JUDGMENT OF THE COURT (Sixth Chamber)
21 October 1999 *

In Case C-333/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arbeitsgericht Gelsenkirchen (Germany) for a preliminary ruling in the proceedings pending before that court between

Susanne Lewen

and

Lothar Denda

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), of Article 11(2)(b) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in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 1989 L 348, p. 1) and of Clause 2(6) of the Annex to 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),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), President of the Chamber, G. Hirsch and R. Schintgen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Lewen, by F. Lorenz, Rechtsanwalt, Düsseldorf,

— Mr Denda, by B. Pawelzik, 'Assessor' to Zahntechniker-Innung, Münster,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and C. Lewis, Barrister,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, and M. Wolfcarius, of its Legal Service, acting as Agents, assisted by T. Eilmansberger and M. Pflügl, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Lewen, represented by F. Lorenz, of Mr Denda, represented by B. Pawelzik, of the German Government, represented by W.-D. Plessing, Ministerialrat in the Federal Ministry of Finance, acting as Agent, of the United Kingdom Government, represented by J.E. Collins and C. Lewis, and of the Commission, represented by M. Wolfcarius, assisted by M. Barnert, of the Brussels Bar, at the hearing on 28 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 4 March 1999,

gives the following

Judgment

1 By order of 29 August 1997, received at the Court on 24 September 1997, the Arbeitsgericht (Labour Court) Gelsenkirchen referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), of Article 11(2)(b) 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 1989 L 348, p. 1) and of Clause 2(6) of the Annex to 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 Those questions were raised in proceedings between Mrs Lewen and Mr Denda in his capacity as owner of the firm Denda Zahntechnik, in Gelsenkirchen,

concerning Mrs Lewen's claim that her employer should pay her a Christmas bonus for 1996.

Legislative background

Community legislation

3 Under Article 119 of the Treaty, the Member States are required to ensure and maintain the application of the principle of equal pay for male and female workers for equal work. 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.

4 Article 8 of Directive 92/85 provides:

'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.'

5 The provisions of Article 11 of Directive 92/85 relevant to the main proceedings state:

'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:

1. ...

2. in the case referred to in Article 8, 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'.

6 Article 1 of Directive 96/34 is intended to give effect to the framework agreement on parental leave set out in the annex to that directive.

7 Clause 2(6) of the Annex to Directive 96/34 provides: 'Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply'.

8 Under Article 2(1) of Directive 96/34, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 3 June 1998 at the latest. Thus, when Mrs Lewen's employer refused to pay the Christmas bonus, the period prescribed for the transposition of that directive had not yet expired.

National legislation

9 Articles 3 and 6 of the Mutterschutzgesetz (Law for the protection of mothers, hereinafter 'the MuSchG') provide:

'Article 3 (Prohibition of work by pregnant women)

1. The activity of an expectant mother must be suspended if it appears from a medical certificate that the life or health of the woman or her child would be threatened by continuing activity.

2. Expectant mothers must not be employed during the last six weeks before confinement unless they expressly declare that they are willing to do so. They may withdraw that declaration at any time.'

'Article 6 (Prohibition of work after confinement)

1. During the period after confinement, women must not be employed for a period of eight weeks. In the event of premature or multiple births, that period shall be twelve weeks.'

10 Parenting leave (or parental leave) is governed by the Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub — Bundeserziehungsgeldgesetz (Law on the grant of the parenting allowance and parenting leave, hereinafter 'the BErzGG'). Parenting leave, which may be taken on a voluntary basis and regardless of sex, begins at the earliest, under Article 15(2) of the BErzGG, at the end of the period for the protection of mothers and ends no later than the date on which the child reaches the age of three. During that period the contract of the employee on leave is suspended. The employee on parenting leave does not receive monthly remuneration but, under Article 1 et seq. of the BErzGG, receives a benefit known as the 'parenting allowance' which is paid by the State and is income-based.

