JUDGMENT OF THE COURT (Second Chamber)
16 February 2006 *

In Case C-294/04,

REFERENCE for a preliminary ruling under Article 234 EC, made by the Juzgado de lo Social n° 30 de Madrid (Spain), by decision of 5 July 2004, received at the Court on 12 July 2004, in the proceedings

Carmen Sarkatzis Herrero

v

Instituto Madrileño de la Salud (Imsalud),

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Schintgen, P. Kūris (Rapporteur) and J. Klučka, Judges,

* Language of the case: Spanish.

Advocate General: C. Stix-Hackl,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 September 2005,

after considering the observations submitted on behalf of:

— the Instituto Madrileño de la Salud (Imsalud), by F. Peláez Albendea, acting as Agent,

— the Spanish Government, by E. Braquehais Conesa, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. Albenzio, avvocato dello Stato,

— the United Kingdom Government, by E. O'Neill, acting as Agent, and K. Smith, Barrister,

— the Commission of the European Communities, by I. Martínez del Peral and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation 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), 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 (10th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) and Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4)

2 This reference has been made in the course of proceedings between Ms Sarkatzis Herrero and the Instituto Madrileño de la Salud (Madrid Institute of Health, Imsalud) regarding the date to be taken into account in calculating her seniority as a public servant. Ms Sarkatzis Herrero submits that the date of her appointment, even though she was on maternity leave at that time, should be used and not the date on which she actually took up her post at the end of that leave.

Law

Community legislation

3 Article 2 of Directive 76/207 provides:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

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

...'

4 Under Article 3(1) of that directive:

'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 8(1) of Directive 92/85 provides:

'Member States shall take the necessary measures to ensure that workers [who are pregnant, have recently given birth or are breastfeeding] 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.'

6 Under the heading of 'Employment rights', Article 11(2) of the same directive is worded as follows:

'[I]n the case referred to in Article 8, the following must be ensured:

(a) the rights connected with the employment contract of workers [who are pregnant, have recently given birth or are breastfeeding], other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers [who are pregnant, have recently given birth or are breastfeeding]'.

7 Directive 96/34 puts into effect the framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations, clause 2, point 5, of which provides that '[a]t the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship'.

National legislation

8 It is apparent from the order for reference that the Spanish legal provisions on the filling of public service posts provide that taking up the post is a precondition of the commencement of rights as an official. The Staff Regulations applicable to non-health personnel employed by the Social Security Health Institutions (Estatuto de personal no sanitario al servicio de las Instituciones Sanitarias de la Seguridad Social), approved by Order of 5 July 1971 (BOE No 174 of 22 July 1971, p. 12015), do not provide for any exception in that regard.

9 By decision of 3 December 1997, the Instituto Nacional de la Salud (National Institute of Health, Insalud) organised an open competition and laid down the common bases of the selection tests for the award of a number of vacant posts in various categories within the health institutions connected with that institute. In the section relating to appointments and the taking-up of posts, paragraph 2 of Part 9 of that decision provides that applicants who are appointed have one month beginning on the day following the date of publication of the decision of appointment in which to take up their posts. Under paragraph 3 of Part 9 an applicant who does not take up a post within the prescribed period loses all the rights stemming from his participation in the competition, unless just cause is shown, and accepted by the body which organised the competition.

10 The national court compares those rules with the provisions in Royal Decree 118/1991 of 25 January 1991 on the selection of personnel covered by the Staff Regulations and the filling of posts in Social Security Health Institutions (Real Decreto sobre selección de personal estatutario y provisión de plazas en las Instituciones de la Seguridad Social, BOE No 33 of 7 February 1991, p. 4325), Article 12(5) of which provides that, except in cases of *force majeure*, successful applicants who have not submitted, within the prescribed period, the supporting documents called for in the notice of competition cannot be appointed.

The main proceedings and the questions referred for a preliminary ruling

11 Ms Sarkatzis Herrero was employed as a temporary servant by Insalud, and then, after a transfer of competences and the health services concerned together with the relevant staff, by Imsalud.

