JUDGMENT OF THE COURT

30 June 1998 *

In Case C-394/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before that court between

Mary Brown

and

Rentokil Initial UK Limited (formerly Rentokil Limited)

on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

* Language of the case: English.

THE COURT,

composed of: C. Gulmann, President of the Third and Fifth Chambers, acting as President, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini, P. J. G. Kapteyn (Rapporteur), J. L. Murray, D. A. O. Edward, J.-P. Puissochet, P. Jann and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. Von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mrs Brown, by Colin McEachran QC, and Ian Truscott, Advocate, instructed by Mackay Simon, Solicitors,

— Rentokil Initial UK Ltd, by John Hand QC, and Gerard F. McDermott, Barrister, instructed by Gareth T. Brown, Solicitor,

— the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and Dinah Rose, Barrister,

— the Commission of the European Communities, by Pieter Jan Kuyper, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Brown, Rentokil Initial UK Ltd, the United Kingdom Government and the Commission at the hearing on 16 December 1997,

after hearing the Opinion of the Advocate General at the sitting on 5 February 1998,

gives the following

Judgment

1 By order of 28 November 1996, received at the Court Registry on 9 December 1996, the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 Those questions have been raised in proceedings brought by Mary Brown against Rentokil Initial UK Ltd (hereinafter 'Rentokil') in connection with her dismissal whilst pregnant.

3 According to the order for reference, Mrs Brown was employed by Rentokil as a driver. Her job was mainly to transport and change

'Sanitact' units in shops and other centres. In her view, it was heavy work.

4 In August 1990, Mrs Brown informed Rentokil that she was pregnant. Thereafter she had difficulties associated with the pregnancy. From 16 August 1990 onwards, she submitted a succession of four-week certificates mentioning various pregnancy-related disorders. She did not work again after mid-August 1990.

5 Rentokil's contracts of employment included a clause stipulating that, if an employee was absent because of sickness for more than 26 weeks continuously, he or she would be dismissed.

6 On 9 November 1990, Rentokil's representatives told Mrs Brown that half of the 26-week period had run and that her employment would end on 8 February 1991 if, following an independent medical examination, she had not returned to work by then. A letter to the same effect was sent to her on that date.

7 Mrs Brown did not go back to work following that letter. The parties agree that there was never any question of her being able to return to work before the end of the 26-week period. By letter of 30 January 1991, which took effect on 8 February 1991, she was accordingly dismissed while pregnant. Her child was born on 22 March 1991.

8 At the time when Mrs Brown was dismissed, section 33 of the Employment Protection (Consolidation) Act 1978 provided that an employee who was absent from work wholly or partially because of pregnancy or confinement would, subject to

certain conditions, be entitled to return to work. In particular, the employee had to have been in employment until immediately before the start of the 11th week before the expected date of confinement and, at the beginning of the 11th week, have been continuously employed for a period of not less than two years.

9 According to the order for reference, on the assumption that the date on which Mrs Brown's child was born was also the expected date of delivery, she was not entitled, because she had not been in employment for two years as at 30 December 1990, to absent herself from work from the beginning of the 11th week before delivery pursuant to section 33 of the Employment Protection (Consolidation) Act 1978, or to return to work at any time during the 29 weeks following delivery. She was, however, entitled to statutory maternity pay under sections 46 to 48 of the Social Security Act 1986.

10 By order dated 5 August 1991, the Industrial Tribunal dismissed Mrs Brown's application under the Sex Discrimination Act 1975 concerning her dismissal. The Tribunal held that, where absence through pregnancy-related illness, but which began long before the statutory maternity provisions could apply and subsisted continuously thereafter, is followed by dismissal, that dismissal does not fall into the category of dismissals which must automatically be considered discriminatory because they are due to pregnancy.

11 By order of 23 March 1992, the Employment Appeal Tribunal dismissed Mrs Brown's appeal.

12 By judgment of 18 January 1995, the Extra Division of the Court of Session reached the preliminary conclusion that in this case there was no discrimination within the meaning of the Sex Discrimination Act 1975. It pointed out that, since

the Court of Justice had drawn a clear distinction between pregnancy and illness attributable to pregnancy (Case C-179/88 *Handels-og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* [1990] ECR I-3979 ('*Hertz*')), Mrs Brown, whose absence was due to illness and who had been dismissed on account of that illness, could not succeed.

13 Mrs Brown appealed to the House of Lords, which referred the following questions to the Court for a preliminary ruling:

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

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

2 (a) Is it contrary to Articles 2(1) and 5(1) of the Equal Treatment Directive to dismiss a female employee as a result of absence through illness arising from pregnancy who does not qualify for the right to absent herself from

work on account of pregnancy or childbirth for the period specified by national law because she has not been employed for the period imposed by national law, where dismissal takes place during that period?

