JUDGMENT OF THE COURT (Fifth Chamber)

4 October 2001 *

In Case C-109/00,

REFERENCE to the Court under Article 234 EC by the Højesteret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Tele Danmark A/S

and

Handels- og Kontorfunktionærernes Forbund i Danmark (HK), acting on behalf of Marianne Brandt-Nielsen,

on the interpretation of Article 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) and 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

* Language of the case: Danish.

(tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), P. Jann, L. Sevón and C.W.A. Timmermans, Judges,

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

after considering the written observations submitted on behalf of:

— Tele Danmark A/S, by M. Kofmann, advokat,

— Handels- og Kontorfunktionærernes Forbund i Danmark (HK), acting on behalf of Ms Brandt-Nielsen, by M. Østergård, advokat,

— the Commission of the European Communities, by H.C. Støvlbæk and H. Michard, acting as Agents, assisted by P. Heidmann, advokat,

— the EFTA Surveillance Authority, by P. Dyrberg and J.M. Langseth, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Tele Danmark A/S, Handels- og Kontorfunktionærernes Forbund i Danmark (HK), the Commission and the EFTA Surveillance Authority at the hearing on 29 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 10 May 2001,

gives the following

Judgment

1 By order of 21 March 2000, received at the Court on 23 March 2000, the Højesteret (Supreme Court, Denmark) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 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) and 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 within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

2 The two questions have been raised in proceedings between Tele Danmark A/S, a telephone undertaking, and Handels- og Kontorfunktionærernes Forbund i Danmark (Danish Union of Commercial and Office Employees, hereinafter 'HK'), acting on behalf of Ms Brandt-Nielsen, following her dismissal by Tele Danmark.

Legal background

Community legislation

3 Directive 76/207 is intended to implement the principle of equal treatment for men and women as regards access to employment, including promotion, and to professional training, and working conditions.

4 Article 3(1) of Directive 76/207 provides:

'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.'

5 Article 5(1) of Directive 76/207 states:

'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.'

6 Directive 92/85 is intended in particular, as stated in the 15th recital in its preamble, to protect pregnant workers, workers who have recently given birth and workers who are breastfeeding against the risk of dismissal for reasons associated with their condition, which could have harmful effects on their physical and mental state.

7 Article 10(1) of Directive 92/85 thus provides:

'Member States shall take the necessary measures to prohibit the dismissal of workers... during the period from the beginning of their pregnancy to the end of the maternity leave... save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.'

8 The 14th recital in the preamble to Directive 92/85 states that, in view of their vulnerability, it is necessary for pregnant workers, workers who have recently given birth or who are breastfeeding to be allowed maternity leave. Such a right is provided for in Article 8 of that directive, which reads as follows:

'1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of

maternity leave of a 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.'

National legislation

9 Paragraph 9 of the Lov om ligebehandling af mænd og kvinder med hensyn til beskæftigelse og barselsorlov m.v. (Law on equal treatment for men and women as regards employment, maternity leave etc., hereinafter 'the Equal Treatment Law') prescribes:

'An employer may not dismiss an employee on the ground that the latter has insisted on exercising her right of absence or has been absent pursuant to Paragraph 7 or otherwise on grounds of pregnancy, childbirth or adoption.'

10 Paragraph 16 of the Equal Treatment Law provides:

'1. If an employee is dismissed contrary to Paragraph 9, the dismissal shall be set aside if a request is made to that effect, unless, in exceptional cases and after balancing the interests of the parties, it is found to be manifestly unreasonable to insist that the employment relationship be maintained or restored.

2. If an employee is dismissed contrary to Paragraph 9 and the dismissal is not set aside, the employer shall pay compensation.

...

4. If dismissal occurs during pregnancy or at the time of childbirth or adoption, the employer shall be required to show that the dismissal was not based on those grounds.

...'

The main proceedings and the questions referred for a preliminary ruling

11 In June 1995, Ms Brandt-Nielsen was recruited by Tele Danmark for a period of six months from 1 July 1995, to work in its customer service department for mobile telephones. It was agreed between the parties at the recruitment interview that Ms Brandt-Nielsen would have to follow a training course during the first two months of her contract.

