OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 19 February 1998 *

Summary

* Original language: Spanish.

1. This is the first time that the Court of Justice has been called upon to give a preliminary ruling on the interpretation of certain provisions of Directive 92/85/EEC [1] concerning maternity leave and entitlement to the maintenance of employment rights during such leave, at the request of a national court, specifically the Industrial Tribunal, Manchester (United Kingdom), which has stayed proceedings in a number of cases before it pending a ruling under Article 177 of the EC Treaty on five questions, the wording of which has been agreed between the parties.

I — The facts

2. The proceedings before the Industrial Tribunal have been brought by Mrs Boyle and other female employees of the Equal Opportunities Commission (hereinafter 'the EOC'), a public body set up under the Sex Discrimination Act 1975 to promote equal treatment and equality of opportunity as between men and women in the United Kingdom. The applicants wish to have declared void certain provisions of the EOC Maternity Scheme (rules governing employees' absences on account of pregnancy and maternity, hereinafter 'the Maternity Scheme'), which are incorporated in their employment contracts, because, by providing for the application of certain measures in the event of pregnancy or maternity and/or ultimately, by reference to sex, they discriminate against women. The contested provisions coincide with those applied in the Civil Service in England and Wales.

3. The applicants are employees of the EOC and are all of childbearing age. They have all completed one year's service with the EOC. They were not employed on a casual or standby basis and none of them was employed for a fixed term of less than two years. Mrs Boyle started working for the EOC for an indefinite period around 1976. During her employment she has taken maternity leave on two occasions. The dates of birth of the plaintiffs in the main proceedings are: Mrs Boyle, 23 June 1953, Mrs Taylor, 24 June 1961, and Mrs Mansley, 14 December 1961. The last two each took maternity leave recently and all three may wish to take further periods of maternity leave: hence their interest in having the contested provisions in their employment contracts declared void or unenforceable.

1 — 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 breast-feeding (Tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

II — The applicable national provisions

A — *Legal provisions concerning employment rights in the event of pregnancy and maternity and the right to be paid when absent from work*

4. Sections 71 to 78 of the Employment Rights Act 1996 grant all female workers a general right to maternity leave for a continuous period of 14 weeks (hereinafter 'maternity leave'), commencing either on the date which the employee notifies to her employer or on the first day after the beginning of the sixth week before the expected date of childbirth, whichever is earlier.

Sections 79 to 85 of that Act grant employees who meet certain conditions, including continuous employment for the two preceding years, the right to return to work after their maternity leave, at any time during the 29 weeks following the week in which childbirth occurred — the 'right to return to work'. To describe the period of time for which the worker may stop working on account of pregnancy and maternity and retain the right to return to work, the duration of which may, by virtue of a concession from the employer, exceed 29 weeks, I shall use the expression 'unpaid maternity leave'.

5. Sections 164 to 166 of the Social Security Contributions and Benefits Act 1992 govern the right of workers who have been employed for a specified period, [2] and whose earnings are of a specified level, [3] to receive Statutory Maternity Pay from their employer for a maximum of 18 weeks, if they are absent from work on account of pregnancy or maternity. There are two rates of Statutory Maternity Pay: the higher rate and the lower rate. The higher rate consists of nine-tenths of the woman's normal weekly earnings in the eight weeks preceding the 14th week before the expected week of confinement; the lower rate, which is fixed and amounts at present to UKL 54.55, is paid where its amount exceeds the nine-tenths figure. A woman who, for two continuous years ending at the start of the 14th week prior to the expected week of confinement, has worked for an employer who is under an obligation to pay her the benefit will receive it at the higher rate for the first six weeks and at the lower rate for the remainder of the period. A woman who is entitled to Statutory Maternity Pay, but does not qualify for the higher rate, will receive it at the lower rate.

2 — At least 26 weeks ending with the week preceding the 14th week before the expected week of confinement.

3 — This must not be less than the lowest level of income taken into account for the payment of social security contributions.

Any pregnant women who do not meet the necessary conditions to receive Statutory Maternity Pay are entitled to receive, subject to a maximum of 18 weeks, a Maternity Allowance, which at present amounts to UKL 54.55 per week.

Sections 151 to 163 of the same Act govern the right to benefits in respect of incapacity for work on account of illness. In such circumstances, workers are entitled to receive Statutory Sick Pay from their employers for a maximum of 28 weeks, the present rate being UKL 54.55 per week.

6. Paragraph 5 of Schedule 5 to the Social Security Act 1989, which incorporates in domestic law the provisions of Directive 86/378/EEC, [4] governs the situation of a woman on maternity leave regarding the accrual of pension rights under an occupational scheme. By virtue of that provision, a woman must be allowed to continue to belong to an occupational pension scheme as if she were working normally. She may not receive more favourable treatment than a woman in active employment, but her contributions to the pension scheme will be based on the amount she receives from her employer whilst on maternity leave by way of contractual remuneration or Statutory Maternity Pay.

4 — Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1986 L 225, p. 40).

B — *The contested provisions of the Equal Opportunities Commission Maternity Scheme*

7. The rules relevant to the decision to be given in these proceedings are as follows:

3. Paid Maternity Leave

3.1 A member of staff will be allowed 3 months and 1 week's paid maternity leave for the period of continuous absence before and after childbirth, provided that she:

— states that she intends to return to work in the EOC after childbirth and she agrees to repay any payment made during that period if she fails to return. Such payment will exclude any Statutory Maternity Pay to which there is an entitlement;

— is in paid service with the EOC at the time her maternity leave begins and has rendered at least one year's such service;

— is not employed on a casual, standby or short notice appointment;

— is not employed on a fixed-term appointment of less than two years.

4. Unpaid maternity leave.

A member of staff who qualifies for paid maternity leave will also qualify for unpaid maternity leave, subject to the following restrictions:

— the total period of paid and unpaid maternity leave must not exceed 52 weeks;

— unpaid maternity leave cannot be terminated earlier than 41 weeks from the actual date of childbirth, unless the maximum limit of 52 weeks is exceeded or the employee agrees to curtail it.

4.2 A permanent member of staff with less than one year's service is entitled to a total of 26 weeks' leave.

4.3 All other employees, regardless of type of contract and number of hours worked, are entitled to 14 weeks' leave.

5.1 Maternity leave [5] may start on any day of the working week, subject to the following restrictions:

— unpaid maternity leave cannot start earlier than 14 weeks before the expected week of childbirth;

— paid maternity leave cannot start earlier than 11 weeks before the expected week of childbirth;

5 — Footnote not relevant to English text.

— paid maternity leave must start from the actual date of childbirth if this occurs earlier than:

— the expected week of childbirth, or

— the date a member of staff has specified for beginning her maternity leave.

