JUDGMENT OF THE COURT
8 November 1990 *

In Case C-177/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for a preliminary ruling in the proceedings pending before that court between

Elisabeth Johanna Pacifica Dekker

and

Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus

on the interpretation of Articles 2 and 3 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 (Official Journal 1976 L 39, p. 40),

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris and F. Grévisse, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator,

after considering the observations submitted on behalf of

Mrs Dekker, the plaintiff in the main proceedings, by T. E. Van Dijk, of the Hague Bar,

* Language of the case: Dutch.

the VJV, the defendant in the main proceedings, by J. L. de Wijkerslooth, of the Hague Bar,

the United Kingdom, by J. A. Gensmantel, of the Treasury Solicitor's Department, acting as Agent,

the Netherlands Government, by E. F. Jacobs, General Secretary of the Ministry of Foreign Affairs, acting as Agent,

the Commission of the European Communities, by K. Banks and B. J. Drijber, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral submissions of Mrs E. J. P. Dekker, the VJV-Centrum, represented by S. M. Evers, of the Hague Bar, the Netherlands Government, represented by J. W. de Zwaan, acting as Agent, the United Kingdom, represented by D. Pannick, acting as Agent, and the Commission at the hearing on 3 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 November 1989,

gives the following

Judgment

1 By judgment of 24 June 1988, which was received at the Court on 30 June 1988, the Hoge Raad der Nederlanden referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 2 and 3 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 (Official Journal 1976 L 39, p. 40; hereinafter referred to as 'the Directive').

2 Those questions arose in the context of a dispute between Mrs Dekker and the Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus (hereinafter: 'the VJV'). In June 1981 Mrs Dekker applied for the post of instructor at the training centre for young adults run by the VJV. On 15 June 1981 she informed the committee dealing with the applications that she was three months' pregnant. The committee none the less put her name forward to the board of management of the VJV as the most suitable candidate for the job. By letter of 10 July 1981, however, the VJV informed Mrs Dekker that she would not be appointed.

3 In the letter the VJV explained that the reason for the decision was that Mrs Dekker was already pregnant at the time of lodging her application and that, according to the information it had obtained, the consequence would be that, if the VJV were to employ her, its insurer, the Risicofonds Sociale Voorzieningen Bijzonder Onderwijs (Assurance Fund for the provision of social benefits in special education; hereinafter referred to as 'the Risicofonds') would not reimburse the daily benefits that the VJV would be obliged to pay her during her maternity leave. As a result, the VJV would be financially unable to employ a replacement during Mrs Dekker's absence and would thus be short-staffed.

4 It is apparent from the documents before the Court that under Article 6 of the Ziekengeldreglement (the internal rules of the Risicofonds governing daily sickness benefits) the board of management of the Risicofonds is empowered to refuse to reimburse to a member (the employer) all or part of the daily benefits in the event that an insured person (the employee) becomes unable to perform his or her duties within six months of commencement of the insurance if, at the time when that insurance took effect, it was to be anticipated from the state of health of the person concerned that such incapacity would supervene within that period. Unlike Article 44(1)(b) of the Ziektewet (the Netherlands Law on sickness insurance), which lays down the insurance scheme generally applicable to private-sector employees, the Ziekengeldreglement, which alone applies to Mrs Dekker, contains no derogation for pregnancy from the rule permitting reimbursement of the daily benefits to be refused in cases of 'foreseeable sickness'.

5 The Arrondissementsrechtbank (District Court) Haarlem and the Gerechtshof (Regional Court of Appeal), in turn, dismissed Mrs Dekker's applications for an order requiring the VJV to pay her damages for her financial loss, whereupon she appealed to the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

6 Taking the view that the appeal raised problems as to the interpretation of Council Directive 76/207, the Hoge Raad der Nederlanden decided to refer the following questions to the Court for a preliminary ruling:

'(1) Is an employer directly or indirectly in breach of the principle of equal treatment laid down in Articles 2(1) and 3(1) of the Directive (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) if he refuses to enter into a contract of employment with a candidate, found by him to be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post, in conjunction with rules concerning unfitness for work laid down by a public authority under which inability to work in connection with pregnancy and confinement is assimilated to inability to work on account of sickness?

(2) Does it make any difference that there were no male candidates?

(3) Is it compatible with Articles 2 and 3 that:

(a) if a breach of the principle that the rejected candidate must be accorded equal treatment is established, fault on the part of the employer is also required before a claim based on that breach such as the present can be upheld;

(b) if such a breach is established, the employer for his part can still plead justification, even if none of the cases provided for in Article 2(2) to (4) applies?

(4) If fault as referred to in Question 3 above may be required or grounds of justification may be pleaded, is it then sufficient, in order for there to be absence of fault or for a ground of justification to exist, that the employer runs the risk referred to in the summary of the facts, or must Articles 2 and 3

be interpreted as meaning that he must bear those risks, unless he has satisfied himself beyond all doubt that the benefit on account of unfitness for work will be refused or that posts will be lost, and he has done everything possible to prevent that from happening?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

8 It should be noted at the outset that the purpose of the Directive, according to Article 1(1), is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

9 Article 2(1) of the Directive provides that '... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. Under Article 3(1) 'application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts ...'.