12 In August 1995, Ms Brandt-Nielsen informed Tele Danmark that she was pregnant and expected to give birth in early November. Shortly afterwards, on 23 August 1995, she was dismissed with effect from 30 September, on the ground that she had not informed Tele Danmark that she was pregnant when she was recruited. She worked for the whole of September.

13 Under the applicable collective agreement, Ms Brandt-Nielsen would have been entitled to paid maternity leave starting eight weeks before the expected date of giving birth. In the present case, that period should have started on 11 September 1995.

14 On 4 March 1996, HK, acting on behalf of Ms Brandt-Nielsen, brought proceedings against Tele Danmark before the Retten i Århus (District Court, Århus) for compensation, on the ground that her dismissal by Tele Danmark was contrary to Paragraph 9 of the Equal Treatment Law.

15 The Retten i Århus, by judgment of 14 January 1997, dismissed the action on the ground that Ms Brandt-Nielsen, who had been recruited for a six-month period, had failed to state that she was pregnant at the recruitment interview, although she was expected to give birth during the fifth month of the contract of employment.

16 By judgment of 15 April 1999, the Vestre Landsret (Western Regional Court), hearing Ms Brandt-Nielsen's appeal, ruled in her favour on the ground that it was not disputed that the dismissal was linked to her pregnancy.

17 Tele Danmark appealed to the Højesteret against that decision, arguing that the prohibition under Community law of dismissing a pregnant worker did not apply to a worker, recruited on a temporary basis, who, despite knowing that she was pregnant when the contract of employment was concluded, failed to inform the employer of this, and because of her right to maternity leave was unable, for a substantial part of the duration of that contract, to perform the work for which she had been recruited.

18 Those were the circumstances in which the Højesteret stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Do Article 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 and/or 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, or other provisions in those directives or elsewhere in Community law preclude a worker from being dismissed on the ground of pregnancy in the case where:

(i) the woman in question was recruited as a temporary worker for a limited period;

(ii) when she entered into the contract of employment, the worker knew that she was pregnant but did not inform the employer of that fact; and

(iii) her pregnancy meant that the worker was unable to work for a significant portion of her period of employment?

(2) Does the fact that the employment occurs in a very large undertaking and that that undertaking frequently uses temporary workers have any bearing on the answer to Question 1?'

The first question

19 By its first question the Højesteret asks essentially whether Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85 must be interpreted as precluding a worker from being dismissed on the ground of pregnancy where she was recruited for a fixed period, she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded, and because of her pregnancy she was unable to work during a substantial part of the term of that contract.

20 Tele Danmark submits that the prohibition under Directives 76/207 and 92/85 of dismissing a worker who is pregnant does not apply in the circumstances of the present case. It was not in fact the pregnancy itself which was the determining reason for Ms Brandt-Nielsen's dismissal but the fact that she was unable to perform a substantial part of the contract. Moreover, the fact that she failed to inform the employer of her pregnancy, despite knowing that she would be unable to work during a substantial part of the term of the contract owing to her pregnancy, constituted a breach of the duty of good faith required in relations between employees and employers, capable in itself of justifying dismissal.

21 Tele Danmark says that it is only where the contract has been concluded for an indefinite period that refusing to employ a pregnant woman or dismissing her contravenes Community law. In such an employment relationship, it must be presumed that the worker's obligations will continue beyond the maternity leave, so that observance of the principle of equal treatment leads to a fair result.

22 Ms Brandt-Nielsen, the Commission and the EFTA Surveillance Authority submit, on the other hand, that neither Directives 76/207 and 92/85 nor the case-law of the Court makes a distinction according to whether the contract under which the worker has been recruited is for a fixed or an indefinite period.

23 They submit that in the present case both Directive 76/207 and Directive 92/85 preclude the dismissal of Ms Brandt-Nielsen, since the reason for dismissal was clearly her pregnancy. According to the Court's case-law, neither financial loss incurred by the employer nor the requirements of the proper functioning of his undertaking can justify the dismissal of a pregnant worker, as the employer has to assume the risk of the economic and organisational consequences of the pregnancy of employees.