— the sixth week before the expected week of childbirth.

6.3 The minimum period of service that must be completed following paid maternity leave is one calendar month. Where this requirement is not satisfied, the member of staff will be asked to repay any salary or wages paid for the period of maternity leave (less any Statutory Maternity Pay).

5.2 If a member of staff specifies that she wishes to begin her maternity leave in any of the six weeks before the expected week of childbirth, the following restriction applies:

— if she is on a pregnancy-related sick absence immediately before her specified date and childbirth occurs during the period of sick absence, paid maternity leave can be brought forward to whichever is the later of:

— the beginning of the period of sick absence;

7.1 Paid sick leave is not allowed once paid maternity leave has begun or during a period of unpaid maternity leave. There may, however, be an entitlement to Statutory Sick Pay during unpaid maternity leave. Evidence of incapacity must be submitted to the Personnel and Payroll Unit so that any eligibility for Statutory Sick Pay can be determined.

7.2 Where a member of staff has provided at least three weeks' notification of her intention to return to work on a specified date, paid sick leave will be allowed from this date. Paid sick leave following childbirth terminates the maternity leave arrangements.

7.3 The period of paid and/or unpaid maternity leave and unpaid leave will not reckon against the normal sick leave limits.

7.4 A member of staff who resumes work after maternity leave is entitled to have the same job and the same terms and conditions as if she had not been absent.

8.1 A member of staff not entitled to paid leave of absence retains her contractual rights and benefits, except remuneration, during the first 14 weeks of leave. This means that annual leave will continue to accrue. The period of absence only accrues for pension purposes if in receipt of Statutory Maternity Pay.

C — *Provisions of the Equal Opportunities Commission Staff Handbook*

8. In the order for reference, the Industrial Tribunal states that the parties agree that Annex 4 to the Staff Handbook [6] forms part of the applicants' contract of employment. So far as is relevant here, the manual provides as follows:

4.1.9 Effect on Annual Leave of Leave Without Pay

Any leave taken without pay (for example unpaid sick, special, or maternity leave) reduces the annual leave entitlement for that year by a proportion of the amount of unpaid leave taken: for example, one month's unpaid leave reduces annual leave entitlement for that year by 1/12.

4.1.11 Sick Leave and Annual Leave

Annual leave is not taken instead of sick leave. Staff who fall ill or are injured during annual leave to the extent that they are unfit to work should inform their line manager as

6 — Annex 4 governs types of leave available to EOC employees, namely: Annual Leave, Public and Privilege Leave, Sick Leave, Medical Appointments, Special Leave and Maternity Leave.

soon as possible, and submit either a self-certificate or a doctor's note (according to the duration of sick leave) as soon as possible after that. The period of absence covered by the note will then count as sick leave.

4.3.4 Sick Pay

Salary is paid in full for all sick leave of up to six months' total duration in any twelve-month period. Thereafter half-pay continues up to a total of twelve months' paid sick leave in four years. Once entitlement to full sick pay and half sick pay is exhausted further sick leave will be unpaid; or sick pay may be given at pension rate, equivalent to the amount to which the employee would have been entitled had they been retired prematurely on ill-health grounds.

4.3.5 Statutory Sick Pay

All employers are required by law to pay Statutory Sick Pay for any period of sick leave totalling up to 28 weeks provided that there are four or more consecutive days on which an employee is unable to work and provided certain other State benefits are not being paid. SSP rates are generally less than the EOC's own sick pay provisions and therefore the EOC normally fulfils its legal requirements in respect of SSP by virtue of the sick pay arrangements described in 4.3.4. ...

4.3.6 Adjustments to pay: sickness benefits

If entitlement to Statutory Sick Pay is exhausted in a particular case, the employee is informed by Personnel, who will forward medical certificates covering continuing absence to their Department of Health and Social Security (DHSS) office so that State benefits can be claimed. Any State benefits that are due will be paid by the DHSS. The total of sick pay and State benefits must not exceed normal pay, and sick pay will be adjusted to avoid this happening.

III — The preliminary questions

9. In order to resolve the disputes before it, the Industrial Tribunal, Manchester, seeks a preliminary ruling from the Court of Justice on the following questions, the wording of which was proposed by the parties:

'In circumstances such as those of the present cases, do any of the following matters infringe the prohibition of unfair and/or unfavourable treatment of women because of pregnancy, childbirth, maternity and/or sickness in relation thereto under EC law (in particular Article 119 of the Treaty of Rome and/or Council Directive 75/117/EEC [7] and/or Council Directive 76/207/EEC [8] and/or Council Directive 92/85/EEC):

(1) A condition that maternity pay, beyond the Statutory Maternity Pay, is paid only if the woman states that she intends to return to work and agrees to be liable to repay such maternity pay if she does not return to work for one month on the conclusion of maternity leave.

(2) A condition that where a woman, who is absent on paid sick leave with a pregnancy-related illness, gives birth during such absence, her maternity leave may be backdated to the later date of either six weeks before the expected week of childbirth or when the sickness leave began.

(3) A prohibition on a woman, who is unfit for work for any reason whilst on maternity leave, from taking paid sick leave, unless she elects to return to work and terminate her maternity leave.

(4) A condition limiting the time during which annual leave accrues to the statutory minimum period of 14 weeks maternity leave and accordingly excluding any other period of maternity leave.

(5) A condition limiting the time in which pensionable service accrues during mater-

7 — 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).

8 — Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 39).

nity leave to when the woman is in receipt of contractual or Statutory Maternity Pay and accordingly excluding any period of unpaid maternity leave.'

IV — The applicable Community provisions

10. Article 119 of the Treaty provides as follows:

'Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement.

(b) that pay for work at time rates shall be the same for the same job.'

11. Directive 75/117 provides, so far as is relevant here:

Article 1

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

...'

Article 3

'Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principles of equal pay.'

Article 4

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wages agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.'

12. For its part, Directive 76/207 provides:

Article 1

'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 regards access to employment, including promotion, and to vocational training and as regards working conditions ... this principle is hereinafter referred to as "the principle of equal treatment".

...'

Article 2

'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.

...

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

...'

Article 5

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

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

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

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

...'

13. Article 6 of Directive 86/378 provides:

'1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, in particular by reference to marital or family status, for:

...

(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;

...'

14. Finally, Article 8 of Directive 92/85 provides with regard to maternity leave:

'1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 [who are pregnant, have

recently given birth or are breast-feeding] 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.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

As regards rights under employment contracts, Article 11 provides:

'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:

...

2. In the case referred to in Article 8 [maternity leave], 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 twelve months immediately prior to the presumed date of confinement.'

V — Observations submitted to the Court of Justice

15. Written observations have been submitted in these proceedings, under Article 20 of the EC Statute of the Court of Justice, by the applicants in the main proceedings, jointly, the EOC, the Governments of the United Kingdom and Ireland and the Commission. The Austrian Government also attended the hearing to present oral observations.

16. The applicants claim that the obligation which the EOC Maternity Scheme imposes on pregnant women in order to receive full pay during maternity leave, demanding repayment of the difference between that amount and Statutory Maternity Pay if they do not return to the work at the end of that period, constitutes discrimination in relation to pay on account of pregnancy, contrary to Article 119 of the Treaty. A commitment of that kind is not imposed on workers as a precondition for receiving full pay in cases of absence on other grounds. They also consider that the obligation imposed on a woman who is unfit for work on account of illness to commence paid maternity leave rather than remaining on sick leave when she reaches the sixth week prior to the expected week of confinement constitutes either discrimination in relation to pay or discrimination in relation to working conditions, contrary to Article 5 of Directive 76/207.

In their opinion, it is also discriminatory and thereby contrary to Community law to refuse to permit a woman who falls ill after maternity leave has commenced to take paid sick leave. In such circumstances an employee who is unfit for work is denied the right, on account of her pregnancy or the fact that she has recently given birth, from exercising her contractual right to take sick leave, on full pay, and she is required to take her maternity leave, at the end of which she must repay part of her remuneration if she does not return to work.

Similarly, they consider that the fact of disregarding, for the purposes of accruing pension rights under the occupational scheme financed entirely by the employer, periods of leave of absence or unpaid leave, including unpaid maternity leave, constitutes indirect discrimination against women. They consider that the condition under which only paid service constitutes reckonable service for the purposes of accruing pension rights appears neutral at first sight but is, in reality, a condition which adversely affects women, since a substantially higher proportion of women than of men take leave of absence or unpaid leave, only women being able to take such leave of absence after maternity leave. For the same reason, they submit that the fact that

any leave of absence or unpaid leave taken brings about a reduction, in the year in question, of the period of annual leave entitlement proportional to the duration of the unpaid leave constitutes discrimination against women.

17. The respondent considers it wrong to equate any condition of employment applicable to pregnancy or maternity with direct discrimination on grounds of sex, contrary to Community law, since to do so is incompatible with the refusal of the Court of Justice to compare pregnancy to a pathological condition. In its view it is necessary for the Court to clarify the circumstances in which different treatment on grounds of pregnancy constitutes discrimination contrary to Community law and, in particular, to indicate the correct test to be applied to establish where discrimination exists under the various applicable Community provisions. In its view, if the correct approach is to treat pregnancy and maternity as situations requiring protection for a specified period, which cannot be equated with other absences from work, it will be necessary to ascertain where that period is to begin and end. In the absence of specific legislation and in application of the principle of subsidiarity, the EOC submits that determination of the commencing and ending date of the protected period and the possibility of those dates being brought forward in certain circumstances are matters to be determined in the employment contract.

18. The United Kingdom states, first, that in the main proceedings the issue is the compatibility with Community law of the contractual scheme drawn up by a particular employer, which is partially based upon provisions of national law which implemented EC measures and which partially represents particular contractual arrangements between employer and employee, which go beyond the minimum protection for workers guaranteed by Directive 92/85. It goes on to say that the principle of equal pay for men and women must be interpreted in the light of the provisions designed to protect women who are pregnant or who have recently given birth, contained in Directive 92/85, and maintains that the measures approved in each Member State in implementation of that directive must be regarded as an indivisible 'package' of minimum rights, which include maternity leave, pay, protection against dismissal during pregnancy and maintenance of employment rights. It follows that an employee cannot be allowed to choose from among the rights in that package those which she sees as most advantageous, such as maternity leave, and seek to disapply other provisions in that package, which seem less favourable to her, such as the fact that the pay she receives in that period is less than full pay.

It concludes that the Community legislation should be interpreted as not precluding the application to employees of the disputed provisions contained in the EOC maternity scheme.

19. Ireland considers that Directive 92/85, adopted to protect the health and safety of pregnant workers and to uphold their employment rights, contains the main provisions governing maternity in the case of working women, except as regards circumstances not covered by the directive, in which case it is necessary to rely on other provisions of Community law, in particular Directive 75/117 or Directive 76/207. It considers, however, that in this case the answer to the preliminary questions is to be found in Directive 92/85, the provisions of which do not preclude the application of the disputed provisions to female employees of the EOC.

20. With respect to the first question, the Commission considers that the disputed stipulations, in so far as they grant employees the right to receive full pay whilst on maternity leave of 14 weeks' duration, conform to Directive 92/85. However, under those same stipulations, if the employee does not return to work for at least one month she must repay the difference between what she received and the amount of the Statutory Maternity Pay. To the extent to which that provision means that a woman who does not return to work fails to receive, during maternity leave, income equivalent to what she would have received if she had been absent from work on account of illness, the Commission considers it incompatible with Directive 92/85.

It suggests that the second and third questions be considered together, since both deal with situations in which maternity leave partly coincides with unfitness for work on grounds of illness, and that they are governed by the principle that an employee cannot be in both sets of circumstances at the same time. That appears to the Commission to be a perfectly legitimate rule, provided that its application does not mean that the employee is deprived of her 'physical' and legal right to a continuous and protected period of at least 14 weeks' maternity leave. It would be contrary to the spirit of Directive 92/85 for an employee to be compelled to give up her maternity leave in order to be able to take sick leave.

The Commission also suggests a combined answer to the fourth and fifth questions, since both deal with the maintenance of rights under the employment contract during a woman's absence on account of maternity. The Commission considers that the right to annual leave and pension rights must continue to accrue in the maternity leave period prescribed by Article 8 of Directive 92/85. However, periods of leave to care for a child, which exceed the length provided for by that article, do not enjoy protection and it would not therefore be incompatible with that directive for the right to annual leave and pension rights not to accrue during those periods.

VI — The jurisdiction of the Court of Justice to answer the questions submitted by the Industrial Tribunal

21. In the same way as the Commission in its written observations, I too have wondered whether the Court of Justice has jurisdiction to answer the questions. At first sight, it would not appear particularly useful to interpret Community provisions laying down the principle of equal pay and the principle of equal treatment for men and women, and the provisions of Directive 92/85 relating to maternity leave and the maintenance of employment rights during that period, when the disputes pending before the national court, although certainly relating to the compatibility with Community law of certain clauses of the applicants' employment contracts, do not derive from the actual application of those clauses to them.

22. In that connection, according to settled case-law, by virtue of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of a provision of Community law, the Court of Justice is, in principle, bound to give a ruling. [9]

23. But the Court has also taken the view that in order to determine whether it has jurisdiction, it is a matter for the Court of Justice to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. [10]

24. And it also said that a request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action. [11]

25. However, it is beyond doubt that the disputes in which the Industrial Tribunal must adjudicate are not hypothetical. They are real disputes, in which the applicants seek a declaration that certain clauses of their employment contracts are contrary to Community

9 — Case C-125/94 *Aprile* v *Amministrazione delle Finanze dello Stato* [1995] ECR I-2919, paragraphs 16 and 17.

10 — Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraph 25.

11 — Case C-143/93 *Furlanis* v *ANAS and Itinera* [1995] ECR I-3633, paragraph 12.

law and therefore void, in order to preclude their application to them in the future, should the case arise. Since national law allows them to bring such actions, I am of the opinion that the questions submitted are objectively necessary in order to resolve the disputes and that the Court of Justice must answer the questions. [12]

VII — Consideration of the preliminary questions

26. To date, the Court has given several judgments on the application of the principle of equal pay and the principle of equal treatment for men and women to cases involving the employment rights of workers who are pregnant or who have recently given birth. Examples are *Gillespie*, [13] dealing with pay during maternity leave; *Dekker*, [14] concerning a refusal to appoint a pregnant woman; *Hertz*, [15] concerning the dismissal of a woman on account of incapacity for work which commenced after maternity leave and was attributable to an illness caused by the confinement; *Habermann-Beltermann*, [16] concerning the possibility of declaring a contract void or capable of being avoided in consequence of the legal prohibition of night work by pregnant women; *Webb*, [17] concerning the non-comparability of the situation of a pregnant woman who is unable to carry out the task for which she was recruited with that of a man suffering the same incapacity for medical or other reasons; and *Larsson*, [18] concerning the possibility of taking into account, for the purposes of dismissal, of absence due to a woman's incapacity for work as a result of pregnancy, before the start of maternity leave. An Opinion has been delivered but judgment is still awaited in the *Thibault* case [19] concerning the possibility of a woman not being given an annual assessment report because she was absent from work on maternity leave; the *Høj Pedersen* case, [20] concerning the right to equal pay when a woman's pregnancy renders her unfit for work; and the *Brown* case [21] concerning the possibility of dismissal of a pregnant worker because her absence due to unfitness for work attributable to pregnancy exceeded the period which, under the employment contract, rendered workers liable to dismissal on grounds of illness.

A common denominator in all those cases is that it was or is necessary for them to be

12 — Case C-415/93 *Union Royale Belge de Société de Football and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 65.

13 — Case C-342/93 *Gillespie* [1996] ECR I-475.

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

15 — Case C-179/88 *Handels-og Kontorfunktionærernes Forbund i Danmark* [1990] I-3979.

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

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

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

19 — Case C-136/95 *Thibault*. The Opinion was delivered on 9 January 1997.

20 — Case C-66/96 *Høj Pedersen*. The Opinion was delivered on 10 July 1997.

21 — Case C-394/96 *Brown*. The Opinion was delivered on 5 February 1998.

resolved by reference to an interpretation of the Community legislation which was in force at the material time, namely either Article 119 of the Treaty and Directive 75/117, in the case of the principle of equal pay; or Directive 76/207 in the case of equal treatment regarding access to employment, training and promotion, and working conditions.

27. In order to deal with the present case, however, recourse may now be had to Directive 92/85, since the wording of the clauses which the applicants in the main proceedings seek to have declared void is the wording adopted in order to bring them into line with the text of that directive.

Since it is an individual directive which, as indicated by its very title, purports to apply measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast-feeding, I consider that, in order to answer the preliminary questions, it will be necessary to rely primarily on the provisions of that directive and, on a subsidiary basis, on the remainder of the Community legislation of more general scope.

28. Before examining the various questions, I must point out that, in order to answer them, it is necessary to reformulate them since, otherwise, in view of the complexity and originality of the national legislation on which the disputed clauses are partly based, the terminological problems associated with the various concepts would be insoluble, and the answers might not be helpful to the national court.

I shall therefore reformulate the questions, relying for that purpose, in view of the lack of detail in the order for reference regarding the factual and legal background to the disputes, upon the documents produced by the national court and by the parties which have submitted observations in these proceedings, and on the replies to the written questions put by the Court to the respondent and to the United Kingdom Government, in order to clarify the scope of some of the disputed clauses.

(1) *The first question*

29. I infer that by this question the national court wishes to ascertain whether the Community law provisions which it cites mean that an employer, who is prepared, for the benefit of his employees, to go beyond the legal provisions applicable to pay during maternity leave, is precluded from imposing, as a *quid pro quo*, by means of clauses like those of the EOC Maternity Scheme, the

requirement that the employees declare, before commencing maternity leave, that they intend returning to work and give an undertaking to repay the difference between the full salary paid to them and the Statutory Maternity Pay that they would have received had they not given an undertaking to return to work, in the event of their failing to come back to work for at least one month.

30. Among the rights connected with the employment contract which must be guaranteed to women, under Article 11(2)(b) of Directive 92/85, is the maintenance of a payment and/or entitlement to an adequate allowance during the period of maternity leave, the minimum period of which is to be 14 continuous weeks, of which two are compulsory. Under Article 11(3), the allowance is deemed to be 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.

31. Under the EOC maternity scheme, employees who fulfil the stricter requirements regarding length of service and type of contract are entitled to continue to receive full pay for three months and one week. If their length of service is less, they will receive Statutory Maternity Pay, which consists of nine-tenths of normal pay over a given period, to be paid for the first six weeks, and a fixed amount which at present is UKL 54.55 per week for the remainder of the period. If she does not fulfil the conditions for entitlement to the latter allowance, the worker may apply for the Maternity Allowance, which amounts to UKL 54.55 per week.

In addition, the EOC Staff Handbook provides, with respect to remuneration for an employee who is unfit for work through illness, that he will be entitled to full pay for a period not exceeding the first six months, within a period of 12 months. Thereafter, he will receive half-pay for a maximum of 12 months within a period of four years. If incapacity continues, in principle nothing will be payable by the employer and the employee will then be able to receive certain State benefits.

The issue is whether, as the applicants in the main proceedings and the Commission contend, Directive 92/85 precludes the EOC Maternity Scheme from requiring employees to give an undertaking to return to work after maternity leave in order to receive full pay and to refund the difference between that amount and Statutory Maternity Pay if they do not return, on the ground that such a requirement means that a woman in those

circumstances will not have received income equivalent to that to which she would have been entitled if the break in her activities had been attributable to an illness. In the Commission's view, Article 11(2)(b) and (3) of Directive 92/85 must be construed as meaning that the term 'adequate', used in the text in relation only to the allowance, must also apply to remuneration, so that it will be necessary to consider the question of adequacy in each case, having regard to the legitimate expectations of the particular employee, and drawing a comparison with the amount she would receive if on sick leave.

32. I do not agree with that interpretation, for the following reasons. First, because the text of Article 11(2)(b) requires maintenance of *a payment*, not of *pay*. [22] It is thus accepted at the outset that the income received by a worker on maternity leave does not coincide with the earnings she receives while at work or in any other circumstances. Indeed, it would be difficult to pay her a higher sum when she was not working than she would receive if working. I must therefore conclude that the directive does not stand in the way of remuneration being, during maternity leave, lower than the wages received by the worker whilst at work or in any other circumstances.

33. Secondly, because the distinction between pay and allowances is linked with the source of the income payable to the woman. Thus, with regard to pay, reference must be made to Article 119 of the Treaty which defines it broadly as: '... the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer'. That definition has been completed by the case-law of this Court which, since 1971, has included within that concept 'immediate or future' consideration [23] and, in 1990, it added that the benefits paid by an employer to a worker in respect of his employment are to be classified as pay 'whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis'. [24]

By a process of elimination, the allowance will, necessarily, be any income of a public or private nature received by a woman whilst on maternity leave and not paid by the employer in respect of her employment. That definition, it seems to me, will in most cases include amounts paid by social security authorities,

22 — Emphasis added.

23 — Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445, paragraph 6.

24 — Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 20.

either directly or through management agencies.

In my opinion, the terminology used for the two concepts supports that interpretation. Where the provision refers to 'a payment', it is accompanied by the word 'maintenance'. This means that, either by operation of law or by virtue of a collective agreement or individual contract, it will be the employer who must ensure that the employee receives, whilst on maternity leave and in respect of the employment relationship, a given level of income which, as I pointed out earlier, does not necessarily have to coincide with full pay. On the other hand, where the provision refers to 'an ... allowance', it is accompanied by the words 'entitlement to', which brings it closer to the sphere of social security protection and distances it somewhat from the concept of pay.

34. The distinction drawn by the provision between the 'maintenance of a payment' and 'entitlement to an ... allowance' is helpful in considering whether the word 'adequate' refers only to the allowance or must be deemed to extend to the payment, as the Commission submits. Given that the consideration paid by the employer to the worker in respect of her employment is, as a general rule, greater than the amount of the benefits paid by the social security authorities, for the simple reason that such benefits are usually based on contributions and consists, to a greater or lesser extent, of a percentage of income, it must be concluded that, where Directive 92/85 indicates that the allowance will be deemed adequate if it guarantees income at least equivalent to that which the worker 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 by national legislation, it is referring to allowances paid by national social security schemes and not to pay from the employer in respect of employment. Clearly the latter must also be adequate, but I do not believe that, in practice, an employer, whether public or private, who has to negotiate working conditions with his employees, individually or collectively, will be able to pay less to his employees during maternity leave than they would receive from the social security authorities by way of sickness benefits.

That interpretation is supported by the last recital in the preamble to Directive 92/85, in which it is stated '... the concept of an adequate allowance in the case of maternity leave must be regarded as a technical point of reference with a view to fixing the minimum level of protection and should in no circumstances be interpreted as suggesting an analogy between pregnancy and illness'. If the purpose of an adequate allowance is to set the minimum level of protection, I do not see how it could mean that, in each specific case, a woman will be entitled to receive the same income during maternity leave as she receives when unfit for work through illness.

35. Thirdly, I do not agree with the interpretation advocated by the Commission because Article 11(2)(b) of Directive 92/85 contemplates the possibility of guaranteeing at the same time 'maintenance of a payment' and 'entitlement to an adequate allowance'. If that meant that both of them had to be adequate within the meaning of the directive — by guaranteeing income at least equivalent to that which the worker would receive in the event of a break in her activities on grounds of health — the result would be that she could be entitled to receive from her employer the remuneration which the latter is required to pay his employees in the event of incapacity for work and, in addition, the allowance provided by the social security scheme by way of sickness benefit. On the contrary, I believe that the only possibility of both being payable arises where the social security benefit, which normally represents a 'minimum', may be supplemented by the employer, either by operation of law or under an agreement with his employees.

36. Finally, there is yet another reason for which the interpretation proposed by the Commission seems to me unacceptable. On examining the system set up by the respondent to pay its employees whilst they are unfit for work, I note that there are three possible situations: in the first, for six months within a 12-month period, they receive full pay. Thereafter, they are paid only half pay for a maximum of 12 months within a period of four years. Finally, payment from the employer to a worker who is unfit for work ceases. The Commission asserts that the adequacy of the income received during maternity leave will depend on the legitimate expectations of the employee concerned regarding level of pay when she is unfit for work. But, what will be the legitimate expectations of an employee who is already in the second stage, that is to say when she is receiving only half pay? And I need not speculate on the expectations of a person whose incapacity for work has gone on to the point that she no longer receives any pay at all.

37. It is clear from the documents before the Court, first, that the national legislation requires employers to pay employees who fulfil certain conditions regarding length of service and level of earnings Statutory Maternity Pay, consisting of nine-tenths of their ordinary wages for the first six weeks of maternity leave and a fixed amount which at present is UKL 54.55 per week for the remainder of the period. The latter amount coincides with the Maternity Allowance and with the statutory sickness benefit paid by the employer for a maximum of 28 weeks.

It has also been shown that the respondent improves on those conditions for the benefit

of its employees by paying them the difference between Statutory Maternity Pay and full pay for 14 week's maternity leave, requiring them in return to declare, before starting leave, that they intend returning to work and to actually return for at least one month.

38. In the light of the interpretation which I propose for Article 11(2)(b) of Directive 92/85, I do not believe that its provisions mean that an employer, who is prepared, for the benefit of his employees, to go beyond the legal provisions applicable to pay during maternity leave, is precluded from imposing, as a *quid pro quo*, by means of clauses like those of the EOC Maternity Scheme, the requirement that the employees declare, before commencing maternity leave, that they intend returning to work and give an undertaking to repay the difference between the full salary paid to them and the Statutory Maternity Pay that they would have received had they not given an undertaking to return to work, in the event of their failing to come back to work for at least one month.

39. The applicants in the main proceedings also allege discrimination regarding equal pay for men and women stemming from the fact that, to be entitled to receive full pay whilst on maternity leave, they must undertake to return to work and, if they fail to do so, they are obliged to repay the difference between that amount and the Statutory Maternity Pay, since that condition is not imposed on workers in general as a precondition for receiving full pay whilst they are unfit for work, nor are such workers required to repay the difference if they do not resume work when declared fit to do so.