10 Consideration must be given to the question whether a refusal of employment in the circumstances to which the national court has referred may be regarded as direct discrimination on grounds of sex for the purposes of the Directive. The answer depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.

11 The reason given by the employer for refusing to appoint Mrs Dekker is basically that it could not have obtained reimbursement from the Risicofonds of the daily benefits which it would have had to pay her for the duration of her absence due to pregnancy, and yet at the same time it would have been obliged to employ a replacement. That situation arises because, on the one hand, the national scheme in question assimilates pregnancy to sickness and, on the other, the Ziekengeldreglement contains no provision excluding pregnancy from the cases in which the Risicofonds is entitled to refuse reimbursement of the daily benefits.

12 In that regard it should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.

13 In any event, the fact that pregnancy is assimilated to sickness and that the respective provisions of the Ziektewet and the Ziekengeldreglement governing reimbursement of the daily benefits payable in connection with pregnancy are not the same cannot be regarded as evidence of discrimination on grounds of sex within the meaning of the Directive. Lastly, in so far as as an employer's refusal of employment based on the financial consequences of absence due to pregnancy constitutes direct discrimination, it is not necessary to consider whether national provisions such as those mentioned above exert such pressure on the employer that they prompt him to refuse to appoint a pregnant woman, thereby leading to discrimination within the meaning of the Directive.

14 It follows from the foregoing that the answer to be given to the first question is that an employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Council Directive 76/207 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 if he refuses to enter into a contract of employment with a

female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.

Second question

15 In its second question the Hoge Raad asks whether the fact that there was no male candidate for the job is liable to alter the answer to the first question.

16 The VJV contends that the second question must be answered in the affirmative, because what is involved is not the discriminatory effect of an abstract measure but a concrete decision by an employer not to engage a specific candidate. When an employer chooses from among exclusively female candidates, his choice cannot be attributable to discrimination on grounds of sex, because in such a case the employer is guided by other considerations of a financial or administrative nature.

17 It should be stressed that the reply to the question whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal. If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate. In those circumstances the absence of male candidates cannot affect the answer to the first question.

18 The answer to be given to the second question must therefore be that the fact that no man applied for the job does not alter the answer to the first question.

Third question

19 The third question relates to whether it is contrary to Articles 2 and 3 of the Directive for a legal action in damages based on breach of the principle of equal treatment to be capable of succeeding only if it is also proved that the employer is at fault and cannot avail himself of any ground exempting him from liability.

20 Mrs Dekker, the Netherlands Government and the United Kingdom all take the view that, once an infringement of the principle of equal treatment is established, that infringement must be sufficient to make the employer liable.

21 For its part, the VJV notes that the distinction drawn in the two limbs of the third question between fault attributable to the employer and the possible absence of any ground exempting him from liability is partly linked to the national law applicable to the main proceedings, which provides different legal consequences, according to the case. The VJV claims that the Directive allows an answer to be given only to the question whether an infringement of the principle of equal treatment may be justified in any given case.

22 It must be observed in this regard that Article 2(2), (3) and (4) of the Directive provide for exceptions to the principle of equal treatment set out in Article 2(1), but that the Directive does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability.

23 Article 6 of the Directive recognizes the existence of rights vesting in the victims of discrimination which can be pleaded in legal proceedings. Although full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective protection (judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 23). It must, furthermore, have a real deterrent effect on the employer.

24 It must be observed that, if the employer's liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to him and also to there being no ground of exemption recognized by the applicable national law, the practical effect of those principles would be weakened considerably.

25 It follows that when the sanction chosen by the Member State is contained within the rules governing an employer's civil liability, any breach of the prohibition of discrimination must, in itself, be sufficient to make the employer liable, without there being any possibility of invoking the grounds of exemption provided by national law.

26 Accordingly, the answer must be that, although Directive 76/207 gives the Member States, in penalizing infringement of the prohibition of discrimination, freedom to choose between the various solutions appropriate for achieving its purpose, it nevertheless requires that, where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.

Fourth question

27 In view of the answer to the third question, there is no need to give a ruling on the fourth question.

Costs

28 The costs incurred by the Netherlands Government, the United Kingdom and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden, by judgment of 28 June 1988, hereby rules as follows:

(1) An employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(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 if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities, which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.

(2) The fact that no man applied for the job does not alter the answer to the first question.

(3) Although Directive 76/207 gives the Member States, in penalizing infringement of the prohibition of discrimination, freedom to choose between the various solutions appropriate for achieving its purpose, it nevertheless requires that, where a Member State opts for a sanction forming part of the rules on civil liability, any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable, and no regard may be had to the grounds of exemption envisaged by national law.

Due Moitinho de Almeida Rodríguez Iglesias

Díez de Velasco Slynn Kakouris Grévisse

Delivered in open court in Luxembourg on 8 November 1990.

J.-G. Giraud
Registrar

O. Due
President