12 While Ms Sarkatzis Herrero was still employed by Insalud, that institution organised a competition in order to recruit permanent staff. After passing that competition, the applicant in the main proceedings was appointed to the post of administrative assistant by a decision published on 20 December 2002. That decision assigned her to a post which she had to take up within a period of one month.

13 Ms Sarkatzis Herrero, who was on maternity leave at that time, immediately requested that the period for taking up the post be extended until the end of that leave and at the same time she requested that the period of maternity leave be taken into consideration for the purpose of calculating her seniority. By communication of 8 January 2003, Imsalud granted the request for an extension without, however, mentioning the matter of the calculation of her seniority.

14 On 12 September 2003, Ms Sarkatzis Herrero brought an action against Imsalud before the referring court seeking a ruling that her seniority as an official should be calculated as from the date of her appointment and not as from the date on which she actually took up the post at the end of her maternity leave.

15 By order of 20 November 2003, that court stayed proceedings and requested the parties to the main proceedings to submit their observations on the appropriateness of a reference to the Court for a preliminary ruling. The national court subsequently made the order referring three questions to the Court for a preliminary ruling.

16 First, the national court observes that the taking-up of the post by the official is necessary for the commencement and enjoyment of his rights under the Staff Regulations, that domestic legislation does not provide for any exception to take account of situations such as that of the applicant in the main proceedings and that, in this case, the authorities concerned placed the situation of a woman on maternity leave on the same footing as *force majeure* or just cause allowing her to defer taking up her post.

17 The national court infers from this that, firstly, an extension to the prescribed period for the taking-up of a post by such a worker means that an application must be made and is thus subject to a risk of refusal, and, secondly, the woman is entitled to full enjoyment of her rights only at the end of her maternity leave. Thus, rights to remuneration and to social security benefits do not accrue until she has taken up the post and her advancement on the basis of seniority is delayed in comparison with that of the other successful applicants from the same competition who did take up their posts on the appointed date.

18 Secondly, the national court finds that, as a result of her appointment to a permanent post, the applicant in the main proceedings, who was already working for Imsalud in a temporary job, was promoted, even though this was formally presented as a new appointment.

19 It infers from all those factors that the decision by Imsalud at issue in the main proceedings is contrary to Article 11(2)(a) of Directive 92/85.

20 Thirdly, the national court finds that no consideration deriving from the traditional regulation of access to the public service may prevail over the rights of a female official who is on maternity leave or justify adversely affecting her professional position or obstructing the reconciliation of her family life with the normal progression of her career.

21 Lastly, that court finds that the difference in treatment suffered by Ms Sarkatzis Herrero as compared with the other successful applicants from the same competition who were able to take up their posts in the normal manner is incompatible with the right of a woman on maternity leave to return at the end of that leave to her job or an equivalent job, on terms and conditions which are not less favourable and to benefit from any improvement in working conditions which has taken place during her absence and from which she should have benefited, a right which is recognised in Directive 76/207 and Directive 96/34.

22 Against that background, the Juzgado de lo Social n° 30 de Madrid (Social Court No 30, Madrid) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must the Community provisions on maternity leave and equal treatment for men and women in access to work be interpreted as meaning that a woman on maternity leave who while in that situation obtains a post in the public service must enjoy the same rights as the other applicants who have been successful in the competition for access to the public service?

2. Irrespective of what might have occurred in the case of an employee taking up a post for the first time, if the employment relationship was in force, albeit

suspended, while she was on maternity leave, does access to the status of permanent employee constitute one of the rights associated with career advancement whose effectiveness cannot be affected by the fact that the person concerned is on maternity leave?

3. In application of the abovementioned provisions, and in particular those on equal treatment for men and women in access to employment or when employment has been obtained, is a temporary servant who is on maternity leave when she obtains a permanent post entitled to take up her administrative post and assume the status of official, with the rights inherent in such status, such as the initiation of her professional career and the calculation of her seniority, from that moment, and on the same conditions as all the other applicants who have obtained posts, notwithstanding that, according to the provisions of domestic law applicable in her case, the exercise of the rights associated with the actual performance of work may be suspended until such time as she actually commences work?'

On the questions referred for a preliminary ruling

23 It should be noted at the outset that, as the questions raised refer generally to provisions of Community law on maternity leave and equal treatment for men and women, it is necessary to identify the relevant Community rules in order to be able to answer those questions.

24 First of all, the national court mentions Directive 96/34 on parental leave in the grounds of its decision.

25 Clearly, however, at the time of her appointment as an official, the applicant in the main proceedings was on maternity leave and not on parental leave. It follows that Directive 96/34 is not relevant to an examination of the questions referred.

26 Secondly, the position of the applicant in the main proceedings should be examined in the light of Directive 92/85 if the unfavourable treatment which Ms Sarkatzis Herrero describes infringes the rights protected by that directive.

27 It is not, however, apparent from the documents submitted to the Court that the applicant in the main proceedings claimed that those rights had been infringed in the course of the existing employment relationship.

28 Ms Sarkatzis Herrero's position, characterised by the commencement of a new employment relationship in the course of maternity leave, is clearly different from returning to the same job or an equivalent job at the end of such leave.

29 Furthermore, all the interested parties who submitted observations to the Court accept that there is a fundamental difference between the position of a temporary servant and that of an official.

30 The taking-up of a post by an official, under the rules which apply in the present case, is dependent upon taking part in a competition and a decision of appointment. The fact that Ms Sarkatzis Herrero was employed by the same institution before and after her maternity leave is irrelevant in this respect.

31 It thus appears that there is no legal continuity between Ms Sarkatzis Herrero's successive positions and she must thus be regarded as having taken up a new job in becoming an official and not as having returned to her previous job.

32 It follows that Directive 92/85 is also not of relevance in answering the questions referred. Therefore, there is no need to answer the second question referred for a preliminary ruling.

33 By its first and third questions, which it is appropriate to examine together, the national court is essentially asking whether Community law precludes a national law which provides that, for the purpose of calculating the seniority of an official, only the date on which the person concerned took up the post is taken into consideration, and there is no exception for women who are on maternity leave on the date when they are called upon to take up the post to which they have been appointed.

34 Those questions must be examined in the light of Articles 2(1) and (3) and 3 of Directive 76/207, in the version which applies to the facts of this case, in order to establish whether, when a female official is on maternity leave at the time of her appointment, deferring the start of her career to the date on which she actually took up her post constitutes discrimination on grounds of sex.

35 First, it must be noted that the Court has held that Directive 76/207 applies to employment in the public service. That directive is of general application, a factor inherent in the very nature of the principle which it lays down (see Case 248/83 *Commission* v *Germany* [1985] ECR 1459, paragraph 16).

36 As the Advocate General observed in point 34 of her Opinion, Article 2(1) of Directive 76/207 prohibits any discrimination whatsoever on grounds of sex and Article 3 et seq. of the same directive define the areas in which there is to be no discrimination. Thus, direct and indirect discrimination are prohibited as regards conditions for access to employment, including selection criteria and recruitment conditions, access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining and also as regards work experience, conditions of employment, working conditions and participation in an organisation which represents workers or others.

37 In the exercise of the rights conferred under Article 2(3) of Directive 76/207, women cannot be the subject of unfavourable treatment regarding their access to employment and working conditions, since the aim of the directive, in that respect, is to ensure substantive, not formal equality (see, to that effect, Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 26).

38 Thus the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that it is not permissible for an employer to refuse to take on a pregnant woman on the ground that a prohibition on employment arising on account of the pregnancy would prevent her being employed from the outset and for the duration of the pregnancy in the post of unlimited duration to be filled (Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 27).

