

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER

delivered on 9 January 1997 *

1. In this case, the Court is called upon to answer a question submitted by the French Cour de Cassation (Court of Cassation) concerning the interpretation of certain provisions of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions¹ (hereinafter 'Directive 76/207').

That question arose in relation to an application by the Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés (National Old-Age Insurance Fund for Employees) (hereinafter 'CNAVTS'), a social security institution, for review of a judgment given in 1990 by the Conseil de Prud'hommes (Labour Tribunal), Melun, in favour of Évelyne Thibault.

2. As is evident from the order for reference, Mrs Thibault was engaged by the CNAVTS as an *agent technique* in 1973 and promoted to the position of *rédacteur juridique* in 1983.

Throughout 1983, Mrs Thibault's attendance at work suffered from a certain lack of continuity: she was absent on sick leave for a total of fifty-two days (4 to 13 February, 3 to 16 March and 16 May to 12 June); then she took a sixteen-week period of maternity leave (13 June to 1 October), followed by a six-week period of child-care leave (3 October to 16 November) under Article 46 of the Convention Collective Nationale du Travail du Personnel des Organismes de Sécurité Sociale (national collective labour agreement for the staff of social security institutions) (hereinafter 'the collective agreement'). Her attendance at work for the whole year was recorded as totalling one hundred and fifty-five days.

3. Relying on Chapter XIII of the standard service regulations for the application of the collective agreement (hereinafter 'the service regulations'), which provides that employees who are present at work for at least six months in any year must be the subject of an assessment of performance by their immediate superiors, the CNAVTS refused to draw up an assessment for Mrs Thibault in relation to 1983.

The fact that no assessment of performance was drawn up by her superiors meant that Mrs Thibault could not be included on the list of staff, classified according to their

* Original language: Spanish.

1 — OJ 1976 L 39, p. 40.

assessment marks, which is used annually for the purpose of awarding advancements on merit equivalent to 2% of salary.

4. Mrs Thibault applied to the Conseil de Prud'hommes (Labour Tribunal), Paris, for an order that the CNAVTS draw up an assessment for her in relation to 1983 and award her the appropriate advancement, claiming that the lack of such an assessment, which was not drawn up for her because she had been absent on maternity leave, constituted discrimination and that she had thereby lost an opportunity of obtaining the advancement for the year in question.

By judgment of 17 December 1985, the defendant was ordered to pay the applicant arrears for the period from 1 January to 31 December 1984 on the ground that she had been unfairly deprived of the advancement, since maternity leave cannot be counted as absence for the purpose of calculating the period of six months' attendance at work which entitles employees to an assessment of performance.

5. The CNAVTS applied for review of that judgment. The Cour de Cassation set it aside on 9 February 1989 and referred the case back to the Conseil de Prud'hommes, Melun, for a new judgment.

In its judgment of 24 January 1990, the Conseil de Prud'hommes allowed Mrs Thibault's application, on the grounds that Article L 123-1 of the Labour Code contains a clearly anti-discriminatory provision; that her absence on maternity leave should have been counted as actual attendance for the purpose of calculating the period necessary to create entitlement to an assessment of performance; and that, accordingly, the applicant had been at work for more than six months, for which reason her immediate superiors should have given her an assessment of performance. It therefore ordered the CNAVTS to pay her arrears of FF 3 334 for 1984.

6. In the course of the proceedings brought by the CNAVTS for review of that judgment, the Cour de Cassation, noting that the rule contained in Article L 123-1(c) of the Labour Code was the result of the transposition into national law of Directive 76/207, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Must Articles 1(1), 2(1), 5(1) and, if relevant, 2(4) of Council Directive 76/207/EEC of 9 February 1976 be interpreted as meaning that a woman may not be deprived of the right to an assessment of performance, and consequently to the possibility of an advancement in career, on the ground that she was absent from work by reason of maternity leave?'

7. Under Article 45 of the collective agreement, pregnant employees who prove a certain period of service are entitled to sixteen weeks' maternity leave on full pay, which may be extended to twenty-eight weeks in some cases. That time is not counted in the computation of sick leave and cannot give rise to any reduction in annual leave. Moreover, under Article 46, on completing her maternity leave, a woman is entitled to take either three months' leave on half-pay or one-and-a-half months' leave on full pay, and to keep her job.

8. Article L 122-26-2 of the Labour Code provides that the period of maternity leave is to be treated as a period of actual work when determining a worker's rights by virtue of length of service. Under Article L 123-1(c) of that Code, subject to the special provisions laid down therein, unless belonging to a particular sex is a decisive condition for holding a post or exercising a professional activity, no-one may adopt any measure on the basis of sex, in particular in relation to pay, training, post, assessment, grading, promotion or transfer.

