

Case C-506/06

Sabine Mayr

v

Bäckerei und Konditorei Gerhard Flöckner OHG

(Reference for a preliminary ruling
from the Oberster Gerichtshof (Austria))

(Social policy — Directive 92/85/EEC — Measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding — Meaning of ‘pregnant worker’ — Prohibition of dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave — Woman dismissed where, at the date she was given notice of her dismissal, her ova had been fertilised in vitro, but not yet transferred to her uterus — Directive 76/207/EEC — Equal treatment for men and women — Woman undergoing in vitro fertilisation treatment — Prohibition of dismissal — Scope)

Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 27 November
2007 I - 1020
Judgment of the Court (Grand Chamber), 26 February 2008 I - 1038

Summary of the Judgment

1. *Social policy — Protection of the safety and health of workers — Pregnant workers and workers who have recently given birth or are breastfeeding — Directive 92/85*
(Council Directive 92/85, Art. 10(1))
2. *Social policy — Male and female workers — Access to employment and working conditions — Equal treatment — Directive 76/207*
(Council Directive 76/207, Arts 2(1) and 5(1))

1. Directive 92/85 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 and, in particular, the prohibition of dismissal of pregnant workers provided for in Article 10(1) of that directive must be interpreted as not extending to a female worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in vitro fertilised ova exist, but they have not yet been transferred into her uterus.

kept for an indeterminate period, with the national legislation in question in the case in question providing, in that regard, that the fertilised ova may be kept for a maximum period of 10 years. Therefore, applying the protection against dismissal laid down in Article 10 of Directive 92/85 in favour of a female worker before the transfer of the fertilised ova could have the effect of granting the benefit of that protection even where that transfer is postponed, for whatever reason, for a number of years or even where such transfer is definitively abandoned, the in vitro fertilisation having been carried out merely by way of precaution.

In that regard, the protection established by Article 10 of Directive 92/85 cannot, for reasons connected with the principle of legal certainty, be extended to such a worker. Before their transfer into the uterus of the woman concerned, those ova may, in certain Member States, be

(see paras 41, 42, 53 and operative part)

2. Articles 2(1) and 5(1) of Directive 76/207 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 the dismissal of a female worker who is at an advanced stage of in vitro fertilisation treatment, that is, between the follicular puncture and the immediate transfer of the in vitro fertilised ova into her uterus, where it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment.

While it is true that workers of both sexes can be temporarily prevented from

carrying out their work on account of the medical treatment they must receive, the treatment, consisting of a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilisation, directly affects only women. It follows that the dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on grounds of sex.

(see paras 50, 52, 54 and operative part)