24 As to the circumstance that Ms Brandt-Nielsen failed to state that she was pregnant when she was recruited, the Commission submits that a worker is not obliged to inform her employer of her condition, since the employer is not entitled to take it into account on recruitment. The EFTA Surveillance Authority adds that, if such an obligation to inform the employer were accepted, it could render ineffective the protection of pregnant workers established by Article 10 of Directive 92/85, even though the Community legislature intended such protection to be especially high.

25 As the Court has held on several occasions, the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, contrary to Article 5(1) of Directive 76/207 (Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 15; and Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 19).

26 It was also in view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions, that the Community legislature, in Article 10 of Directive 92/85, laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave.

27 During that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition of dismissing pregnant workers, save in exceptional cases not connected with their condition where the employer justifies the dismissal in writing.

28 The Court has held, moreover, that a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave (Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12), and that the same conclusion must be drawn as regards the financial loss caused by the fact that the woman appointed cannot be employed in the post concerned for the duration of her pregnancy (Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 29).

29 In paragraph 26 of *Webb*, the Court also held that, while the availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract, the protection afforded by Community law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period corresponding to maternity leave

is essential to the proper functioning of the undertaking in which she is employed. A contrary interpretation would render ineffective the provisions of Directive 76/207.

30 Such an interpretation cannot be altered by the fact that the contract of employment was concluded for a fixed term.

31 Since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no bearing on the discriminatory character of the dismissal. In either case the employee's inability to perform her contract of employment is due to pregnancy.

32 Moreover, the duration of an employment relationship is a particularly uncertain element of the relationship in that, even if the worker is recruited under a fixed-term contract, such a relationship may be for a longer or shorter period, and is moreover liable to be renewed or extended.

33 Finally, Directives 76/207 and 92/85 do not make any distinction, as regards the scope of the principle of equal treatment for men and women, according to the duration of the employment relationship in question. Had the Community legislature wished to exclude fixed-term contracts, which represent a substantial proportion of employment relationships, from the scope of those directives, it would have done so expressly.

34 Consequently, the answer to the first question must be that Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85 are to be interpreted as precluding a worker from being dismissed on the ground of pregnancy

— where she was recruited for a fixed period,

— she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded,

— and because of her pregnancy she was unable to work during a substantial part of the term of that contract.

The second question

35 By its second question the Højesteret asks whether the fact that the worker has been recruited by a very large undertaking which frequently uses temporary workers is of relevance to the interpretation of Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85.

36 The parties to the main proceedings agree with the Commission and the EFTA Surveillance Authority that this question should be answered in the negative.

37 It suffices to observe that Directives 76/207 and 92/85 do not distinguish, as regards the scope of the prohibitions they lay down and the rights they guarantee, according to the size of the undertaking concerned.

38 As to the fact that the employer makes considerable use of fixed-term contracts, it must be noted, as appears from paragraphs 30 to 33 above, that the duration of the employment relationship has no bearing on the extent of the protection guaranteed to pregnant workers by Community law.

39 The answer to the second question must therefore be that the fact that the worker has been recruited by a very large undertaking which employs temporary workers frequently is of no relevance to the interpretation of Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85.

Costs

40 The costs incurred by the Commission and the EFTA Surveillance Authority, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Højesteret by order of 21 March 2000, hereby rules:

1. Article 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 and 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 within the meaning of Article 16(1) of Directive 89/391/EEC) are to be interpreted as precluding a worker from being dismissed on the ground of pregnancy

— where she was recruited for a fixed period,

— she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded,

— and because of her pregnancy she was unable to work during a substantial part of the term of that contract.

2. The fact that the worker has been recruited by a very large undertaking which employs temporary workers frequently is of no relevance to the interpretation of Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85.

La Pergola Wathelet Jann

Sevón Timmermans

Delivered in open court in Luxembourg on 4 October 2001.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber