employer is to be deemed to constitute discrimination prohibited by law if, when deciding on the conditions of employment, the employer acts in such a way that the person concerned finds herself in a less favourable position on the basis of pregnancy, childbirth or for some other gender-related reason.

12 The Law on employment contracts (työsopimuslaki (55/2001)) ('Law on employment contracts'), in Paragraph 3 of Chapter 2, provides that if the working duties or working conditions of a pregnant worker endanger her health or that of the foetus, and if the risk factor arising from the work or conditions of employment cannot be eliminated, every effort must be made to transfer the worker concerned to other duties suitable in terms of her working capacities and skills for the period of pregnancy.

13 There is a similar provision in Paragraph 11(2) of Chapter 2 of the Law on safety at work (työturvallisuuslaki (738/2002)).

14 Paragraph 4 of Chapter 9 of the Law on sickness insurance (sairausvakuutuslaki (1224/2004)) provides that a pregnant woman in paid employment is entitled to receive special maternity benefits ('erityisäitiysraha') if a chemical substance, radiation, a transmissible illness associated with her occupational tasks or conditions of work or another comparable factor endangers her health or that of the foetus. The payment of such benefits is subject to the condition that the insured person is fit for work, that it is impossible to organise other work for her within the meaning of Paragraph 3(2) of Chapter 2 of the Law on employment contracts, and that the insured person is required for that reason not to work.

15 It is apparent from the information provided to the Court that Finnish law does not contain an express provision relating to the determination of the salary in the case where a pregnant worker is temporarily moved to another job in order to perform tasks which differ from those she normally performs.

16 The collective agreement for air crew (matkustamohenkilökunnan työehtosopimus; 'the collective agreement') was concluded between the trade union of air hostesses and stewards of Finland and the employers' union for service sectors. That agreement was in force from 1 April 2005 to 30 September 2007.

17 Maternity benefits and special maternity benefits are governed by Paragraph 16(B) of the collective agreement. According to Paragraph 16(B)(2), an air hostess may stop in-flight work immediately after she is found to be pregnant. Without prejudice to grounds of health, in-flight work is allowed until the 18th week of pregnancy at the latest.

18 According to Paragraph 16(B)(3), an air hostess may, on request, be transferred to other work provided by the employer during pregnancy. At the request of the person concerned, the employer is to provide other work until the date of commencement of maternity benefits ('äitiyspäiväraha') referred to by the Law on sickness insurance, or is to pay her salary during the period concerned.

19 Under Paragraph 16(B)(4), the salary referred to in Paragraph 16(B)(3) is paid up to the amount for the annual holidays of the worker concerned. If an air hostess refuses the work assigned to her, she loses her entitlement to that pay.

20 On 20 June 1989, Finnair adopted a decision which entered into force on 1 July 1989 concerning the determination of pay for ground work to be paid to air hostesses during pregnancy ('the decision of 20 June 1989'). Pursuant to that decision, and in accordance with the collective agreement, air hostesses transferred to ground work on account of pregnancy are to be paid an amount corresponding to annual paid holidays. The monthly earnings to be paid during the period of ground work are made up of the basic monthly salary and 25 times the additional pay called 'lisäpäiväpalkka'. The latter is calculated on the basis of the average amount of the additional pay for all air hostesses and stewards in the same pay grade. The pay grade is determined by the length of service of the worker concerned. The multiplying factor 25 results from the fact that 25 days' salary is paid per month.

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

21 The applicant in the main proceedings has worked for Finnair as an air hostess since 8 April 1998. She was promoted to purser in October 2005.

22 The applicant in the main proceedings became pregnant at the beginning of 2007. The date of confinement was 16 October 2007. On account of her pregnancy she was temporarily transferred to ground duties, namely office work, on 30 April 2007. She occupied that position until 15 September 2007, the date on which her maternity leave began.

23 The transfer took place in accordance with Article 5(1) and (2) of Directive 92/85, the relevant provisions of the Law on employment contracts, the Law on safety at work and the collective agreement. It is apparent from the file that the reason for the transfer was the fact that the work of the applicant in the main proceedings exposed her to physical agents, such as ionising and non-ionising radiation which may cause foetal lesions.

24 It is clear from the order for reference that, as a purser, a substantial part of the overall pay of the applicant in the main proceedings is made up of supplementary allowances. The allowances paid to workers may vary considerably depending on whether the person concerned has a supervisory role, such as purser, or whether he or she is an air hostess or steward. Workers may receive various supplementary allowances such as, in particular, allowances for night work, work on Sundays and holidays, an overtime allowance if the working day exceeds eight hours, and allowances for long-haul flights and flights entailing a time difference. In addition, the number of hours

worked by persons with the same pay grade may vary considerably, which affects the amount of the supplementary allowances paid.