9. Articles 29 to 31 of the collective agreement provide for a system of advancements which, over a period of time, can amount to

a maximum of 40% of salary. First, on expiry of the second year after taking up appointment, employees are entitled to receive, annually, 2% of salary by way of advancement linked exclusively to length of service.

Secondly, once the third year after taking up appointment has elapsed and subject to a maximum increase of 24%, the 2% may be supplemented, on a discretionary basis, by a further 2% which is awarded on the basis of the employee's being included on the list compiled annually by reference to the mark which the quality of the employee's work and performance have been assessed as meriting by his or her immediate superiors. The proportion of recipients of this advancement on merit may not exceed 40% of the staff in each grade.

Once 24% of salary has been reached, and subject to a maximum of 40%, increases are granted only on the basis of length of service, at a rate of 2% per annum.

10. Chapter XIII of the service regulations implements Articles 29 to 31 of the collective agreement. In particular, with regard to the discretionary award of the 2% increase, it provides that any employee who has been

present at work for at least six months must have an assessment of performance drawn up by his or her immediate superiors.

regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".

11. Moreover, the supplement of 13 November 1975, appended to the collective agreement, defines the concept of 'professional experience' as time actually spent at work. Article 3 thereof provides that, with effect from 1 July 1973, in addition to actual attendance, the following absences must be counted as periods of 'professional experience' for the purpose of classifying posts: annual leave, special short-term leave, time spent as an elected trade-union official, and absences on certain other specified grounds, subject to a maximum of five working days per six-month period.

2....'

13. Article 2 provides:

'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.

Article 3*bis*, which was added by an annex of 15 December 1983 and entered into force on 16 January 1984, provides that maternity leave must be counted as a period of 'professional experience' in the same way as the absences listed in Article 3.

...

12. Article 1 of Directive 76/207 provides as follows:

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

'1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by remov-

ing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).'

independent occupations and professions shall be, or may be declared, null and void or may be amended;

...'

14. Finally, by virtue of 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.

15. Written observations were submitted, within the time-limit laid down for that purpose by Article 20 of the Protocol on the EC Statute of the Court of Justice, and oral observations were put forward at the hearing, by the French Government, the United Kingdom and the Commission.

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

16. The French Government states that Directive 76/207 has been transposed into national law, and specifically into Article L 123-1 of the Labour Code, that infringement of its provisions entails criminal sanctions, and that the prohibition of discrimination contained in the directive must be observed not only in the legislation of the Member States but also in the context of collective agreements concluded by employers and workers.

(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

In its opinion, the Court's case-law, according to which both refusal to enter into a contract of employment with,² and dismissal of,³ a pregnant woman constitute discrimi-

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

3 — Case C-32/93 *Webb* [1994] ECR I-3567.

nation, must also apply to the right to be given an assessment of performance and the right to advancement in career, since those factors form part of working conditions for the purposes of Article 5 of Directive 76/207.

In Mrs Thibault's case, the employer should have separated the period of maternity leave from the period of sick leave; the latter is the only period which can be counted as absence from work for the purpose of applying Chapter XIII of the service regulations without infringing the principle of equal treatment, since equating maternity leave with absence from work for any other reason is contrary to the Court's case-law on equal treatment in so far as, in this case, it meant that an assessment of performance, the existence of which is a necessary precondition for inclusion on the list of employees eligible to receive the advancement on merit amounting to 2% of salary, was not drawn up for her in relation to 1983.

It adds that such discriminatory treatment arises not from the applicable provisions of laws and the collective agreement but from the interpretation thereof by the CNAVTS, since under no circumstances is an employer obliged to regard maternity leave as time absent from work, and those provisions must be interpreted by the national court in such a way that they conform to the requirements of Community law.

The French Government proposes that the Court should reply in the affirmative to the question referred to it by the Cour de Cassation for a preliminary ruling.

17. The United Kingdom is of the opinion that Mrs Thibault was not the victim of discrimination on grounds of sex, for four reasons: first, because the reason for which an assessment of performance was not drawn up for her relates to her absence from work; second, because the situation of a woman who is absent from work as a result of taking maternity leave cannot be compared to that of a man or woman who is working; third, because the determination of all rights extended to women during maternity leave is a matter for the Member States, without prejudice to the provisions of Directive 92/85/EEC;⁴ and, finally, because Directive 76/207 does not confer any right to have periods of absence by reason of maternity counted as periods of work which could give rise to entitlement to an assessment of performance.

It proposes that the Court should reply to the national court that, where a worker's right to have an assessment of performance drawn up for him or her in relation to a particular period is subject to proof of his or her attendance at work for a minimum length of time, Directive 76/207 does not require the employer to make such an assessment in the

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).

case of a female worker who, having taken maternity leave, was not at work for that minimum period.

18. The Commission points out that pregnancy is a condition which can affect only women and that, consequently, simply to treat maternity leave in the same way as sick leave even though they are two distinct situations constitutes direct discrimination despite the fact that the criterion governing the application of the rule, namely, absence from work for more than six months in the year in question, is neutral. It adds that refusal to draw up an assessment of performance for a pregnant woman in the circumstances described constitutes direct discrimination on grounds of sex, since that refusal is based on a method of calculating periods of absence from work which adversely affects only pregnant women.

It takes the view that the question submitted for a preliminary ruling must be answered in the affirmative.

19. In view of the conflicting positions adopted, I will say at the outset that I disagree totally with the opinions put forward by the United Kingdom and with the solution proposed in its written observations, and that, conversely, I agree with most of the arguments put forward both by the French Government and by the Commission.

20. Starting from the assumption 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'⁵ and taking into account the Court's consistent case-law according to which '... discrimination can only arise through the application of different rules to comparable situations or the application of the same rule to different situations',⁶ I shall now consider whether, by simply treating maternity leave in the same way as sick leave, the contested rule in the collective agreement, which applies to men and women alike, guarantees equal treatment because both situations are similar, or whether, on the contrary, it introduces direct discrimination on grounds of sex by applying the same rule to different situations since, for the purpose of calculating attendance at work, it takes into consideration a category of leave which only women can take.

21. With regard to the protection of working women who are pregnant or have recently given birth, Article 2(3) of Directive 76/207 allows Member States to adopt provisions which introduce different treatment. In its judgment in the *Hofmann* case,⁷ the Court held that '... by reserving to Member States the right to retain, or introduce provisions which are intended to protect women

5 — Judgment No 29/1987 of the Spanish Tribunal Constitucional (Constitutional Court) of 6 March 1987; paragraph 5 (b) (BOE of 24 March 1987).

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

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

in connection with “pregnancy and maternity”, the directive recognises the legitimacy, in terms of the principle of equal treatment, of protecting a woman’s needs in two respects. First, it is legitimate to ensure the protection of a woman’s biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth ...’.

material and not formal equality, since that would constitute a denial of equality.’⁸

23. However, this case is concerned not with national provisions for the protection of women, adopted on the basis of Article 2(3) of Directive 76/207, but with the application of the principle of equal treatment as regards access to employment and working conditions, laid down in Article 5(1) of the directive.

Maternity leave, the rules for which are set out in Articles 45 and 46 of the collective agreement governing Mrs Thibault’s employment relationship, which is normally split between the weeks immediately before and after childbirth and is restricted to women, undoubtedly falls within the scope of that derogation.

24. In interpreting Directive 76/207, the Court has established clear and consistent case-law setting out its views on unfavourable treatment received by a woman in the labour market because of the fact that she is pregnant.

22. On this point, I agree with Advocate General Tesaro when he states: ‘On closer inspection ..., the provisions adopted in implementation of Article 2 (3) of the directive cannot properly be called derogations from the principle of equality, in that they seek rather to ensure that that principle operates in substance, by permitting such “inequalities” as are necessary in order to achieve equality. In short, different treatment is allowed or imposed, in favour of and to protect female workers, in order to arrive at

Thus, in *Dekker*,⁹ it held that an employer is in direct contravention of the principle of equal treatment embodied in Articles 2(1) and 3(1) of Directive 76/207 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

8 — Opinion of Advocate General Tesaro in Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657 et seq., especially at I-1659, point 11.

9 — Cited in footnote 2 above, paragraph 14.

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.

In its judgment of the same date in the *Hertz* case,¹⁰ the Court stated: 'It follows from the provisions of the Directive ... [Articles 2 (1) and (3) and 5 (1)] that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman.'

25. A few years later, in *Habermann-Beltermann*,¹¹ the Court confirmed that case-law and held that '... Article 2 (1), read in conjunction with Articles 3 (1) and 5 (1) of Directive 76/207/EEC, precludes 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 breastfeeding, 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.'

26. In its judgment in the *Webb* case,¹² the Court refused to comply with the national court's request that it consider whether the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of an employment contract, of performing the task for which she was recruited can be compared with that of a man similarly incapable for medical or other reasons, since '... pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds ...'. Further on, it added that '... dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the directive.'