40. According to settled case-law of this Court, 'discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations'. [25] Now, in *Gillespie*, in which it was sought to clarify whether the principle of equal pay contained in Article 119 of the Treaty and developed in Directive 75/117 made it compulsory to maintain full pay for workers on maternity leave, the Court of Justice held that 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, reaching the conclusion that neither Article 119 of the Treaty nor Directive 75/117 impose

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

the obligation that workers should receive full pay during maternity leave. [26]

In response to the question whether Community law laid down specific criteria — and, if so, what — for determining the amount of benefit to be paid to workers on maternity leave, the Court answered '[n]or did those provisions [Article 119 of the Treaty and Article 1 of Directive 75/117] lay down any specific criteria for determining the amount of benefit to be paid to them during that period. The amount payable could not, however, be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth. In order to assess the adequacy of the amount payable from that point of view, the national court must take account, not only of the length of maternity leave, but also of the other forms of social protection afforded by national law in the case of justified absence from work. There is nothing, however, to suggest that in the main proceedings the amount of the benefit granted was such as to undermine the objective of protecting maternity leave'. [27] In *Gillespie*, the workers had received the following benefits during maternity leave, under their collective agreement: their full weekly pay for the first four weeks, nine-tenths of their full pay for the next two weeks and, finally, half their full pay for 12 weeks, such conditions being more advantageous than those laid down by the general applicable legislation, which provided for the payment of nine-tenths of full weekly pay for six weeks and then a flat-rate allowance of UKL 47.95 per week for the next 12 weeks.

41. I would also add that the situation of a man rendered unfit for work by illness and that of a woman taking maternity leave are certainly not comparable in any way. The man, had he not been ill, would be working and, on being declared fit, would have to return to work, whereas maternity leave is granted to a woman in order to safeguard her biological state during and after pregnancy and to protect the special relationship between mother and child in the period following confinement. [28] Moreover, as I stated in the Opinion which I delivered in the *Høj Pedersen* case, [29] during maternity leave a woman is not only released from work but also from any other obligation under her employment contract, whereas a man or woman declared unfit for work is required to undergo the therapeutical treatment prescribed by the doctor in order to assist recovery.

26 — Cited in footnote 13 above, paragraphs 17 and 20.
27 — Ibid., paragraph 20.
28 — Case 184/83 *Hoffmann* [1984] ECR 3047, paragraph 25.
29 — Cited in footnote 20 above.

42. For the reasons which I have just set out I consider that Article 119 of the Treaty and Directive 75/117 likewise do not mean that an employer, who is prepared, for the benefit of his employees, to go beyond the legal provisions applicable to pay during maternity leave, is precluded from imposing, as a *quid pro quo*, by means of clauses like those of the EOC Maternity Scheme, the requirement that the employees declare, before commencing maternity leave, that they intend returning to work and give an undertaking to repay the difference between the full salary paid to them and the Statutory Maternity Pay that they would have received had they not given an undertaking to return to work, in the event of their failing to come back to work for at least one month.

(2) *The second question*

43. By this question, the national court appears to be asking whether, under the provisions of Community law which it cites, it is not permissible, by recourse to clauses like those forming part of the respondent's Maternity Scheme, to provide that, where a worker has indicated that she wishes to commence maternity leave on any date in the six weeks prior to the expected week of confinement and is declared unfit for work on account of pregnancy immediately before that date, then, if the birth occurs whilst she is in that situation, the commencement of her maternity leave may be backdated to the later of the following two dates: the beginning of the period of sick absence or the start of the sixth week prior to the expected week of confinement.

44. As regards the length of maternity leave, Directive 92/85 imposes two obligations on the Member States: the first is that workers must be allowed a continuous period of at least 14 weeks before and/or after the confinement; the second is that that period must include compulsory maternity leave of at least two weeks, likewise allocated before and/or after confinement. In accordance with those provisions, the United Kingdom gave to all women a general right, which previously had not existed, to take periods of maternity leave of that duration, the same provisions being contained in the EOC Maternity Scheme. The compulsory maternity leave of two weeks commences in the United Kingdom on the day of confinement, and maternity leave may be extended for the period necessary to satisfy that obligation.

45. The applicants consider it discriminatory for a woman who is unfit for work not to be able to exercise her right to remain on sick leave with full pay if her illness is attributable to pregnancy and she gives birth whilst in that situation.

46. I do not agree with that interpretation. Before Directive 92/85 imposed on the Member States the obligations under review here, that is to say when the only Community provision dealing with pregnancy and maternity was Article 2(3) of Directive 76/207 — which did no more than authorise them to adopt provisions to uphold women's specific rights for those two reasons — the Court held, in *Hertz*, that it is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur. [30]

47. On the basis that the purpose of maternity leave is to permit a worker, without prejudice to her employment rights, to be absent from work because of imminent or recent maternity, and provided that the length of the periods laid down by Article 8 of Directive 92/85 is complied with, I conclude that neither the provisions of that directive nor those of Directive 76/207 preclude a provision like that contained in the respondent's Maternity Scheme under which, where an employee has indicated that she wishes to commence maternity leave on any date in the six weeks prior to the expected week of confinement and is declared unfit for work on account of pregnancy immediately before that date, then, if the birth occurs while she is in that situation, the commencement of her maternity leave may be backdated to the later of the following two dates: the beginning of the period of sick absence or the start of the sixth week prior to the expected week of confinement.

(3) *The third question*

48. By this question, I believe, the national court wishes to ascertain whether under Community law it is not permissible, by recourse to provisions like those in the EOC Maternity Scheme, to prohibit a woman who has begun her maternity leave or is on unpaid maternity leave from being accorded sick leave on full pay — being entitled in the latter case to claim only Statutory Sick Pay — and to impose the requirement that, in order to be granted such leave, she has stated, three weeks in advance, her intention to return to work on a specified day, thereby bringing to an end, if the birth has occurred, her special maternity leave arrangements.

49. In order to answer that question, I think a distinction must be drawn between, on the one hand, maternity leave properly so called, as provided for by Directive 92/85, that is to say, the continuous period of 14 weeks allocated before and/or after confinement, during which in any event workers' rights under their employment contracts are safeguarded and, if

30 — Cited in footnote 15 above, paragraph 15.

appropriate, a payment to them or entitlement to an adequate allowance is maintained, that period being the one provided for both by national legislation and by the provisions of the EOC Maternity Scheme, and, on the other hand, any other leave, paid or otherwise, which the national legislature or the employer, by granting enhanced contractual terms, sees fit to afford to a worker who has recently given birth. I shall consider first maternity leave properly so called.

50. It seems to me to be entirely logical for a woman who is on maternity leave not to be able, at the same time, to be declared unfit for work on account of illness. What sense would it make, legally, if she could be regarded as being simultaneously in both situations? Would it be appropriate, nevertheless, to conclude that she can interrupt her maternity leave, take sick leave and, on recovering, go back to the previous situation?