The main proceedings

11 Mrs Lewen has been employed since 1 September 1990 by Mr Denda, in the latter's firm, Denda Zahntechnik. Her monthly salary is DEM 5 500 gross for a working week of 39.25 hours. Mr Denda also employs male workers.

12 The plaintiff in the main proceedings, who became pregnant at the beginning of 1996, worked from 1 January to 8 April 1996 and from 15 to 18 April 1996. She was on leave from 9 to 12 April 1996 and from 19 April to 15 May 1996. 16 May 1996 marked the start of the six-week period for the protection of mothers provided for by Article 3(2) of the MuSchG, the expected date of confinement being 27 June 1996. The daughter of the plaintiff in the main proceedings was born on 12 July 1996. Under Article 6(1) of the MuSchG, the period of protection came to an end on 6 September 1996. From 7 September 1996 Mrs Lewen, at her own request, took parenting leave, as provided for by Article 15 et seq. of the BErzGG, for a period ending on 12 July 1999.

13 In the years before 1996, the plaintiff in the main proceedings received, like the other employees of the defendant in the main proceedings, a Christmas bonus on 1 December each year equal to a month's salary. On that occasion, the plaintiff in the main proceedings was required to sign the following declaration:

'Christmas bonus

The bonus paid constitutes a single, voluntary social benefit which may be revoked at any time, being limited to the Christmas holidays this year. Consequently, this payment creates no future entitlement regarding either the principle of the bonus, its amount, the terms on which it is paid or the elements which it comprises.

Moreover, the Christmas bonus is granted to you expressly subject to the reservation that you are not to terminate your contract of employment before 1 July of the coming year or give us any grounds to terminate your employment without notice. The same shall apply to breach of the contract of employment. By virtue of this restriction, the bonus must be repaid in full in the event of your leaving.

Acceptance of the bonus entails acceptance of the above terms.'

14 In her action which she commenced before the national court on 10 January 1997, Mrs Lewen seeks an order requiring the defendant to pay her a Christmas bonus for 1996 in the gross sum of DEM 5 500.

15 The national court made, among others, the following observations:

'5. ...

In this Chamber's opinion, the Christmas bonus is "pay", within the meaning of Article 119 of the EC Treaty and Article 11(2)(b) of Directive 92/85/EEC, in respect of work performed in the year in which the bonus is awarded.

To exclude women who are on parenting leave at the time when the bonus is paid from the sphere of those potentially entitled to a special Christmas bonus does not take into account the fact that the employment relationships of those women still exist despite the suspension of their mutual obligations as a result of the parenting leave and accordingly that a mother on parenting leave continues to be loyal to the business. A threatened refusal of bonus payments may, moreover, contribute to dissuading women who have recently given birth from claiming their right to parenting leave in the interests of the child. The Chamber considers it to be wholly incompatible with the prohibition of direct and indirect discrimination in the EC Treaty and the secondary law adopted thereunder for a distinction to be drawn, in regard to the payment of a bonus, between employees who are actively employed and those on parenting leave, in such a way that not even work already performed in the reference year nor periods in which pregnant women and new mothers are prohibited from working are taken into account in such a way as to maintain the claim in part. When he awards bonus

payments, i.e. when awarding pay and payment within the meaning of provisions of EC law, the employer's motive — which the defendant claims to be the case here — of wishing to give an incentive for subsequent work by means of the bonus (which he cannot expect in the near future where the mother is on a lengthy period of parenting leave) does not, in this Chamber's view, provide a sufficient justification for failing to take into account the fact that work was actually performed in the year of the award and the periods in which pregnant and recent mothers were prohibited from working. The employer has in fact profited from the mother's work in the reference year and the prohibition on work pursuant to the MuSchG applies by virtue of that statute, without the need for the mother to make any application in that regard. The fact that, directly after the expiry of the prohibition on her working activity, the mother has made use of her right to parenting leave, and is on such leave when the bonus payment is made, is based essentially on a gender-specific factor.