27. It is clear from that case-law that any decision by the employer which is directly related to the sex of a female candidate, which affects the possibilities of access to a job or modifies the working conditions offered to her as compared with those

10 — Case C-179/88 *Handels-og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13.

11 — Cited in footnote 8 above, paragraph 26.

12 — Cited in footnote 3 above, paragraphs 24 to 26.

offered to a man, constitutes direct discrimination contrary to Directive 76/207.

28. I have no doubt whatsoever that the rule contained in Chapter XIII of the service regulations annexed to the collective agreement, under which any employee who has recorded a minimum of six months' attendance during the year must have an assessment of performance drawn up by his or her immediate superiors, as a necessary, though not sufficient, precondition for receiving the advancement on merit of 2% of salary, must be regarded as a working condition for the purposes of Article 5(1) of the directive.

29. Like the Commission, I note that that rule, which requires a minimum of six months' attendance at work in order for a right to an assessment of performance to arise, lays down a neutral criterion which applies equally to men and women and is not bound, in principle, to affect either group adversely since all are likely, for example, to be absent on account of illness. However, in reality, it is obvious that that rule is liable to operate consistently to the disadvantage of women since it allows the employer to refuse to assess a female employee whose absence during the year under consideration was due, in large measure, to the fact that she took maternity leave.

30. In fact, the way in which the CNAVTS applies that rule of the collective agreement

means that any female employee who takes the full period of maternity leave within the same year will find that, however little she has been absent on account of illness, she will not have accumulated the six months' attendance necessary in order to establish the right to an assessment of performance, and it must also be borne in mind that Article 45 of the collective agreement now provides that, in certain circumstances, maternity leave, which normally lasts sixteen weeks, may extend to twenty-six or twenty-eight weeks. It goes without saying that, in the latter event, merely because she had had a multiple birth, the woman would have no right to have the quality of her work and her performance in the service of her employers during the rest of the year assessed by her immediate superiors.

31. I take the view that the right of all employees to have their work assessed annually is an integral part of the conditions of their contracts of employment particularly since the existence or absence of such an assessment has very practical consequences, such as, in the former case, the possibility of inclusion on the list of recipients of an advancement on merit of 2% of salary if the marks awarded were sufficiently high, or, in the latter case, denial of that possibility.

In those circumstances, it seems obvious to me that treating the period of maternity leave as a period of sick leave has a direct adverse effect on the woman who has given birth, since the risk which she runs on that account of receiving no annual assessment of performance is much greater than that run

by a man for whom only sick leave can be counted in relation to the same period.

32. I conclude that, by being applied equally to different situations, the rule in the collective agreement produces discriminatory effects. Consequently, in order to achieve the equal treatment sought, it will be necessary to treat unequally that which is, in fact, different.

33. For that reason, since the substantive equality between men and women as regards employment precludes any consideration, either when they take up employment or during the employment relationship, of a factor which — by definition — affects only women,¹³ it will not be possible, when calculating the attendance at work of a female employee in order to establish a right to an assessment of performance, to add the period of maternity leave either to periods of sick leave or to absences justified for any other reason.

34. I must admit that, where immediate superiors are required to comment on certain aspects of an employee's performance over a particular period of time, the requirement of a minimum time of attendance at work is

logical enough and cannot be regarded as disproportionate to the result pursued, namely, that they should have a reasonable period of time in order to be able to assess the employee's performance. However, there is nothing to suggest that that period must necessarily be six months, without exception, and I am not convinced that it is impossible to comment if the period is shorter.

In any event, given that this case involves direct discrimination on grounds of sex, it is not appropriate even to consider the existence of any justification.

35. At the hearing, the United Kingdom argued in favour of the applicability to this case of the precedent established by the Court in its judgment in the *Gillespie* case,¹⁴ according to which '... women taking maternity leave provided for by national legislation ... 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'. It infers from that statement that Mrs Thibault, not having been at work for at least six months, is not entitled to have an assessment of performance drawn up for her in relation to 1983 since otherwise she would receive the same treatment as a man or woman who had been working.

13 — Opinions of Advocate General Darmon in the *Dekker* case, cited in footnote 2 above, point 26, and Advocate General Tesouro in the *Webb* case, cited in footnote 3 above, point 8.

14 — Case C-342/93 *Gillespie* [1996] ECR I-475, paragraph 17.

36. I disagree with that argument for two reasons. First, because the *Gillespie* case concerned application of the principle that men and woman should receive equal pay for equal work, laid down by Article 119 of the Treaty and developed in Directive 75/117/EEC,¹⁵ and the Court held that that principle does not require that women should continue to receive full pay during maternity leave, a conclusion which appears logical in view of the fact that women on maternity leave are not working.