39 Lastly, as regards the taking into consideration of a period of maternity leave in respect of attaining a higher grade in the professional hierarchy, the Court has held that a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave and

that a woman who is treated unfavourably because of absence on maternity leave suffers discrimination on the ground of her pregnancy and of that leave (see Case C-284/02 *Sass* [2004] ECR I-11143, paragraphs 35 and 36).

40 However, as the United Kingdom Government rightly pointed out in its observations at the hearing, the facts which gave rise to the judgment in *Sass* are clearly different from those of the case in the main proceedings in that, in Mrs Sass' case, the maternity leave had coincided with career advancement as the case concerned a change in salary grade. By contrast, in the case in the main proceedings, Ms Sarkatzis Herrero was given a new job in the course of maternity leave, and the date on which she took up her post was deferred to the end of that leave.

41 However, as observed by the Advocate General in point 39 of her Opinion, since the aim of Directive 76/207 is substantive, not formal equality, Articles 2(1) and (3) and 3 of that directive must be interpreted as precluding any unfavourable treatment of a female worker on account of maternity leave or in connection with such leave, which aims to protect pregnant women, and that is so without it being necessary to have regard to whether such treatment affects an existing employment relationship or a new employment relationship.

42 That interpretation is supported by the view expressed by the Court in paragraph 48 of *Sass* according to which Community law requires that taking such statutory protective leave should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it and should not lead to discrimination against that woman.

43 It must be pointed out that neither the documents in the case file nor the information provided at the hearing by the Spanish Government make it possible to establish with certainty whether staff who, like the applicant in the main proceedings, have been employed as temporary servants before being appointed as officials enjoy, once they attain the status of official, a resumption of the seniority acquired in the job previously held, including any periods of maternity leave, and, if so, whether that seniority is taken into consideration for the purpose of advancement in their career grades.

44 Since, firstly, doubt remains as to the effect on Ms Sarkatzis Herrero's position of Law 70/1978 of 26 December 1978 on the recognition of previous service in the public service (Ley de Reconocimiento de Servicios Previos en la Administración Pública, BOE No 9 of 10 January 1979, p. 464) and of implementing Decree 1181/89 of 29 September 1989 (BOE No 237 of 3 October 1989, p. 30952) as well as Royal Decree-Law 3/1987 of 11 September 1987 on the remuneration of officials (Real Decreto-Ley de la Jefatura del Estado, sobre retribuciones del personal estatutario del Instituto Nacional de la Salud, BOE No 219 of 12 September 1987, p. 27649), which were cited by Imsalud, and, secondly, Law 55/2003 of 16 December 2003 laying down the Regulatory Framework for personnel in the Health Service (Ley del Estatuto Marco del personal estatutario de los Sercivios de Salud, BOE No 301 of 17 December 2003, p. 44742) was not in force on the date on which the applicant in the main proceedings began her career as an official, it is for the national court to examine whether Ms Sarkatzis Herrero has actually been subject to unfavourable treatment.

45 On the basis of the premisses set out in the order for reference, the deferment of the start of Ms Sarkatzis Herrero's career as an official following her maternity leave constitutes unfavourable treatment for the purposes of Directive 76/207.

46 The fact that other people, in particular men, may, on other grounds, be treated in the same way as Ms Sarkatzis Herrero has no bearing on an assessment of her position since the deferment of the date on which her career is deemed to have started stemmed exclusively from the maternity leave to which she was entitled.

47 Having regard to the foregoing considerations, the answer to the first and third questions must be that Directive 76/207 precludes a national law which does not afford a woman who is on maternity leave the same rights as other successful applicants from the same recruitment competition as regards conditions for access to the career of an official by deferring the start of her career to the end of that leave, without taking account of the duration of the leave, for the purpose of calculating her seniority of service.

Costs

48 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

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, precludes a national law which does not afford a woman who is on maternity leave the same rights as other successful applicants from the same recruitment

competition as regards conditions for access to the career of an official by deferring the start of her career to the end of that leave, without taking account of the duration of the leave, for the purpose of calculating her seniority of service.

[Signatures]