In this Chamber's view, when an employer is awarding and calculating a bonus, his failure to take into account periods in which work is prohibited for reasons of motherhood protection is, moreover, inconsistent with the aim of Directive 92/85/EEC, which is to secure the "maintenance of a payment" within the meaning of Article 11(2)(b) thereof. In Case C-342/93 *Gillespie* v *Northern Health and Social Services Board and Others* [1996] ECR I-475 the Court of Justice did not have an opportunity to interpret Article 11(2)(b) of Directive 92/85/EEC, since the relevant events took place before the expiry of the period for the transposition of that directive. Leaving to one side the fact that, in the case of employees given a bonus in 1996, the defendant employer did not take their periods of incapacity for work in his business into account as periods leading to a reduction in the bonus, according to that provision periods in which working activity is prohibited under the MuSchG may not be equated with periods of incapacity for work, which the Federal Labour Court held may be taken into account so as to reduce a bonus.

Nor, in view of the first paragraph of Article 119 of the EC Treaty and Article 1 of Directive 75/117/EEC, is it permissible under Community law to curtail an annual special payment on the ground that periods of work have not been performed by reason of statutory motherhood protection. Although, in so far as in its judgment in *Gillespie* the Court of Justice adopted a position in regard to the interpretation of Article 119 of the EC Treaty and Article 1 of Directive

75/117/EEC, it stated that the abovementioned provisions do not "lay down any specific criteria for determining the amount to be paid to [the women] during that period" (paragraph 20 of the judgment), nevertheless, "a woman on maternity leave should receive a pay rise awarded before or during that period" (paragraph 21 of the judgment). Consequently when such a female employee has a right under national statutory rules to continue to receive full pay — which is the case in the Federal Republic of Germany under Paragraphs 13 and 14 of the MuSchG — she also has a right under Community law to receive all subsequent pay rises relating to her period of absence by reason of motherhood protection. This must also apply to an annual special payment exhibiting mixed characteristics (see paragraph 1 above), which is paid, at least in part, also in recognition of work performed in the year in which it is awarded.'

The questions referred

16 In those circumstances, the Arbeitsgericht Gelsenkirchen stayed proceedings pending a preliminary ruling from the Court on the following questions:

'(1) Is a Christmas bonus "pay" within the meaning of Article 119 of the EC Treaty or "payment" within the meaning of Article 11(2)(b) of Directive 92/85/EEC for work performed in the year in which the bonus is awarded even where it is given by the employer mainly or exclusively as an incentive for future work and/or loyalty to the firm? Is it to be regarded as in the nature of pay or payment at least where the employer has not announced prior to the beginning of the year of the award that at Christmas in the following year he intends to relate it exclusively to the performance of future work and so to exclude from the payment employees whose relationships at the time of payment and thereafter are in abeyance?

(2) Is there a breach of Article 119 of the EC Treaty, Article 11(2) of Directive 92/85/EEC and Clause 2(6) of [the Annex to] Directive 96/34/EC (which is yet to be transposed) if an employer wholly excludes women who are on parenting leave (*Erziehungslaub)* at the time of payment of the Christmas bonus from receipt of the bonus and does not take into account work performed during the year in which the bonus is paid or periods for the protection of mothers (in which they were prohibited from working)?

(3) If Question 2 is to be answered in the affirmative:

Is there a breach of Article 119 of the EC Treaty, Article 11(2)(b) of Directive 92/85/EEC and Clause 2(6) of the [Annex to] Directive 96/34/EC if, when awarding a Christmas bonus to a women who is on parenting leave, an employer takes into account the following periods by way of pro rata reduction:

— periods of parenting leave;

— periods for the protection of mothers (in which they were prohibited from working)?'