25 The supplementary allowances represented approximately 40% of the pay of the applicant in the main proceedings before she was temporarily transferred to ground work. Her basic monthly salary is EUR 1 821.76 and her average monthly pay is EUR 3 383.04. After her transfer, the total monthly pay of the applicant in the main proceedings was reduced by EUR 834.56.

26 According to the applicant in the main proceedings, Finnair was not entitled to reduce her pay following her temporary transfer, in particular by failing to take into consideration the fact that she was a purser. Such a reduction constitutes discriminatory conduct contrary to Directive 92/85 and Law 609/1986. In her action before the national court, the applicant claimed payment, for the period at issue in the main proceedings, of at least the same pay as that she received as a purser.

27 Finnair contends that the action should be dismissed. It argues that during her pregnancy the applicant in the main proceedings was paid more than is normally paid to a worker who performs corresponding ground duties. Furthermore, while working as a purser she could not claim a guaranteed amount of allowances. The amount of allowances paid to her is always dependent on how many and what kind of flights she flies.

28 Taking the view that the Court has not yet given a ruling on the interpretation of Article 11(1) of Directive 92/85, and that the interpretation of that provision is of great importance as regards the resolution of the dispute before it, the Helsingin

käräjäoikeus (Helsinki District Court) decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 11(1) of Directive [92/85] to be interpreted as meaning that a worker who is transferred to other lower-paid work because of her pregnancy must, on the basis of that provision, be paid as much as she received on average before the transfer, and is it relevant in that respect what kind of allowances and on what basis the worker was paid in addition to her basic monthly pay?'

The question referred for a preliminary ruling

29 By its question, the referring court asks essentially whether Article 11(1) of Directive 92/85 must be interpreted as meaning that a pregnant worker who, in accordance with Article 5(2) thereof, has been temporarily transferred to a post in which she performs tasks other than those which she performed prior to that transfer is entitled to the same pay as she received on average before the transfer. The referring court also asks whether the type of allowances received by that worker and the reasons for the payment of those allowances while performing her previous duties are relevant in that respect.

30 As a preliminary point, it should be recalled that because certain activities may present a specific risk of exposure to hazardous agents, processes or working conditions for a pregnant worker or for one who is breastfeeding or who has recently given birth,

such as those listed in Annex I to Directive 92/85, endangering safety or health, the European Union legislature, by adopting Directive 92/85, introduced the requirement to evaluate and communicate risks and a prohibition on the exercise of certain activities (see, to that effect, Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 44).

31 Where the results of the risk assessment carried out in accordance with Article 4 of Directive 92/85 reveal a risk to safety or health and an effect on the pregnancy or breastfeeding of a worker, Article 5(1) and (2) of that directive provide that the employer is required temporarily to adjust the working conditions and/or the working hours or, if that is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, to move the worker concerned to another job.

32 It is only when such a move is also not feasible that Article 5(3) of that directive provides that the worker is to be granted leave, in accordance with national legislation and/or national practice, for the whole of the period necessary to protect her safety or health (Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 57).

33 It is clear from Article 11(1) of Directive 92/85 that, in the cases referred to in Articles 5, 6 and 7 thereof, the rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, pregnant workers, must be ensured in accordance with national legislation and/or national practice.

34 It should be recalled that, as regards workers on maternity leave, Article 11(2)(b) of Directive 92/85 also provides that they must be guaranteed the 'maintenance of a payment to [them], and/or entitlement to an adequate allowance'.

35 According to settled case-law of the Court, the concept of pay used in Article 11 of that directive, like the definition in the first subparagraph of Article 141(2) EC, encompasses the consideration paid directly or indirectly by the employer during the worker's maternity leave in respect of her employment. By contrast, the concept of allowance to which that provision also refers includes all income received by the worker during her maternity leave which is not paid to her by her employer pursuant to the employment relationship (see Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 31).

36 As regards the concept of the adequate allowance to which workers on maternity leave are entitled under Article 11(2)(b) of Directive 92/85, the Court has also held that the definition in Article 11(3) is intended to ensure that during her maternity leave the worker receives an income at least equivalent to the sickness allowance provided for by national social security legislation in the event of a break in her activities on health grounds (*Boyle and Others*, paragraph 32).

37 According to that case-law, female workers must be guaranteed an income of that level during their maternity leave, irrespective of whether, in accordance with Article 11(2)(b) of Directive 92/85, it is paid in the form of an allowance, pay or a combination of the two (*Boyle and Others*, paragraph 33).

38 However, even if Article 11(1) and 11(2)(b) and 11(3) of Directive 92/85 all refer to the 'maintenance of a payment to, and/or entitlement to an adequate allowance for, [pregnant workers and workers who have recently given birth or are breastfeeding]', it is clear from the objectives pursued by that directive and the case-law of the Court relating to those provisions that, as far as concerns the receipt of an income, the situation of pregnant workers referred to in Article 5 of that directive and that of workers on maternity leave which is dealt with by Article 8 thereof cannot be treated alike for all purposes.

39 In the first place, the pregnant workers referred to in Article 5(1) and (2) of Directive 92/85, whose working conditions have been temporarily adjusted, continue to work and to perform the duties requested by their employer.

40 However, women taking maternity leave provided for by Article 8 of that directive are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work (see Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 17, and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 46).

41 In the second place, it is clear from Article 11(3) of Directive 92/85 that the definition of adequate allowance which is mentioned therein applies only to Article 11(2)(b), and thus only to workers on maternity leave (see, to that effect, *Høj Pedersen and Others*, paragraph 39).

42 Bearing in mind the differences mentioned above between the cases referred to in Article 5(1) and (2) of Directive 92/85, on the one hand, and Article 8 thereof, on the other, it is therefore impossible to transpose the case-law of the Court relating to the definition of the concepts of pay and adequate allowance in Article 11(2)(b) and (3) of that directive, which covers workers taking maternity leave, to the entitlement to remuneration of workers who, during their pregnancy, have had their working conditions adjusted or have been moved temporarily to another job pursuant to Article 5(1) and (2).

43 The transposition of the case-law of the Court on maternity leave to workers in situations such as those referred to in Article 5(1) and (2) of Directive 92/85 could give rise to an unfair situation in which a worker, such as the applicant in the main proceedings, who is temporarily transferred, because she is pregnant, to a post other than that which she occupied before the transfer, could have her pay cut during that period to an amount equivalent to the allowance provided for by national social security law, where for health reasons that worker stops working.

44 Such a pay cut for a worker who actually continues working would not only be contrary to the protection of the security and health of pregnant workers pursued by Directive 92/85, but would also undermine the legal provisions of the European Union on equal treatment for male and female workers, contrary to the ninth recital in the preamble thereto.

45 In the case in the main proceedings, Finnair and the Finnish Government submit that, pursuant to Article 11(1) of Directive 92/85, the determination of the amount of income to be paid to a worker temporarily transferred to another job because of her pregnancy is left to the discretion of the Member States. According to the Finnish

Government, the level of pay must be such that the objective of protecting the safety and health of the pregnant worker referred to by that directive is not undermined.

46 By contrast, the applicant in the main proceedings and the Commission argue that a pregnant worker in a situation comparable to that of the applicant must a priori be entitled to continue receiving the full amount of her salary during her temporary transfer.

47 The Italian Government states that, according to Italian law, a pregnant worker assigned to duties which correspond to those of a grade lower than those she usually performs retains the pay corresponding to her previous duties. However, as regards bonuses and supplementary allowances which are added to the basic salary, a distinction should be made between those paid as consideration for the professional qualities specific to the worker concerned, which the employer should not be able to withhold or reduce if that worker is temporarily moved to another job in order to protect her health, and those paid on account of the particular methods of performing the work which are awarded only in order to compensate for specific disadvantages or difficulties encountered by the worker and which may be withheld if the specific situations justifying them no longer exist.

48 In that connection, it must be recalled that, during the period which gave rise to the dispute before the referring court, the applicant in the main proceedings continued working and performing the tasks entrusted to her by her employer. Furthermore, the temporary transfer was not made at the applicant's request, but in accordance with the relevant provisions of Finnish law and Article 5(2) of Directive 92/85, and was intended to avoid any risks to the safety or health of the worker concerned or to her child.

49 That being the case, an examination of the wording of Article 11(1) of Directive 92/85 and of the objective of protecting pregnant workers and workers who have recently given birth or are breastfeeding pursued by that directive indicates that, contrary to the submissions of the Commission and the applicant in the main proceedings, a pregnant worker, such as the applicant, who is temporarily transferred to another job and whose pay before the transfer is made up of a basic salary and a series of supplementary allowances, the payment of which depends with respect to some of those allowances on the performance of specific functions, cannot, on the basis of that provision, claim that she should continue to receive all the remuneration she received before the temporary transfer.

50 First, even if, being based on the employment relationship and paid to a pregnant worker covered by Article 5(1) and (2) of Directive 92/85 who continues to work, the income that the employer pays to that worker constitutes pay within the meaning of Article 141 EC, the fact remains that Article 11(1) thereof, in most of the language versions existing at the time of its adoption, refers to the maintenance of 'a' payment and not 'the' payment to the worker concerned.