However, the issue in this case is the application of the principle of equal treatment for men and women as regards working conditions, and the Court has stated, in the *Gillespie* judgment, that Directive 76/207, as is clear from the second recital in its preamble,¹⁶ does not apply to the principle of equal pay.

37. Secondly, even if I took the view that the precedent set by *Gillespie* was applicable to this case, I would still not agree with the conclusions which the United Kingdom draws from it. In fact, the Court also stated in that judgment that, since the benefit paid during maternity leave is calculated on the basis of the average pay received by the

woman while she was actually at work, the principle of non-discrimination requires that she benefit from any pay rise, even if back-dated, which is awarded between the period covered by the reference pay and the end of maternity leave, adding that to deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.

In my opinion, if it were assumed that the Court's judgment in *Gillespie* were applicable to this case, it would serve to confirm that the act of equating maternity leave with sick leave, when calculating attendance at work for the purpose of determining whether a woman is entitled to an assessment of performance, is discriminatory. In fact, one could take up the Court's wording and, adapting it to this case, state that to deny a woman the right to an assessment of performance because she has been absent from work on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant and given birth, she could not have been denied that right.

38. For all the reasons which I have just set out, I propose that the Court state in answer to the question referred to it that Article 5(1) of Directive 76/207 must be interpreted as precluding a neutrally worded national provision contained in a collective agreement, under which an employee who proves at

¹⁵ — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

¹⁶ — Cited in footnote 14 above, paragraph 24.

least six months' attendance at work must be the subject of an assessment of performance by his or her immediate superiors, but which, when applied in practice, produces direct discrimination on grounds of sex in so far as it allows maternity leave to be counted as sick leave for the purpose of calculating the time spent at work by a female employee.

provisions contrary to the principle of equal treatment which are included in, *inter alia*, collective agreements and internal rules of undertakings shall be, or may be declared, null and void or may be amended. In my opinion, despite the fact that Article L 123-1 of the Labour Code has correctly transposed Directive 76/207 into national law, the retention in the service regulations annexed to the collective agreement of the rule at issue creates for individuals 'an ambiguous state of affairs by maintaining ... a state of uncertainty as to the possibilities available to them of relying on Community law'.¹⁷

39. Before concluding, let me make one final point. The French Government, in its observations, maintains that the discrimination which Mrs Thibault has suffered arises neither from the relevant legislation (namely Article L 123-1 of the Labour Code which incorporates Directive 76/207 into national law) nor from the applicable rules of the collective agreement and internal rules, but from the interpretation which the CNAVTS has placed on those provisions.

40. I am only partly in agreement with that view. Although those rules do not oblige the employer to count maternity leave as absence from work for purposes of establishing the right to an assessment of performance, they likewise do not prohibit him from so doing, thereby in fact allowing the interpretation which the CNAVTS adopted in Mrs Thibault's case.

That is clearly borne out by the fact that both Mrs Thibault, in the proceedings before the national courts, and the French Government and the Commission, both in their written observations and in the oral observations submitted in these preliminary-ruling proceedings, have had to rely, in order to show that national law did not allow the interpretation adopted by the CNAVTS, on the one hand, on Article L 122-26-2 of the Labour Code, which applies only for purposes of calculating length of service and, on the other, on Article 3*bis* of the agreement of 13 November 1975 appended to the collective agreement, which applies only for the purpose of classifying posts. In any event, the latter provision did not enter into force until January 1984, that is, later than the year under consideration.

41. Article 5(2)(b) of Directive 76/207 requires Member States to ensure that any

17 — Case 167/73 *Commission v France* [1974] ECR 359, paragraph 41.

42. In those circumstances, it is appropriate to refer to the Court's case-law according to which '... when it interprets and applies national law, every national court must assume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned'.¹⁸ Moreover, the Court has also stated that: '... in applying national law, whether the provisions in ques-

tion 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'.¹⁹

Conclusion

43. In the light of the foregoing considerations, I propose that the question referred for a preliminary ruling should be answered as follows:

Article 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the application of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions must be interpreted as meaning that it precludes a neutrally-worded national provision contained in a collective agreement, under which an employee who proves at least six months' attendance at work must be the subject of an assessment of performance by his or her immediate superiors, but which, when applied in practice, produces direct discrimination on grounds of sex in so far as it allows maternity leave to be counted as sick leave for the purpose of calculating the time spent at work by a female employee.

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

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