The first question

17 By its first question, the national court seeks essentially to ascertain whether a Christmas bonus of the kind at issue in the main proceedings falls within the concept of pay within the meaning of Article 119 of the Treaty or Article 11(2)(b) of Directive 92/85 even if the bonus is paid by the employer mainly or exclusively as an incentive for future work or loyalty to the undertaking or both.

18 According to the defendant in the main proceedings, the bonus, having been paid voluntarily as an exceptional allowance at Christmas, cannot be regarded as pay within the meaning of Article 119 of the Treaty.

19 It must be borne in mind that, according to settled case-law, the concept of pay within the meaning of the second paragraph of Article 119 of the Treaty includes all consideration paid to a worker in respect of his employment by his employer, whether immediate or future and whether paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see Case 80/70 *Defrenne* [1971] ECR 445, paragraph 6, Case 12/81 *Garland* [1982] ECR 359, paragraph 10, and Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 20).

20 For the purposes of Article 119, the reason for which an employer pays a benefit is of little importance provided that the benefit is granted in connection with employment.

21 It follows that a Christmas bonus of the kind at issue in the main proceedings, even if paid on a voluntary basis and even if paid mainly or exclusively as an incentive for future work or loyalty to the undertaking or both, constitutes pay within the meaning of Article 119 of the Treaty.

22 As regards the concept of payment within the meaning of Article 11(2)(b) of Directive 92/85, that provision is intended to ensure that, during maternity leave, female workers receive an income at least equal to that prescribed by Article 11(3) of that directive, irrespective of whether it is paid in the form of an allowance, pay or a combination of the two (Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraphs 31 to 33).

23 Not being intended to ensure such a level of income during a worker's maternity leave, the bonus at issue in the main proceedings cannot be regarded as falling within the concept of payment within the meaning of Article 11(2)(b) of Directive 92/85.

24 Accordingly, the answer to the first question must be that a Christmas bonus of the kind at issue in the main proceedings constitutes pay within the meaning of Article 119 of the Treaty, even if it is paid voluntarily by the employer and even if it is paid mainly or exclusively as an incentive for future work or loyalty to the undertaking or both. It does not, however, fall within the concept of payment within the meaning of Article 11(2)(b) of Directive 92/85.

The second question

25 By its second question, the national court seeks essentially to ascertain whether Article 119 of the Treaty, Article 11(2) of Directive 92/85 and Clause 2(6) of the Annex to Council Directive 96/34/EC preclude an employer from excluding women entirely from the benefit of a bonus paid voluntarily as an exceptional allowance at Christmas if, at the time of payment of the bonus, they are on parenting leave, without taking account of the work done during the year in which the bonus is paid or of the periods for the protection of mothers (in which they were prohibited from working).

26 It must be borne in mind, first of all, that in view of its mandatory nature, the prohibition of discrimination between male and female workers not only applies to action on the part of public authorities, but also extends to all collective agreements designed to regulate employment relationships and to contracts between individuals (see, in particular, Case C-184/89 *Nimz* v *Freie und Hansestadt Hamburg* [1991] ECR I-297, paragraph 11, and Case C-281/97 *Krüger* v *Kreiskrankenhaus Ebersberg* [1999] ECR I-5127, paragraph 20). That prohibition also applies to unilateral action by an employer vis-à-vis his employees.

27 Second, the finding that an advantage such as the Christmas bonus at issue in this case falls within the concept of pay as broadly defined in Article 119 of the Treaty does not necessarily imply that it must be regarded as retroactive pay for work performed in the course of the year in which the bonus is paid, as the national court appears to assume. That, however, is a question of fact which is a matter to be appraised by the national court in the light of its national law.

28 It is therefore for the national court to appraise, in order to classify the Christmas bonus under national law, the weight of the defendant's argument that in paying the 1996 Christmas bonus his aim was to encourage those in 'active' employment on 1 December 1996 to work hard in the forthcoming months and thus to reward their future loyalty to their employer.