51 Furthermore, Article 11(4) of that directive provides that Member States may make entitlement to pay or the allowance referred to in Article 11(1) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

52 Next, the Court has already observed that the facts relating to the nature of the work done and the conditions in which it is carried out may, if appropriate, be considered to be objective factors unrelated to any discrimination on grounds of sex such as to justify any differences in pay between different groups of workers (see, to that effect, in the context of Article 141 EC, Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 52).

53 In the present case, it is common ground that the payment of some of the supplementary allowances to which the applicant in the main proceedings was entitled before her temporary transfer was dependent on the performance of specific functions in particular circumstances and that, during her temporary transfer to another job, she did not perform such functions.

54 Finally, Article 11(1) of Directive 92/85 refers explicitly to national legislation and/or national practice.

55 Thus, that provision leaves to the Member States and, where appropriate, to management and labour a certain amount of discretion when they define the conditions for the exercise and implementation of the entitlement of the pregnant workers covered by Article 5(2) of Directive 92/85 to pay. It is therefore for the Member States to define the detailed rules for the application of that entitlement, although they are not able to make the existence of that entitlement, which derives directly from that directive and the employment relationship between the pregnant worker and her employer, subject to any preconditions whatsoever (see, by analogy, Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 53).

56 The exercise by the Member States and, where appropriate, management and labour of that discretion when determining the pay to which a pregnant worker, who is temporarily transferred to another job during and on account of her pregnancy, is entitled cannot undermine the objective of protecting the safety and health of pregnant workers pursued by Directive 92/85 nor ignore the fact that such a worker actually continues to work and to perform the tasks entrusted to her by her employer.

57 As is clear from the 16th recital in the preamble to Directive 92/85, measures for the organisation of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance.

58 The pay which must be maintained with respect to a pregnant worker in accordance with Article 11(1) of Directive 92/85, following her temporary transfer to a position other than that which she occupied before her pregnancy, cannot, in any event, be less than that paid to workers occupying the job to which she is temporarily assigned. For the duration of that temporary transfer, the pregnant worker is also entitled to the pay components and supplementary allowances relating to that job provided that she fulfils the conditions of eligibility for them in accordance with Article 11(4) of that directive.

59 Furthermore, as the Advocate General observed, in points 69 and 70 of his Opinion, in defining the pay components of such a worker which must be maintained for the duration of the temporary transfer, in accordance with Article 11(1) of Directive 92/85, the Member States and, where appropriate, management and labour are bound by the nature of the various supplementary allowances paid by the employer and which may, in some cases, such as that at issue in the main proceedings, constitute a substantial part of the overall pay of the pregnant worker concerned.

60 It follows that, in addition to the basic salary relating to her contract or her employment relationship, a pregnant worker temporarily transferred to another job, pursuant to Article 5(2) of Directive 92/85, remains, during that transfer, entitled to the pay components or supplementary allowances which relate to her professional status such as, in particular, her seniority, her length of service and her professional qualifications.

61 However, the Member States and, where appropriate, management and labour are not required pursuant to Article 11(1) of Directive 92/85 to maintain, during the temporary transfer, the pay components or supplementary allowances which, as is clear from paragraph 53 of this judgment, are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance.

62 It is clear from the foregoing that, following her temporary transfer to a job other than that which she occupied before her pregnancy, in accordance with Article 5(2) of Directive 92/85, a pregnant worker is not entitled under Article 11(1) thereof to the pay she received on average before that transfer.

63 Nevertheless, it should be recalled that Article 11(1) of Directive 92/85 provides only for minimum protection with respect to the pay of pregnant workers covered by Article 5 thereof. None of the provisions of that directive prevents the Member States or, where appropriate, management and labour from providing for the maintenance of all the pay components and supplementary allowances to which the pregnant worker was entitled before her pregnancy and her temporary transfer to another job.

64 Directive 92/85, which was adopted in accordance with Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), does not prevent a Member State, as is clear from Article 137(4) EC, from maintaining or laying down more stringent protective measures, provided that they are compatible with the provisions of the Treaty (see, to that effect, Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915, paragraph 37).

65 In the case in the main proceedings, as is clear from paragraphs 19 and 20 of this judgment, in accordance with the collective agreement and the decision of 20 June 1989, following her transfer to ground duties on account of her pregnancy, a pregnant air hostess receives pay up to the amount of her annual paid holiday.

66 The remuneration paid by Finnair to a pregnant worker during her temporary transfer is made up of her basic monthly salary and a supplementary allowance called 'lisäpäiväpalkka'. As is clear from paragraph 20 of this judgment, that supplementary allowance is calculated in two stages. First, the average supplementary allowance received by an air hostess or steward during a given reference period is calculated. That is the personal supplementary allowance called 'lisäpäiväpalkka' paid to the worker concerned during that period. Second, the average amount of the personal supplementary allowances of all air hostesses and stewards in the same pay grade is calculated.

67 It should be noted that because the pay of pregnant workers following a temporary transfer to a post other than that which they previously occupied is calculated on the basis of an average amount over a given reference period of the allowances received by all the air hostesses and stewards in the same pay grade, such a pay scheme may lead either to a reduction or an increase in income received by the pregnant worker as compared with the amount which was paid to her during the reference period concerned. As is clear from the order for reference, air crew may receive more than a dozen different allowances, the payment of which is related to the particular ways in which the work is carried out. In those circumstances, both the amount and the type of allowances received by air hostesses and stewards in the same pay grade during that reference period may vary considerably.

68 The choice by a Member State or, where appropriate, management and labour of a pay scheme, according to which the income of pregnant workers following a temporary transfer is made up of the basic monthly salary and the average amount of allowances received by air crew during a given reference period, cannot, in principle, be regarded as contrary to Article 11(1) of Directive 92/85.

69 However, in so far as such a pay scheme, in the calculation of the average monthly pay for pregnant air hostesses who have been temporarily transferred in accordance with Article 5(2) of Directive 92/85, fails to take account of the pay components or supplementary allowances which relate to the professional status of the pregnant worker – which is in no way affected by the temporary transfer – such as supplementary allowances relating to the seniority of the worker concerned, her length of service and her professional qualifications, that scheme cannot be regarded as compatible with the requirements of Article 11(1) of Directive 92/85.

70 As is clear from paragraph 56 of this judgment, although, in accordance with Article 11(1) of Directive 92/85, the determination of the methods of calculating the pay entitlement of a pregnant worker covered by Article 5(2) thereof is entrusted to the Member States, they must not lay down methods which are not compatible with the objective of protecting the safety and health of pregnant workers pursued by that directive. Further, they must not ignore the fact, when determining that pay, that such a worker actually continues to work.

71 In the present case, as the applicant in the main proceedings submits, while her personal supplementary allowance called 'lisäpäiväpalkka' was EUR 74.35 per day during

the reference period, the average amount of that supplementary allowance paid to all air hostesses and stewards in the same pay grade was, for the same period, EUR 39.74 per day. As a result of the worker concerned being temporarily transferred to ground work, her total monthly pay was reduced by EUR 834.56 as compared with the pay she received before the temporary transfer.

72 It is for the referring court to ascertain whether, according to the method of calculating the pay provided for by the collective agreement and/or the decision of 20 June 1989 as regards air hostesses during pregnancy, the applicant in the main proceedings was deprived, following her temporary transfer to a post other than that which she normally occupied, of pay components or supplementary allowances relating to her professional status. If that is the case, the pay scheme providing for such a reduction in her pay for the duration of the temporary transfer pursuant to Article 5(2) of Directive 92/85 must be regarded as contrary to the provisions of Article 11(1) thereof.

73 Having regard to all the foregoing, the answer to the question referred is that Article 11(1) of Directive 92/85 must be interpreted as meaning that a pregnant worker who, in accordance with Article 5(2) thereof, has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to that transfer is not entitled to the pay she received on average prior to that transfer. In addition to the maintenance of her basic salary, such a worker is entitled, pursuant to Article 11(1), to pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications. Although Article 11(1) of Directive 92/85 does not preclude the use of a method of calculating remuneration to be paid to such a worker based on the average amount of the allowances linked to working conditions of all the air crew in the same pay grade during a given reference

period, the failure to take account of those pay components or supplementary allowances must be regarded as contrary to that provision.

Costs

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

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

Article 11(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as meaning that a pregnant worker who, in accordance with Article 5(2) thereof, has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to that transfer is not entitled to the pay she received on average

prior to that transfer. In addition to the maintenance of her basic salary, such a worker is entitled, pursuant to Article 11(1), to pay components or supplementary allowances relating to her professional status, such as allowances relating to her seniority, her length of service and her professional qualifications. Although Article 11(1) of Directive 92/85 does not preclude the use of a method of calculating remuneration to be paid to such a worker based on the average amount of the allowances linked to working conditions of all the air crew in the same pay grade during a given reference period, the failure to take account of those pay components or supplementary allowances must be regarded as contrary to that provision.

[Signatures]