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

The first part of the first question

14 It should be noted at the outset that the purpose of Directive 76/207, according to Article 1(1), is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

15 Article 2(1) of the Directive provides that '... the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. According to Article 5(1) of the Directive, '[a]pplication 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'.

16 According to settled case-law of the Court of Justice, the dismissal of a female worker on account of pregnancy, or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex (see Case C-177/88 *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, paragraph 12; *Hertz*, cited above, paragraph 13; Case C-421/92 *Habermann-Beltermann* v *Arbeiterwohlfahrt Bezirksverband* [1994] ECR I-1657, paragraph 15; and Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, paragraph 19).

17 As the Court pointed out in paragraph 20 of its judgment in *Webb*, cited above, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.

18 It was precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the Community legislature, pursuant to Article 10 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive adopted within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), which was to be transposed into the laws of the Member States no later than two years after its adoption, provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition of dismissal of pregnant women during that period, save in exceptional cases not connected with their condition (see, in this regard, paragraphs 21 and 22 of the judgment in *Webb*, cited above).

19 In replying to the first part of the first question, which concerns Directive 76/207, account must be taken of that general context.

20 At the outset, it is clear from the documents before the Court that the question concerns the dismissal of a female worker during her pregnancy as a result of absences through incapacity for work arising from her pregnant condition. As Rentokil points out, the cause of Mrs Brown's dismissal lies in the fact that she was ill during her pregnancy to such an extent that she was unfit for work for 26 weeks. It is common ground that her illness was attributable to her pregnancy.

21 However, dismissal of a woman during pregnancy cannot be based on her inability, as a result of her condition, to perform the duties which she is contractually bound to carry out. If such an interpretation were adopted, the protection afforded by Community law to a woman during pregnancy would be available only to pregnant women who were able to comply with the conditions of their employment contracts, with the result that the provisions of Directive 76/207 would be rendered ineffective (see *Webb*, cited above, paragraph 26).

22 Although pregnancy is not in any way comparable to a pathological condition (*Webb*, cited above, paragraph 25), the fact remains, as the Advocate General stresses in point 56 of his Opinion, that pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition.

23 In paragraph 15 of its judgment in *Hertz*, cited above, the Court, on the basis of Article 2(3) of Directive 76/207, also pointed out that that directive admits of

national provisions guaranteeing women specific rights on account of pregnancy and maternity. It concluded that, during the maternity leave accorded to her under national law, a woman is protected against dismissal on the grounds of her absence.

24 Although, under Article 2(3) of Directive 76/207, such protection against dismissal must be afforded to women during maternity leave (*Hertz*, cited above, paragraph 15), the principle of non-discrimination, for its part, requires similar protection throughout the period of pregnancy. Finally, as is clear from paragraph 22 of this judgment, dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on grounds of sex.

25 It follows that Articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy.

26 However, where pathological conditions caused by pregnancy or childbirth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, *Hertz*, cited above, paragraphs 16 and 17). In such circumstances, the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders, are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are, there is no discrimination on grounds of sex.

27 It is also clear from all the foregoing considerations that, contrary to the Court's ruling in Case C-400/95 *Larsson* v *Føtex Supermarked* [1997] ECR I-2757, paragraph 23), where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work.

28 The answer to the first part of the first question must therefore be that Articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

The second part of the first question

29 The second part of the first question concerns a contractual term providing that an employer may dismiss workers of either sex after a stipulated number of weeks of continuous absence.

30 It is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Board and Others* [1996] ECR I-475, paragraph 16).

31 Where it is relied on to dismiss a pregnant worker because of absences due to incapacity for work resulting from her pregnancy, such a contractual term, applying both to men and to women, is applied in the same way to different situations since, as is clear from the answer given to the first part of the first question, the situation of a pregnant worker who is unfit for work as a result of disorders associated with her pregnancy cannot be considered to be the same as that of a male worker who is ill and absent through incapacity for work for the same length of time.

32 Consequently, application of that contractual term in circumstances such as the present constitutes direct discrimination on grounds of sex.

33 The answer to the second part of the first question must therefore be that the fact that a female worker has been dismissed during her pregnancy on the basis of a contractual term providing that the employer may dismiss employees of either sex after a stipulated number of weeks of continuous absence cannot affect the answer given to the first part of the first question.

The second question

34 In view of the answer given to the first question, it is unnecessary to answer the second question.

Costs

35 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 28 November 1996, hereby rules:

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy.

The fact that a female worker has been dismissed during her pregnancy on the basis of a contractual term providing that the employer may dismiss employees of either sex after a stipulated number of weeks of continuous absence does not affect the answer given.

Gulmann Ragnemalm Wathelet Schintgen

Mancini Kapteyn Murray Edward

Puissochet Jann Sevón

Delivered in open court in Luxembourg on 30 June 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President