29 In order to give a helpful answer to the question submitted, it is therefore necessary, in view of the doubts as to the exact classification of the bonus under national law, to consider first the hypothesis that the voluntary payment of a bonus as an exceptional allowance by an employer at Christmas does not constitute retroactive pay for work performed and is subject only to the condition that the worker is in active employment when it is awarded.

30 The first point to note is that the voluntary payment of a bonus at Christmas by an employer to a worker, during parenting leave, does not fall within the scope of either Article 11(2) of Directive 92/85 or Clause 2(6) of the Annex to Directive 96/34.

31 Article 11(2) of Directive 92/85 is not applicable in so far as subparagraph (a) concerns rights linked to the contract of employment of a female worker which must be assured in the event of maternity leave. The bonus, paid voluntarily as an exceptional allowance not during maternity leave but during parenting leave,

cannot be regarded as a right which must be assured in the case of maternity. As regards subparagraph (b), it is clear from paragraph 23 of the present judgment that it too is inapplicable.

32 As regards Clause 2(6) of the Annex to Directive 96/34, the bonus does not constitute a right acquired or in the process of being acquired by the worker on the date on which parental leave started since it is paid voluntarily after the start of that leave.

33 Second, for the purposes of Article 119 of the Treaty, such a practice on the part of an employer does not involve direct discrimination since it applies without distinction to male and female workers. It is therefore necessary to consider whether it may constitute indirect discrimination.

34 According to settled case-law, indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, in particular, *Boyle*, cited above, paragraph 76).

35 In that connection, the first point to note is that, as the national court has indicated, women take parenting leave far more often than men, and that is also confirmed by the situation in the defendant's undertaking.

36 Furthermore, according to settled case-law, discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (*Boyle*, cited above, paragraph 39).

37 A worker who exercises a statutory right to take parenting leave, which carries with it a parenting allowance paid by the State, is in a special situation, which cannot be assimilated to that of a man or woman at work since such leave involves suspension of the contract of employment and, therefore, of the respective obligations of the employer and the worker.

38 The refusal to pay a woman on parenting leave a bonus as an exceptional allowance given voluntarily by an employer at Christmas does not therefore constitute discrimination within the meaning of Article 119 of the Treaty where the award of that allowance is subject only to the condition that the worker is in active employment when it is awarded.

39 The position would be different if the national court were to classify the bonus at issue under national law as retroactive pay for work performed in the course of the year in which the bonus is awarded.

40 In those circumstances, an employer's refusal to award a bonus, even one reduced proportionally, to workers on parenting leave who worked during the year in which the bonus was granted, on the sole ground that their contract of employment is in suspense when the bonus is granted, places them at a disadvantage as compared with those whose contract is not in suspense at the time of the award and who in fact receive the bonus by way of pay for work performed in the course of that year. Such a refusal therefore constitutes discrimination within the meaning of Article 119 of the Treaty since female workers are likely, as noted in paragraph 35 of this judgment, to be on parenting leave when the bonus is awarded far more often than male workers.

41 As to whether periods for the protection of mothers (in which they are prohibited from working) must be taken into account, it must be held that they are to be assimilated to periods worked.

42 Indeed, to exclude periods for the protection of mothers from the periods worked for the purpose of awarding a bonus retroactively as pay for work performed would discriminate against a female worker simply as a worker since, had she not been pregnant, those periods would have had to be counted as periods worked.

43 The answer to the second question must therefore be that Article 119 of the Treaty precludes an employer from excluding female workers on parenting leave entirely from the benefit of a bonus paid voluntarily as an exceptional allowance at Christmas without taking account of the work done in the year in which the bonus is paid or of the periods for the protection of mothers (in which they were prohibited from working) where that bonus is awarded retroactively as pay for work performed in the course of that year.

44 However, neither Article 119 of the Treaty nor Article 11(2) of Directive 92/85 nor Clause 2(6) of the Annex to Directive 96/34 precludes a refusal to pay such a bonus to a woman on parenting leave where the award of that allowance is subject to the sole condition that the worker must be in active employment when it is awarded.