51. I see a number of reasons for rejecting that interpretation. In the first place, it must be borne in mind that, although a period of 14 weeks' maternity leave must without fail be provided for in the legislation of the Member States, the internal regulations of undertakings and in contracts of employment, as far as the worker is concerned, apart from the two weeks compulsory maternity leave which, in the United Kingdom, commence on the day of the birth, the entitlement may be waived. Secondly, Directive 92/85 clearly provides, in Article 8, that the maternity leave is to comprise a continuous period of at least 14 weeks. It is not therefore possible to take part of that period and then take the remainder at a later stage. Thirdly, under Article 11(4) of Directive 92/85, the maintenance of a payment and/or entitlement to an adequate allowance may be made conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits under national legislation, amongst which it is not appropriate to include earlier periods of work exceeding 12 months immediately prior to the expected date of confinement. The possibility of treating maternity leave as having ended and being given paid sick leave will, for a woman who falls ill after giving birth and is not entitled to receive any income during maternity leave, offer indubitable advantages.

52. For those reasons, I consider that the provisions of Directive 92/85 do not preclude a clause like that contained in the EOC Maternity Scheme under which a woman who is in the course of her 14 weeks' maternity leave must, provided that the two weeks of compulsory leave have been completed, accept that her special maternity leave arrangements have definitively ceased so that she can be granted paid sick leave.

53. As regards unpaid maternity leave, the entitlement to and duration of which are

determined by reference to the conditions fulfilled by the workers and for which remuneration is limited to the payment by the employer of Statutory Maternity Pay for the first four weeks, I do not consider that it can be regarded as maternity leave within the meaning of Directive 92/85. In the present case, the workers are entitled to be absent from work for up to 52 weeks. That period includes the 14 weeks' maternity leave and the remainder will be unpaid maternity leave. The applicants consider that the clause in the Maternity Scheme which makes receipt of full pay, if they fall ill during the period of unpaid leave, conditional upon their giving up their special arrangements, discriminates against women who find themselves in that situation.

That type of unpaid leave is a right which, being reserved in the United Kingdom exclusively for women, falls within the exception provided for in Article 2(3) of Directive 76/207 which enables the Member States to provide for special treatment for women, in particular as regards pregnancy and maternity, for which there is no parallel in the treatment accorded to their male colleagues.

54. I consider that Community law does not preclude the application of a clause of the kind at issue here. Although it does provide for different treatment as between men and women, in that women, if they fall ill whilst on unpaid maternity leave are not automatically granted the right to sick leave on full pay (they are entitled only to Statutory Sick Pay), whereas male workers automatically enjoy that right for the first six months of a period of 12 months, it must also be recognised that the situations are different, since men are not granted any right to unpaid parental leave. But there is another important difference which becomes apparent when both fall ill: to be able to claim that right, a male worker must be at work (and I do not think that the fact that he may fall ill whilst on annual leave changes that assessment), whilst the woman is on unpaid leave, during which she is relieved of the obligation to work.

55. In those circumstances, and provided that the two weeks' compulsory maternity leave have been taken, I consider that none of the provisions cited by the national court precludes recourse to stipulations of the kind contained in the EOC Maternity Scheme which prohibit a woman who has begun her maternity leave or is on unpaid maternity leave from being accorded sick leave on full pay — being entitled in the latter case to claim only Statutory Sick Pay — and to impose the requirement that, in order to be granted such leave, she has stated, three weeks in advance, her intention to return to work on a specified day, thereby bringing to an end, if the birth has occurred, her special maternity leave arrangements.

(4) *The fourth question*

56. By this question, the national court seeks a ruling as to whether, under the Community law provisions which it cites, it is not permissible, by recourse to a stipulation of the kind contained in the EOC Maternity Scheme, to limit the period for which annual leave entitlement accrues to the 14 weeks' maternity leave and to exclude such accrual whilst the woman concerned is on leave of another kind in order to care for a newborn child.

57. Article 11(2)(a) of Directive 92/85 requires the Member States, whilst a worker is taking the maternity leave provided for in Article 8, to safeguard the rights connected with her employment contract. There is no doubt that the accrual of annual leave is one of the rights connected with an employee's employment contract. Nor is there any doubt that, for the 14-week period of maternity leave in the United Kingdom, regardless of any right to receive any particular income, employees are guaranteed the accrual of annual leave.

The applicants nevertheless claim the right to the accrual of annual leave whilst they are on unpaid maternity leave, which is granted to them if they fulfil certain requirements regarding length of service.

58. As I stated earlier, Directive 92/85 merely lays down the obligation to safeguard rights connected with the employment contract whilst the worker is taking the maternity leave provided for in Article 8, that is to say for 14 weeks. For the remaining time, up to the 52 weeks representing the maximum period for which an employee of the EOC may be absent from work on account of pregnancy and maternity, she will be in the special situation which I described when considering unpaid maternity leave in connection with the answer to be given to the third question. For the reasons which I put forward at that time, I consider that Directive 92/85 does not impose the obligation to safeguard an employee's rights under her employment contract, such as the accrual of annual leave, beyond the 14 weeks' maternity leave provided for in Article 8.

59. The applicants maintain that that clause, which is ostensibly neutral, involves indirect discrimination, since, during their working life, it is women who most frequently take unpaid leave, since they are allowed to take unpaid maternity leave.

60. Quite apart from the fact that I consider that reserving solely to women the availability of unpaid leave to look after a newborn child does not help promote equality of opportunity between the sexes, since what it does in reality is to perpetuate in society the idea that it is women who as a matter of priority should

take care of the children — with all the concomitant adverse effects on their future careers — I do not share the view put forward by the applicants.

61. The Court of Justice has repeatedly held that, to justify a finding of indirect discrimination, a provision formulated in neutral terms, which in this case is contained in the Staff Handbook, whereby any unpaid leave will reduce annual leave in proportion to the length of the leave of absence, must in fact be detrimental to a much larger number of women than men. [31]

However, the argument that that provision adversely affects a much larger number of women because they more frequently take unpaid leave cannot succeed in the present case since the leave taken by the women referred to by the applicants in support of their allegation of indirect discrimination reflects special arrangements which have no connection with unpaid leave taken voluntarily for personal reasons, which is available to both men and women. In the first place, in the United Kingdom only women may take unpaid leave to look after a newborn child, of a predetermined duration and with the right to return to work. [32] In the second place, unpaid leave of that kind is a protective measure covered by Article 2(3) of Directive 76/207, which is afforded to a woman because she has recently given birth and the grant of such leave and the rules concerning it, where it exceeds the minimum requirements of Directive 92/85, are matters reserved exclusively to the Member States.

62. For the foregoing reasons, I am of the opinion that Community law does not preclude the limitation, by means of stipulations such as those of the EOC Maternity Scheme, of the time during which annual leave accrues to the 14 weeks' maternity leave and the exclusion of such accrual during unpaid maternity leave.

(5) *The fifth question*

63. By this question the national court wishes to ascertain whether any of the provisions which it cites precludes imposition, for the

31 — Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30; Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16; Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paragraph 24; and Case C-343/92 *Roks and Others* [1994] ECR I-571, paragraph 33.

32 — In Case C-200/91 *Coloroll* [1994] ECR I-4389, the Court of Justice stated in reply to questions from the High Court as to whether, in the sphere of equal pay for men and women, Article 119 of the Treaty was applicable to company pension schemes which at all times have had members of only one sex, that 'a worker cannot rely on Article 119 in order to claim pay to which he could be entitled if he belonged to the other sex in the absence, now or in the past, in the undertaking concerned of workers of the other sex who perform or performed comparable work. In such a case, the essential criterion for ascertaining that equal treatment exists in the matter of pay, namely the performance of the same work and receipt of the same pay, cannot be applied.'

acquisition of pension rights during maternity leave, of the condition that the woman must receive pay or Statutory Maternity Pay from her employer, with the result that she is prevented from acquiring pension rights if, during maternity leave, she receives income from funds unconnected with the employer or if she receives no income at all, and likewise if she takes unpaid maternity leave.

64. I must point out once again that Article 11(2)(a) of Directive 92/85 provides that workers must, when on maternity leave, which is to be of at least 14 weeks' duration, have the rights connected with their employment contracts maintained. There is no doubt at all that the accrual of pension rights, particularly where, as in this case, they form part of an occupational scheme financed entirely by the employer, is one of the rights connected with the worker's employment contract.

However, Clause 8.1 of the EOC Maternity Scheme provides that where an employee is not entitled to receive full pay during her maternity leave, the 14 weeks' absence will be taken into account for the purposes of the accrual of pension rights only if she is entitled to receive Statutory Maternity Pay.

65. Consequently, an EOC employee who does not meet the requirements of the Maternity Scheme for the employer to pay her Statutory Maternity Pay, both in the case of her receiving during maternity leave any of the State benefits available in respect of maternity and in the case of her receiving no income at all, will be prevented from accruing any pension rights under the occupational scheme of which she is a member.

66. It is true that such a possibility appears to be acceptable by virtue of Article 6(g) of Directive 86/378, in so far as it provides that provisions contrary to the principle of equal treatment are to include those based on sex, which suspend the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer. In fact the rule in the Maternity Scheme at issue is consistent with that provision: pension rights continue to accrue whilst pay, in the form either of salary or of Statutory Maternity Pay, is paid by the employer. On the other hand, the accrual of pension rights is interrupted when the income received by the woman during that period is paid out of public or private funds unconnected with the employer or when she receives no income at all.

67. However, despite the fact that the wording which Directive 96/97/EC [33] laid down as the

33 — Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ 1997 L 46, p. 20).

new version of that article has not changed that provision, I consider that Article 11(2)(a) of Directive 92/85, under which workers are to be guaranteed during maternity leave of a continuous period of at least 14 weeks the rights connected with their employment contracts, must be interpreted as meaning that the accrual of pension rights under an occupational scheme during the 14 weeks' maternity leave may not be made conditional upon the worker's receiving, in the form of pay or Statutory Maternity Pay, income paid by the employer.

In my opinion, it would be contrary to the aim pursued by Directive 92/85 if, during the period of maternity leave for which it provides, the guarantee of one of the rights connected with the employment contract, seen as an unconditional right, could be made subject, by virtue of a provision of the kind now under consideration, to the condition that the woman must receive pay from her employer during that period, when the directive itself provides that the Member States are entitled to make the right to pay or to an allowance conditional upon the worker concerned fulfilling the requirements laid down by national legislation in order to qualify for those advantages.

68. On the other hand, on the basis of the reasons set out in relation to the third and fourth questions regarding unpaid maternity leave, I consider that Community law does not preclude a woman from being denied the possibility of accruing pension rights under an occupational scheme whilst she is on unpaid leave of that kind.

69. In the light of the reasons which I have just expounded, I am of the opinion that Article 11(2)(a) of Directive 92/85, in conjunction with the provisions of Article 8 thereof, precludes making the accrual of pension rights under an occupational scheme during the 14 weeks' maternity leave conditional upon the worker receiving, in the form of wages or Statutory Maternity Pay, income paid by her employer.

VIII — Conclusion

70. In view of the foregoing considerations, I propose that the following answers be given to the questions submitted by the Industrial Tribunal, Manchester:

(1) In circumstances such as those of the present case, neither Article 119 of the Treaty of Rome, nor 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, nor Council Directive 76/207/EEC 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, nor Council Directive 92/85/EEC 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 breast-feeding (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) precludes the application of clauses of the kind examined in this Opinion under which:

(a) an employer, who is prepared, for the benefit of his employees, to go beyond the legal provisions applicable to pay during maternity leave, imposes, as a *quid pro quo*, by means of clauses like those of the EOC Maternity Scheme, the requirement that the employees declare, before commencing maternity leave, that they intend returning to work and give an undertaking to repay the difference between the full salary paid to them and the Statutory Maternity Pay that they would have received had they not given an undertaking to return to work, in the event of their failing to come back to work for at least one month;

(b) where a worker has indicated that she wishes to commence maternity leave on any date in the six weeks prior to the expected week of confinement and is declared unfit for work on account of pregnancy immediately before that date, then, if the birth occurs whilst she is in that situation, the commencement of her maternity leave may be backdated to the later of the following two dates: the beginning of the period of sick leave or the start of the sixth week prior to the expected week of confinement;

(c) a woman who has begun her maternity leave or is on unpaid maternity leave is not allowed to be accorded sick leave on full pay — being entitled in the latter case to claim only Statutory Sick Pay — and is required, in order to be granted such leave, to have stated, three weeks in advance, her intention to return to work on a specified day, thereby bringing to an end,

if the birth has occurred, her special maternity leave arrangements, provided that the two weeks of compulsory maternity leave have already been taken;

(d) the time for which annual leave accrues is limited to the 14 weeks' duration of the maternity leave, and such accrual is excluded during unpaid maternity leave.

(2) Article 11(2)(a) of Directive 92/85, in conjunction with Article 8 thereof, precludes making the accrual of pension rights under an occupation scheme during the 14 weeks' maternity leave conditional upon the employee's receiving, by way of salary or Statutory Maternity Pay, income from her employer.