The third question

45 By its third question, the national court seeks essentially to ascertain whether Article 119 of the Treaty, Article 11(2)(b) of Directive 92/85 and Clause 2(6) of the Annex to Directive 96/34 preclude an employer, when granting a Christmas

bonus to a female worker who is on parenting leave, from taking the following periods into account so as to reduce the benefit pro rata:

— periods of parenting leave;

— periods for the protection of mothers (in which they were prohibited from working).

46 First, as pointed out in paragraphs 23 and 32 of this judgment, the payment, during a worker's parenting leave, of a bonus as an allowance awarded voluntarily at Christmas does not fall within the scope of either Article 11(2)(b) of Directive 92/85 or Clause 2(6) of the Annex to Directive 96/34.

47 Second, it is clear from the answer given to the second question that the fact that an employer, when a Christmas bonus of the kind at issue in the main proceedings is granted, does not take account of work performed in the course of the year in which the bonus is awarded or of periods for the protection of mothers (in which they were prohibited from working) constitutes discrimination within the meaning of Article 119 of the Treaty.

48 It follows that Article 119 of the Treaty precludes an employer when granting a Christmas bonus from taking periods for the protection of mothers into account, so as to reduce the benefit pro rata.

49 On the other hand, an employer cannot be prevented from taking periods of parenting leave into account, so as to reduce the benefit pro rata, since, as pointed

out in paragraph 37 of this judgment, the situation of workers on parenting leave cannot be assimilated to that of a man or a woman at work.

50 The answer to the third question must therefore be that Article 119 of the Treaty, Article 11(2)(b) of Directive 92/85 and Clause 2(6) of the Annex to Directive 96/34 do not preclude an employer, when granting a Christmas bonus to a female worker who is on parenting leave, from taking periods of parenting leave into account, so as to reduce the benefit pro rata.

51 However, Article 119 of the Treaty precludes an employer, when granting a Christmas bonus, from taking periods for the protection of mothers (in which they were prohibited from working) into account, so as to reduce the benefit pro rata.

Costs

52 The costs incurred by the German and United Kingdom Governments 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Arbeitsgericht Gelsenkirchen by order of 29 August 1997, hereby rules:

1. A Christmas bonus of the kind at issue in the main proceedings constitutes pay within the meaning of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), even if it is paid voluntarily by the employer and even if it is paid mainly or exclusively as an incentive for future work or loyalty to the undertaking or both. However, it does not fall within the concept of payment within the meaning of Article 11(2)(b) 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).

2. Article 119 of the Treaty precludes an employer from excluding female workers on parenting leave entirely from the benefit of a bonus paid voluntarily as an exceptional allowance at Christmas without taking account of the work done in the year in which the bonus is paid or of the periods for the protection of mothers (in which they were prohibited from working) where that bonus is awarded retroactively as pay for work performed in the course of that year.

   However, neither Article 119 of the Treaty nor Article 11(2) of Directive 92/85 nor Clause 2(6) of the Annex to Council Directive 96/34/EC of 3 June

1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC precludes a refusal to pay such a bonus to a woman on parenting leave where the award of that allowance is subject to the sole condition that the worker must be in active employment when it is awarded.

3. Article 119 of the Treaty, Article 11(2)(b) of Directive 92/85 and Clause 2(6) of the Annex to Directive 96/34 do not preclude an employer, when granting a Christmas bonus to a female worker who is on parenting leave, from taking periods of parenting leave into account, so as to reduce the benefit pro rata.

However, Article 119 of the Treaty precludes an employer, when granting a Christmas bonus, from taking periods for the protection of mothers (in which they were prohibited from working) into account, so as to reduce the benefit pro rata.

Kapteyn Hirsch Schintgen

Delivered in open court in Luxembourg on 21 October 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber