OPINION OF ADVOCATE GENERAL LÉGER
delivered on 2 December 2004 [1]

1. This reference for a preliminary ruling is yet another concerning the rights in the Community legal order of a pregnant employed woman. The issue at the crux of this case is whether incapacity for work caused by a pregnancy-related illness and occurring during the period of pregnancy may, in accordance with Community law, be treated in the same way as incapacity for work caused by any other illness and be set against the number of days during which, under the sick-leave scheme applicable in the case, employees are entitled to have their pay maintained in full, and then in part.

2. By the questions it has referred, the Labour Court (Ireland) asks, first, whether the national rules at issue fall within the ambit of Article 141(1) and (2) EC and of Council Directive 75/117/EEC, [2] or of Council Directive 76/207/EEC. [3] The national court then seeks to ascertain whether, in the light of the provisions of Community law applicable, such rules must be regarded as discriminatory.

3. In essence, this case raises the question: is the equal treatment enjoyed by women during their pregnancy equal treatment in form or in substance?

I — The legal background

A — *The relevant provisions of Community law*

4. Article 141(1) EC enshrines the principle of equal pay for male and female workers for equal work or work of equal value. Under Article 141(2), the definition of 'pay' includes the ordinary basic or minimum wage or

1 — Original language: French.

2 — Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

3 — Directive 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).

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.

5. The purpose of Directive 75/117 is essentially to further the actual application of the principle of equal pay for men and women set out in Article 141 EC. Article 1 of that directive provides that that principle means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

6. Article 3 of the same directive requires the Member States to abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay. Article 4 requires them to take the necessary measures to ensure that provisions appearing in collective agreements or individual contracts of employment which are contrary to the principle of equal pay may be declared null and void or may be amended.

7. The purpose of Directive 76/207 is, according to Article 1 thereof, to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions.

8. 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.'

9. Article 5 of Directive 76/207 governs equal treatment as regards working conditions in the following terms:

'1. 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.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended ...'

10. It remains to be added that the legal condition of pregnant workers is also the object of special protection under Council Directive 92/85/EEC. [4] According to Article 8 thereof, those workers are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement, and including at least two compulsory weeks. In accordance with Article 11(2)(b) of that directive, those workers are entitled during their maternity leave to the maintenance of a payment or adequate allowance or both. According to Article 11(3), the allowance is to 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.

B — *The relevant provisions of national law*

11. The North Western Health Board's sick-leave scheme [5] provides, inter alia, that employees are entitled to 365 days of paid sick-leave in a period of four years. It also provides that 183 days' absence in a period of

4 — 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).

5 — The North-Western (Ireland) Health Board established by the State for the purpose of exercising certain statutory functions on the State's behalf ('the Board').

12 months are paid at full pay and that, beyond that total of 183 days, days of absence on sick leave are paid at half-pay only, up to the limit of 365 days over four years. [6]

12. This scheme also provides that any incapacity for work arising from a pregnancy-related illness occurring before the 14 weeks of maternity leave is to be deemed to be covered by that scheme. [7]

13. Pursuant to other regulations made by the Irish Department of Health and Children, employees are also entitled to maternity leave during which they receive their pay in full.

II — The facts and the dispute in the main proceedings

14. Ms McKenna is an employee of the Board. On that basis she falls within the ambit of its sick-leave scheme.

15. Ms McKenna found that she was pregnant in January 2000. She was obliged to take sick leave on medical advice, on account of a pregnancy-related illness that lasted for nearly the whole term of her pregnancy. According to the order for reference, her absences from work during her pregnancy were due solely to that illness and a medical certificate has stated that she was unfit for work. [8] As from 6 July 2000, [9] because Ms McKenna had exhausted her right to full pay during sick leave, her pay was reduced to half-pay. From 3 September to 11 December 2000 Ms McKenna was on maternity leave and received her pay at the full rate. When that leave expired, because Ms McKenna was still unfit for work on medical grounds, her pay was once more reduced by half.

16. Before the Equality Officer of the Office of the Director of Equality Investigations, Ms McKenna argued that she had been the victim of discrimination on grounds of sex in breach of Directive 76/207, inasmuch as her employer had treated pregnancy-related illness in the same way as any other illness and had set her period of incapacity for work on account of that illness against her rights to

6 — Point 4(3)(c) of the sick-leave scheme.

7 — Point 4(3)(n) of the General Conditions of the sick-leave scheme is worded as follows: 'It should be noted that sickness as a result of a maternity-related illness prior to the granting of 14 weeks' maternity leave falls to be considered under the Board's sick leave policy.'

8 — Paragraph 12 of the order for reference.

9 — The order for reference gives the date of 6 July 2000 in paragraph 5 and 16 July 2000 in paragraph 12. It would appear, in the light of the Equality Officer's decision in Annex 2 to the order for reference, that the correct date is 6 July 2000. In any case, that uncertainty as to the date from which the complainant in the main proceedings had her pay reduced by half has no bearing on the replies which may be given to the questions asked by the Labour Court.

sick leave. She also maintained that the halving of her pay when her absence was due to a pregnancy-related illness amounted to unfavourable treatment, contrary to Article 141(1) and (2) EC and to Directive 75/117.

17. The Equality Officer ruled that Ms McKenna's action was well founded. She considered that, by treating the pregnancy-related illness as though it were any other illness, the employer had discriminated on grounds of sex and that both Directive 76/207 and the Court of Justice's case-law in that sphere required the Board to take special measures to cover absences from work due to incapacity caused by pregnancy. She considered also that to have reduced the complainant's pay to half-pay before the start of the maternity leave was contrary to Article 141(1) and (2) EC and to Directive 75/117. The Equality Officer therefore ordered the Board to amend the provisions of its sick-leave scheme so that it no longer discriminated against female workers suffering from a pregnancy-related illness occurring during pregnancy. She also ordered the Board to pay Ms McKenna the arrears of pay due to her and to pay her damages.

18. The Board brought an appeal against that decision before the Labour Court. It argued that treating incapacity for work caused by a pregnancy-related illness in the same way as incapacity for work caused by any other illness did not constitute discrimination and was consistent with the Court's judgment in *Høj Pedersen and Others.* [10]

III — The questions referred for a preliminary ruling

19. The Labour Court is of the view that the case before it comprises two aspects. First, there is the question whether the complainant had suffered unequal treatment as regards her working conditions, because the period of her absence on account of incapacity for work due to a pregnancy-related illness was set against the total period of her entitlement to sick leave, with the result that the benefits which she might claim, if she should fall sick in the three following years, have been reduced or exhausted, in value and duration. Second, it falls to be established whether the complainant was discriminated against in terms of pay, in that she was placed on half-pay after the initial 183 days of absence, when the cause of that absence was linked to her pregnancy and could therefore concern women alone.

10 — Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327.

20. The Labour Court then proceeds to consideration of the Court's case-law. It begins by noting that, according to settled case-law, discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. It indicates, however, that to apply that definition to the circumstances of this case seems to it problematical. Thus, on the one hand, the Board claims that the situation in which Ms McKenna was absent from work on the strength of a medical certificate issued by her doctor is comparable to that of any employee whose incapacity for work is attested to by a medical certificate. On the other hand, Ms McKenna maintains that it is the cause of her incapacity for work that must be taken into account and that, in consequence, her incapacity for work caused by her pregnancy is not comparable to the incapacity of a man or woman absent on sick leave.

21. The Labour Court states that the Court has held in *Webb* [11] that Directive 76/207 prohibits the dismissal of a woman who, because of her pregnancy, finds herself incapable of performing the tasks for which she was engaged, and in *Brown* [12] that, although pregnancy is not comparable to a pathological condition, disorders and complications which may arise during it and lead to incapacity for work form part of the risks inherent in the condition of pregnancy and are therefore a specific feature of that condition. The Labour Court deduces from those judgments that Directive 76/207 provides special protection for pregnant women against detrimental treatment on grounds of incapacity due to pregnancy. The rationale underlying those decisions is that, pregnancy being a solely female condition, it can never be compared to pathological illnesses that affect both men and women. Nevertheless, those judgments having been given in cases dealing with the dismissal of, or refusal to employ, pregnant women, the question arises whether they can be transposed to the circumstances concerned and, therefore, whether Directive 76/207 is applicable to this case.

22. On that head, the Labour Court states that, having regard to the case-law, sick pay under an occupational scheme constitutes pay for the purposes of Article 141 EC and Directive 75/117. [13] It next deduces from *Nimz* [14] and *Gerster* [15] that rules of the national scheme at issue which directly and automatically affect pay must be examined in the light of Article 141 EC, whereas those the effect of which on pay is indirect only fall to be examined in the light of Directive 76/207.

11 — Case C-32/93 *Webb* [1994] ECR I-3567

12 — Case C-394/96 *Brown* [1998] ECR I-4185

13 — Case 171/88 *Rinner-Kühn* [1989] ECR 2743

14 — Case C-184/89 *Nimz* [1991] ECR I-297.

15 — Case C-1/95 *Gerster* [1997] ECR I-5253.

23. The Labour Court also mentions that in *Gillespie and Others* [16] the Court held that neither Article 141 EC nor Directive 75/117 required employers to continue full pay for women during maternity leave. From that it draws the deduction that Article 141 EC and Directive 75/117 ought not to oblige an employer to pay a female worker full pay during pregnancy-related sick leave before the start of maternity leave either.

24. The Labour Court also emphasises that in *Høj Pedersen and Others* the Court has held that a rule of national law that confined the employees' right to full pay during sick leave to cases of incapacity to work caused by illnesses unconnected to pregnancy was contrary to Article 141 EC and to Directive 75/117. It notes that, according to that judgment, pregnancy-related illness must be treated in the same way as pathological illnesses so far as the level of pay owed to the pregnant worker is concerned.

25. Finally, the Labour Court points out that in *Gillespie and Others* the Court ruled that issues relating to pay fall to be considered under Article 141(1) and (2) EC and Directive 75/117 exclusively, and cannot also be considered under Directive 76/207.

26. It is having regard to those factors that the Labour Court has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the operation of a sick leave scheme which treats employees suffering from pregnancy-related illnesses and pathological illness in an identical fashion come within the scope of Directive 76/207?

2. If the answer to question 1 is in the affirmative, is it contrary to Directive 76/207 for an employer to offset against an employee's total entitlement to benefit under an occupational sick-leave scheme, a period of absence from work due to incapacity caused by a pregnancy-related illness arising during pregnancy?

3. If the answer to question 1 is in the affirmative, does Directive 76/207 require an employer to have in place

16 — Case C-342/93 *Gillespie and Others* [1996] ECR I-475.

special arrangements to cover absence from work due to incapacity caused by pregnancy-related illness arising during pregnancy?

4. Does the operation of a sick leave scheme which treats employees suffering from pregnancy-related illness and pathological illness [in the same way] come within the scope of Article 141 of the EC Treaty and Directive 75/117?

5. If the answer to question 4 is in the affirmative, is it contrary to Article 141 of the Treaty and Directive 75/117 for an employer to reduce a woman's pay after she has been absent from work for a designated period where the absence is caused by incapacity due to a pregnancy-related illness arising during pregnancy in circumstances in which a non-pregnant woman or a man absent from work for the same period as a result of incapacity due to purely pathological illness would suffer the same reduction?'

IV — Findings of the Court

27. As a preliminary point, it ought to be noted that the subject-matter of the dispute in the main proceedings is Ms McKenna's complaint concerning, on the one hand, the reduction of her pay for the period 6 July to 3 September 2000 and, on the other, the reduction in value and duration of the benefits which she could claim under the sick-leave scheme at issue during the three following years if she were to fall ill. According to the information supplied by the national court, the benefits provided under that sick-leave scheme and which are at issue in this case consist of the employees' entitlement to a certain number of days of sick leave during which they receive their pay in full, and then in part.

28. In addition, as is made clear by the wording of the second, third and fifth questions raised, the issue in the main proceedings concerns only the complainant's absences, due to a pregnancy-related illness, which took place during her pregnancy. Ms McKenna, as she confirmed at the hearing, does not dispute that those of her absences on grounds of incapacity for work that occurred after the end of her maternity leave should be set against her entitlement to sick leave, even if that incapacity was due to an illness originally caused by her pregnancy or parturition.

29. Having regard to those factors, I suggest that, for the Court to give an answer that may be of help to the national court, the questions should be understood as relating

to a sick-leave scheme that treats in exactly the same way those employees who suffer from a pregnancy-related illness and those who are victims of any other illness, inasmuch as periods of absence due to incapacity for work caused by a pregnancy-related illness and occurring during that pregnancy are set against entitlement to paid sick leave.

30. I shall begin by considering which of the rules of Community law must be found to be applicable to the circumstances of the case. I shall then go on to examine whether the provisions of the sick-leave scheme at issue are discriminatory and, if so, the inferences to be drawn from such discrimination.

A — *On the rules of Community law applicable*

31. By its first and fourth questions, which it is appropriate to consider together, the court making the reference asks, in essence, whether a sick-leave scheme which treats in exactly the same way those employees who suffer from a pregnancy-related illness and those who are victims of any other illness, so that the periods of absence owing to incapacity for work caused by a pregnancy-related illness and occurring during that pregnancy are set against entitlement to paid sick leave, falls within the ambit of Directive 76/207 or within the ambit of Article 141(1) and (2) EC and of Directive 75/117.

32. The variety of the replies suggested by the several interveners illustrates the difficulty that there may be in establishing with precision the respective ambits of those various provisions.

33. Thus, Ms McKenna and the Italian Government consider that the scheme at issue falls simultaneously within the ambit of Directive 76/207 and that of Article 141(1) and (2) EC. Ms McKenna states that that scheme is covered by Directive 76/207 in so far as it provides for the setting of her periods of absence due to incapacity for work caused by a pregnancy-related illness against the period of 183 days of sick leave on full pay. That scheme also, in her view, is covered by Article 141(1) and (2) EC and Directive 75/117 in that it led to a reduction of her pay for the period 6 July to 3 September 2000.

34. The Irish, Austrian and United Kingdom Governments and the Board maintain, for their part, that the scheme at issue falls within the scope of Article 141(1) and (2) EC and of Directive 75/117. They argue that particular attention must be paid to the consequences of the scheme and that, under

that scheme, workers like Ms McKenna may qualify for pay during their sick leave. In that connection, they note that, according to settled case-law, sick pay constitutes 'pay' within the meaning of Article 141 EC [17] and not 'treatment' within the meaning of Directive 76/207. They stress that, while Directive 2002/73/EC of the European Parliament and of the Council [18] has widened the ambit of Directive 76/207 in that working conditions are to include pay too, it is not in the circumstances applicable, since the period prescribed for its transposition into national law expires on 5 October 2005. In accordance with the version of Directive 76/207 in force and with the case-law, matters concerning pay fall exclusively within the ambit of Article 141(1) and (2) EC and of Directive 75/117. [19] Furthermore, the fact that Ms McKenna's salary was reduced was the direct and automatic consequence of the application of the scheme in question.

35. Finally, the Commission submits that the scheme at issue falls exclusively within the ambit of Directive 76/207 because it corresponds to working conditions stipulated in the applicant's contract of employment and because its effects on female workers' pay are too indirect to bring it within the ambit of Article 141(1) and (2) EC.

36. I believe, like the Commission, that the provisions of the sick-pay scheme at issue fall within the ambit of Directive 76/207. Before I explain why it appears to me that that must be the correct solution, I think it would be helpful to specify briefly what is at stake in this question.

37. I think that the answer to this question can have no bearing on the issue of whether or not the provisions of the sick-leave scheme are discriminatory. In other words, I think that there cannot be a different outcome to the assessment of the discriminatory nature of those provisions depending on whether those provisions fall to be examined in the light of Directive 76/207 or having regard to Article 141(1) and (2) EC and Directive 75/117. Indeed, the notion of discrimination meets the same definition in the two cases. It involves the application of different rules to comparable situations or the application of the same rule to different situations. [20] I also take as evidence the fact that Directive 2002/73, which makes express reference to the Court's case-law on the definition of discrimination, [21] provides that

17 — *Rinner-Kühn* and *Høj Pedersen and Others*.

18 — Directive 2002/73/EC of 23 September 2002 amending Directive 76/207 (OJ 2002 L 269, p. 15).

19 — See the second recital in the preamble to Directive 76/207 and *Gillespie and Others*.

20 — As regards working conditions, see *Brown*, paragraph 30, and apropos of pay, see Case C-147/02 *Alabaster* [2004] ECR I-13101, paragraph 45.

21 — Twelfth recital in the preamble to that directive.

pay will henceforth form part of the working conditions referred to in Directive 76/207.

38. It appears to me that what is really at stake in determining whether the contested provisions fall within the ambit of Directive 76/207 or of that of Article 141(1) and (2) EC [22] depends on the fact that those texts of Community law do not have the same scope. Thus, while it has several times been held that Article 5(1) of Directive 76/207, which prohibits any discrimination on grounds of sex with regard to working conditions, is sufficiently precise to be relied upon by an individual against a public authority and applied by a national court, [23] the fact nevertheless remains that that provision, contained as it is in a directive, cannot impose obligations directly on an individual. [24] Unlike Article 141(1) EC, which can be applied directly by the national court in a dispute between individuals, [25] that provision has no such 'horizontal direct effect'. [26]

39. In every case which raises the question whether the provisions at issue in the main proceedings fall within the ambit of Article 141(1) and (2) EC and Directive 75/117 or rather within that of Directive 76/207, the Court therefore takes care to state precisely which rules are applicable. [27]

40. To that end, the content of the provisions under consideration is of limited use in the determining of their respective ambits. While Article 141(2) defines the concept of pay in fairly broad terms, Directive 75/117 does not specify what is covered by the expression 'aspects and conditions of remuneration' used in Article 1 thereof. Similarly, so far as Directive 76/207 is concerned, we have seen that, as Articles 1 and 5 thereof make clear, it is intended to put into effect

22 — It would be helpful to observe here that the purpose of Directive 75/117 is essentially to facilitate the practical application of the principle of equal pay laid down in Article 141(1) and (2) EC and thus that it in no way alters the content or scope of the principle (Case 192/85 *Newstead* [1987] ECR 4753, paragraph 20, and *Høj Pedersen and Others*, paragraph 29).

23 — Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 21; Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 40, and Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 71. In the instant case the national court has indicated that Ms McKenna is entitled to rely on the precise and unconditional provisions of Directive 76/207 in the proceedings between her and the Board, because the Board is an emanation of the State, with the result that the conditions are satisfied for it to be possible for the vertical direct effect of the relevant provisions of that directive to be applicable (point 21 of the order for reference).

24 — See, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-201/02 *Wells* [2004] ECR I-723, paragraph 56, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108.

25 — Case 43/75 *Defrenne* [1976] ECR 455, paragraph 40.

26 — Nevertheless, that does not mean that its content has no legal effect in proceedings between individuals, since, as the Court has recently had occasion to observe in *Pfeiffer and Others* (paragraphs 114 to 116), the national court must interpret its national law so far as possible in the light of the wording and the purpose of the directive, in order to achieve the result sought by that act.

27 — See, for example, Case 19/81 *Burton* [1982] ECR 555, paragraph 8; Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 10; *Nimz*, paragraph 8; Case C-476/99 *Lommers* [2002] ECR I-2891, paragraphs 26 to 29, and Case C-77/02 *Steinicke* [2003] ECR I-9027, paragraph 48.

the principle of equal treatment for men and women with regard to 'working conditions'. Nevertheless, it does not define either what is meant by the concept of 'working conditions'.

41. It is therefore in the case-law that we must find the criteria relevant for the purposes of establishing which rules are applicable to the circumstances of the case. Examination of that case-law discloses that the Court has given no general definition of those concepts. It has determined on a case-by-case basis whether the system at issue in the main proceedings constitutes 'working conditions' within the meaning of Directive 76/207 or instead falls within the ambit of Article 141(1) and (2) EC and Directive 75/117.[28] In order to do this, it takes into account, it appears to me, the tenor of the measures concerned in the case in the main proceedings and the consequences of their application for employees, which are the subject-matter of the dispute in those main proceedings.

42. In the instant case we have seen that the provisions of the Board's sick-leave scheme at issue provide, on the one hand, for pregnancy-related illnesses to be treated like any other illness. On the other hand, they fix the duration and value of employees' entitlement to compensation when taking sick leave, in that employees have the right to 365 days of paid sick leave in any period of four years, including 183 days' absence in any period of 12 months during which employees receive their pay in full, the other days of absence on grounds of illness qualifying for half-pay within the limit of 365 days in four years.

43. It is true that, as the Irish, Austrian and United Kingdom Governments and the Board have submitted, the consequence of the application of those provisions in combination is to ensure that those workers suffering from incapacity for work caused by a pregnancy-related illness continue to be paid in full or in part for a certain period. In addition, it is established case-law that the pay to be provided by an employer during a worker's period of sick leave constitutes 'pay' within the meaning of Article 141 EC.[29] Lastly, it is indisputable that, as happened in Ms McKenna's case, application of those provisions may lead to reduction in pay for a pregnant worker who is unfit for work because of a pregnancy-related illness.

28 — Thus, it has been held that the following constitute working conditions, e.g. determination of the beginning of the period of maternity leave (Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 47), the right of all employees to have their performance assessed each year (Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 27), the making available to employees, by their employer, of nursery places at their place of work, or outside it (*Lommers*, paragraph 26), the conditions applicable to employees' returning to work following parental leave (Case C-320/01 *Busch* [2003] ECR I-2041, paragraph 38), a scheme of part-time work designed to allow employees who have reached a certain age to make a smooth transition from work to retirement (*Kutz-Bauer*, paragraph 45, and *Steinicke*, paragraphs 49 and 50), and the determination of when paid annual leave is to be taken (Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 36).

29 — *Rinner-Kuhn* (paragraph 7) and *Høj Pedersen and Others* (paragraph 32).

44. For all that, those considerations to my mind provide no grounds on which the provisions at issue could fall within the ambit of Article 141(1) and (2) EC and Directive 75/117. Indeed, the provisions that are impugned in the main proceedings are not confined to fixing the amount of pay owed to employees on sick leave, but determine also the duration of that entitlement. Next, the direct and automatic consequence of application of the contested provisions to a pregnant worker who is unfit for work during her pregnancy because of a pregnancy-related illness is that the period of her absence due to that incapacity for work is deducted from the number of days for which she is entitled to paid sick leave. Thus, Ms McKenna's complaints about the reduction of her pay for the period 6 July to 3 September 2000 and the lessening of the value and duration of the benefits to which she might be entitled if she were to fall sick in the future are both attributable to the setting against her paid sick leave of her absences due to such incapacity for work.

45. Furthermore, as the Commission has emphasised, application of the impugned provisions of the Board's sick-leave scheme does not necessarily lead to reduction of pay for a pregnant woman unfit for work because of a pregnancy-related illness. Such reduction can come about only if the woman concerned has exhausted the term of 183 days in 12 months during which employees unfit for work may receive full pay. Thus, in the circumstances of the case, Ms McKenna would not have suffered any loss of pay for the period 6 July to 3 September 2000 if the duration of her absences due to incapacity for work during the relevant period of 12 months had been less than 183 days. That reduction of pay is, therefore, no more than an indirect and contingent result of application of the scheme in question. Likewise, the other damage Ms McKenna alleges she has suffered, which is due to the diminution in value and term of the benefits she might claim were she to fall sick in the three following years, will bring about financial consequences only if she does fall sick. In the circumstances, the financial consequences of that reduction of her entitlement to sick leave are, therefore, equally contingent.

46. It appears to me, therefore, that the circumstances of this case are different from those of *Rinner-Kühn* and *Høj Pedersen and Others*, which also concerned schemes of payment in the case of incapacity for work. Thus, in *Rinner-Kühn*, the system at issue provided, where employees were unfit for work, for them to continue to be paid for six weeks but excluded from the benefit of that scheme those workers whose contract of employment provided for a normal period of work of not more than 10 hours a week or 45 hours a month. In *Høj Pedersen and Others*, under the system in question a pregnant

woman unfit for work on account of a pregnancy-related illness was not entitled to be paid her full salary by her employer but only to daily benefits of a lesser amount, whereas, in the case of incapacity for work due to sickness, workers were entitled to receive their pay in full.

47. In those cases it was in the light of Article 119 of the EC Treaty[30] and of Directive 75/117 that the Court considered whether the systems at issue were discriminatory. None the less, in both those cases application of the schemes in question produced direct and automatic effects on the amount of the allowance made to employees when they were sick. Thus, in *Rinner-Kühn,* application of the contested scheme deprived certain employees of the benefit of continuing to receive their pay when unfit for work. Likewise, in *Høj Pedersen and Others* the direct and automatic result of that application was that women workers unfit for work because of a pregnancy-related illness received benefits less than those that they would have received if they had been unfit for work because of any other illness. Application of those schemes therefore affected directly and automatically the amount of the payments made to employees unfit for work, viz. their pay within the meaning of Article 141(1) and (2) EC.

48. That is not the case in the present proceedings. As I have said, the direct and automatic result for pregnant women of the application of the impugned provisions is the setting of their periods of absence due to a pregnancy-related illness against the number of days of paid sick leave. It is, therefore, the duration of the benefits provided for in the case of sick leave and not the amount of those benefits that is the crux of this case. Now, the number of days of paid sick leave is not to be confused with the pay due to employees in case of sickness. I can conclude from the broad logic of the provisions of the sick-leave scheme at issue that they are designed to ensure that employees, if they should fall sick and find themselves for that reason unfit for work, may follow a doctor's orders certifying their temporary incapacity for work and may take care of themselves while remaining in a relationship of employment with the employer and continuing to receive their pay in full, and then in part. That is, therefore, an advantage stipulated in their contract of employment that constitutes, as a result, 'working conditions' within the meaning of Directive 76/207.

49. Accordingly, the fact that in this case application of those provisions leads to financial consequences for the women workers concerned ought not, in accordance with well-established case-law, to be sufficient to bring those provisions within the ambit of

30 — Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.

Article 141(1) and (2) EC and Directive 75/117.[31] It may be timely to observe in this regard that that case-law was elucidated in *Defrenne III*, the background to which was the challenge to an age-limit imposed by an airline on air hostesses because that limit was lower than that imposed on staff of the male sex. It had been argued before the Court that Article 119 of the Treaty must apply in such a case because it was only the expression of a more general principle of non-discrimination, and because the principle of equal pay laid down in that article implied that working conditions were to be the same for women and men. The Court rejected that argument, stating that that article constituted a special rule the scope of which could not be extended to elements of the employment relationship other than those to which it made express reference and which were based on the close connection between the nature of the services provided and the amount of remuneration.[32] Significant development of the Community legal order in the sphere of equal treatment for men and women since the date of the facts involved in *Defrenne III* has not challenged that case-law.[33]

50. Similarly, I believe, unlike Ms McKenna and the Italian Government, that the impugned provisions ought not to be regarded as falling at one and the same time within the ambit of Directive 76/207, inasmuch as their application has led to reduction of the complainant's entitlement to sick leave if she should fall sick in the future, and of Article 141(1) and (2) EC, inasmuch as those provisions resulted in the halving of her pay for the period 6 July to 3 September 2000.

51. As the Commission has very correctly observed, the two complaints put forward by Ms McKenna are the result of the application of the same provisions. They both arise from the setting against the duration of entitlement to paid sick leave of her periods of absence due to a pregnancy-related illness. They are, therefore, the consequence of the same rule arising from the application of the provisions at issue in combination, under which provisions the absences of a pregnant woman on grounds of incapacity for work caused by a pregnancy-related illness must be deducted from her rights to paid sick-leave, like absences due to incapacity for work caused by any other illness. Moreover, as I have already said, the fact that a pregnant worker may suffer a reduction of her pay following such absences is a contingent and indirect result of the application of the

31 — Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 19 to 21; Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 59; *Lommers*, paragraph 28 and *Steinicke*, paragraph 51.

32 — Paragraphs 20 and 21.

33 — Here I shall simply remark that the scope of equal treatment for men and women, originally provided for by Article 119 of the Treaty apropos of pay only, has been widened by several directives, in particular by Directive 76/207, to take in various spheres concerning the employment relationship and social security. The Treaty of Amsterdam raised it to the rank of a fundamental principle to be observed in all the Community's fields of action (see Articles 2 EC and 3(2) EC).

impugned provisions. [34] It is in the light of those considerations that I believe that there are no grounds for holding that those provisions are simultaneously working conditions within the meaning of Directive 76/207 and conditions of pay falling within the ambit of Article 141(1) and (2) EC and Directive 75/117. [35]

52. I therefore propose that the Court should reply to the first and fourth questions referred that a sick-leave scheme that treats in exactly the same way those employees who suffer from a pregnancy-related illness and those who are victims of any other illness, in that the periods of absence due to incapacity for work caused by a pregnancy-related illness and occurring during that pregnancy are set against entitlement to paid sick leave, falls within the ambit of Directive 76/207 and not within that of Article 141(1) and (2) EC and Directive 75/117.

B — *Whether any discrimination exists*

53. By its second question, the national court asks in substance whether it is contrary to Directive 76/207 for a sick-leave scheme to treat in exactly the same way workers suffering from a pregnancy-related illness and those who are victims of any other illness, in that periods of absence due to incapacity for work caused by a pregnancy-related illness and occurring during that pregnancy are set against entitlement to paid sick leave.

54. The Irish and United Kingdom Governments and the Board consider that the provisions of the sick-leave scheme at issue are not discriminatory because they treat in the same way cases of incapacity for work caused by a pregnancy-related illness and those caused by other illness. According to those interveners, Ms McKenna seeks to benefit from a more favourable scheme than the sick-leave scheme under general law. More favourable treatment is not, in their view, justified. Thus, the Court's reasoning in

34 — The circumstances of this case are therefore different from those of the case giving rise to *Seymour-Smith and Perez*. That case concerned national rules under which, on the one hand, in the case of unfair dismissal the person concerned could be reinstated or re-engaged or, if such orders could not be made, compensation could be awarded. On the other hand, those rules provided that workers who had not been continuously employed for a minimum period of two years ending on the effective date of dismissal were excluded from the benefit of those provisions. The Court, sitting as a full court, ruled that the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain compensation fall within the scope of Article 119 of the Treaty. It considered, however, that the conditions determining whether an employee is entitled, where he has been unfairly dismissed, to obtain reinstatement or re-engagement fall within the scope of Directive 76/207 (paragraph 41 of the judgment). In that case it was possible to consider that there were two separate rules, one concerning the conditions for entitlement to reinstatement or re-engagement and the other concerning the conditions for entitlement to compensation. Furthermore, the consequences of the application of the second rule on entitlement to compensation were direct and automatic.

35 — See, to that effect, *Gillespie and Others*, paragraph 24, and *Gerster*, paragraph 24, and Case C-166/99 *Defreyn* [2000] ECR I-6155, paragraph 36.

Brown, that there can be no comparison between a pregnancy-related illness and any other illness is valid only in the case of dismissal and is justified by the very harmful effects that the risk of dismissal might have on a pregnant woman's physical and mental state. In that judgment the Court also took account of the fact that Directive 92/85, which was not yet applicable at the material time, lays down an absolute prohibition of dismissal during pregnancy. That reasoning cannot be transposed to the sphere of sick pay. The interveners submit that in the present case it is the Court's reasoning in *Høj Pedersen and Others* that must be held to apply, according to which workers suffering from illness must be treated in the same manner, whatever the cause of the illness.

55. The Irish and United Kingdom Governments also emphasise that the position taken up by Ms McKenna would have very damaging financial repercussions for the Member States. In this connection the Irish Government refers to the third recital in the preamble to Directive 92/85, which states that under the terms of Article 118a [36] of the EC Treaty, directives are to avoid imposing financial constraints in a way which would hold back the development of small and medium-sized undertakings. Those two interveners also argue that it would be very difficult in practice to distinguish, in the case of a pregnant woman, incapacity for work actually caused by a pregnancy-related illness and incapacity attributable to illness.

56. I do not support that view. Like Ms McKenna, the Italian and Austrian Governments and the Commission, I consider that the provisions in question must be regarded as discriminatory. Like those interveners, I believe that that analysis is logically enough dictated in the light of developments in the case-law in the field of equal treatment of men and women in regard to pregnant women. Indeed, the Ariadne's clew followed in that case-law is, to my mind, that any unfavourable treatment of a pregnant woman which is the consequence of her being pregnant constitutes discrimination on grounds of sex because pregnancy, of its nature, affects women workers alone. The reasons on which that case-law reposes were set out in *Webb* and *Brown*, and recapitulated in Directive 2002/73. [37] Those decisions are intended to protect a woman's biological condition during and after pregnancy. The

36 — Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC.

37 — Twelfth recital in the preamble.

point is to prevent, so far as is possible, women workers from being induced to renounce motherhood on account of the disadvantages it might cause in the conduct of their professional lives. [38]

57. The case-law at first developed in respect of a refusal to hire, or a dismissal, the reason for which was the applicant or employee's pregnancy.

58. Thus, the Court has held that refusal to employ a woman because of her pregnancy constitutes direct discrimination. [39] Such discrimination cannot, therefore, 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 [40] or of her pregnancy, [41] or even by provisions concerning the protection of pregnant women which would prevent her being employed from the outset and for the duration of the pregnancy in the post to be filled. [42]

59. Similarly, the Court has held that dismissal because of pregnancy is contrary to the requirements of Directive 76/207, and not only when the woman is employed under a contract of employment for an indefinite period, [43] but also when she is employed for a fixed term. [44] Furthermore, the breaking of the contract of employment cannot be justified by the fact that the employee is prevented by a statutory prohibition connected to her condition from carrying out the work for which she was engaged. [45] Likewise, the fact that the pregnant worker had been especially engaged to replace a woman on maternity leave does not justify her dismissal either. [46] According to the

38 — See, to this effect, *Webb*, paragraphs 20 to 22, and *Brown*, paragraphs 17 and 18.

39 — Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12, and Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 20.

40 — In *Dekker*, the employer had refused to hire a pregnant woman because of her condition, on the ground that its insurers would not reimburse the daily benefits it would have had to pay the woman in question during her maternity leave and because it would also have been obliged to engage a replacement during that leave.

41 — *Mahlburg*, paragraph 29.

42 — Ibid., paragraph 27. Ms Mahlburg, who worked as a nurse in a cardiac surgery clinic under a fixed-term contract, applied for posts which were to be filled immediately and which required the person appointed to work in the operating theatre. Ms Mahlburg being pregnant at the time she made the application, her employer decided not to accept her application because the provisions of the Mutterschutzgesetz (German law on the protection of mothers) expressly forbade employers to make pregnant women work in areas in which they would be exposed to the harmful effects of dangerous substances.

43 — Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657.

44 — Case C-438/99 *Jiménez Melgar* [2001] ECR I-6915, and Case C-109/00 *Tele Danmark* [2001] ECR I-6993.

45 — *Habermann-Beltermann*. In that case, a home for the aged terminated the contract of employment of a nurse engaged to carry out night-time work, on the ground that she was pregnant and that a provision of the Muttergschutzgesetz prohibited night-time work for women.

46 — *Webb*. Ms Webb had been engaged specifically to replace an employee on maternity leave and she herself found that she was pregnant two weeks after beginning work. The trial and appeal courts had dismissed her action challenging the dismissal, holding that she had not suffered discrimination on grounds of sex because she had become unable to perform the tasks for which she had been engaged and because a man recruited for the same purposes and absent for a comparable period would also have been dismissed.

Court, while the availability of an employee is necessarily 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 maternity is essential to the proper functioning of the undertaking in which she is employed, for any contrary interpretation would render ineffective the provisions of the directive. [47]

60. This protection of pregnant women against unfavourable measures on the basis of their pregnancy has subsequently been extended to pregnancy-related illnesses. That extension was recognised in connection with a dismissal. Thus, in *Brown*, the absence of an employee on grounds of incapacity for work due to a pregnancy-related illness had been taken into account in order to justify her dismissal under a clause in the contract of employment stipulating that if an employee were absent because of sickness for more than 26 weeks continuously, he or she would be dismissed. The Court, expressly reversing the position it had adopted a year earlier in *Larsson*, [48] held that although pregnancy cannot in any way be compared to a pathological condition in order to be able to justify a dismissal as incapacity for work arising from another cause might be, as it had held in *Webb*, the fact remains 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. According to the Court, 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. It concluded that dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her condition 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. [49]

61. Lastly, the protection so afforded to pregnant women unable to work because of a pregnancy-related illness has also been

47 — Ibid., paragraph 26.

48 — Case C-400/95 *Larsson* [1997] ECR I-2757. In that judgment the Court had held that outside the periods of maternity leave laid down by the Member States to allow female workers to be absent during the period in which the problems inherent in pregnancy and confinement occur, and in the absence of any national or, as the case may be, Community provisions affording women specific protection, a woman is not protected under Directive 76/207 against dismissal on grounds of periods of absence due to an illness originating in pregnancy.

49 — Paragraphs 22 and 24 of the judgment. The Court added, however, that 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. It thus repeated the distinction it had drawn in Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraphs 16 and 17.

upheld by the Court in connection with the financial effects of such incapacity for work.

62. Thus, in *Høj Pedersen and Others*, the system applicable in the dispute in the main proceedings provided, as I have indicated above, that in the case of incapacity for work every worker was entitled to receive his or her pay in full, whereas a pregnant woman unfit for work on account of a pregnancy-related illness before the start of her maternity leave was entitled only to daily benefits of a lesser amount. The stages of the reasoning followed by the Court do not differ from those of its reasoning in *Brown*.

63. The Court began by noting that disorders and complications due to pregnancy which may cause incapacity for work are inherent in the condition of pregnancy and are thus a specific feature of that condition. It then went on to examine the effects of application of the scheme at issue, stating that all workers were in principle entitled to continue to be paid in full in the event of incapacity for work. It continued as follows: 'Thus, the fact that a woman is deprived, before the beginning of her maternity leave, of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy must be regarded as treatment based essentially on the pregnancy and thus as discriminatory'. It concluded that such a benefit system constituted direct discrimination prohibited by Article 119 of the Treaty and by Directive 75/117.[50]

64. In the same case of *Høj Pedersen and Others*, the Court was also called upon to rule on national legislation which provides that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her. After recalling that Article 5 of Directive 76/207 provides that women must enjoy the same working conditions as men, the Court observed that the legislation at issue affected women employees only, so that it constituted discrimination in breach of that provision.[51] It then considered that that measure could not be justified by the provisions of Directive 92/85, which permit an employer to adjust the working conditions of a pregnant employee.

65. I deduce from those considerations that, contrary to what is maintained by the Irish and United Kingdom Governments and by the Board, the criteria used by the Court in

50 — *Høj Pedersen and Others*, paragraphs 33 to 37.

51 — Paragraphs 51 to 53 of that judgment.

assessing whether or not the system at issue in *Høj Pedersen and Others* was discriminatory did not differ from those applied in *Brown*, in connection with continuation of the employment relationship. To my mind, the Court by no means held that pregnant women must be afforded a lesser protection as regards the pecuniary consequences of their absence from work due to a pregnancy-related illness. In both cases, the Court took as the basis for its reasoning the premiss that pregnancy and the complications that may arise during it, making the woman unable to work, can affect employees of the female sex alone and it concluded therefrom that unfavourable measures based on that pregnancy or that illness have to be regarded as discrimination on grounds of sex.

66. Thus, in *Høj Pedersen and Others* the Court did not state, as the Irish and United Kingdom Governments and the Board would appear to believe, that a pregnant woman's pregnancy-related illness must be treated in every way as though it were any other illness where the system at issue concerns compensation for cases of incapacity for work, quite irrespective of the consequences of application of such a system. We have seen that, on the contrary, the Court began by examining the nature of the content of the provisions in question and their consequences for pregnant women, applying thereto the same analytical method as with regard to access to employment or to dismissal. Next, it found that the system at issue created a disadvantage for women, based specifically on pregnancy, and deduced from that that the system was discriminatory. The conclusion to which the judgment in *Høj Pedersen and Others* leads, namely, that pregnant women unable to work because of a pregnancy-related illness must receive the same compensation as workers unable to work on account of any other illness, must therefore of necessity be placed in context and interpreted in the light of the objective pursued, viz. to abolish the discrimination created by the system at issue.

67. Indeed, as Ms McKenna points out, the Community rules on equal treatment are intended to bring about equality in substance rather than in form. [52] The pursuit of that objective involves, therefore, paying particular attention to the practical consequences, for women employees, of the application of the provisions at issue in the main proceedings. It is by applying the same line of reasoning as that followed by the Court in the abovementioned cases that I can conclude that the provisions of the Board's sick-leave scheme are discriminatory. Thus,

52 — See, to this effect, *Thibault*, paragraph 26, *Mahlburg*, paragraph 26 and *Gómez*, paragraph 37.

treating incapacity for work caused by a pregnancy-related illness and occurring during the pregnancy in the same manner as incapacity for work caused by any other illness produces the result, under the Board's sick-leave scheme, that absences due to incapacity for work caused by a pregnancy-related illness are set against pregnant workers' entitlement to sick leave. Such deduction constitutes a disadvantage that can affect women alone, since they alone can be subject to such incapacity for work. Since in that manner the Board's scheme makes women suffer a disadvantage in their working conditions on grounds of sex, it must be considered to constitute direct discrimination in contravention of the provisions of Articles 2(1) and 5(1) of Directive 76/207.

68. Contrary, on the one hand, to what the national court seems to think, and, on the other, to the position adopted by the Irish and United Kingdom Governments and the Board, the special situation of women workers on maternity leave, as it appears from the case-law and Directive 92/85, is not in opposition to my analysis. It has, it is true, been held in *Gillespie and Others* that a pregnant woman on maternity leave is not in the same situation as a worker actually at work, so that she cannot, on the basis of Article 141(1) and (2) EC or of Directive 75/117, claim that she should continue to receive full pay, as though she were working.[53] It is equally well established that, under Article 11 of Directive 92/85, a woman worker, during her maternity leave, is not entitled to maintenance of her full pay, but to maintenance of a certain payment or an allowance which must not be less than that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health.[54]

69. However, that case-law and the provisions of Directive 92/85 relate only to the particular situation of women workers during maternity leave.[55] I do not see how that case-law or those provisions could justify the application of unfavourable measures based on the pregnancy before maternity leave has begun.

70. Against the analysis according to which the impugned scheme is discriminatory, the Irish and United Kingdom Governments raise two further arguments, the first of which concerns the pecuniary consequences that such an interpretation could have for employers, and the second of which concerns the practical difficulties of implement-

53 — Paragraphs 17 and 22 of the judgment

54 — It is, however, to be recalled that those provisions do not prevent the maintenance of more favourable provisions existing in the various Member States (Article 3 of Directive 92/85).

55 — *Høj Pedersen and Others*, paragraph 39

ing it. I believe that it has to be possible to reject those arguments.

71. First of all, so far as the financial consequences which might ensue for the employer from the doing away with the discrimination at issue are concerned, that argument has frequently been pleaded in order to justify a measure disadvantageous to pregnant women and, as we have already seen, it has duly been rejected by the Court, which has invariably held that financial loss cannot justify direct discrimination on grounds of sex. [56] I see nothing in this case that could lead to revision of that case-law. The Irish and United Kingdom Governments have produced no evidence that might provide a means for measuring the extent of the financial consequences they allege. It is also to be recalled that, as the case-law now stands, those financial consequences are limited to the term of the pregnancy and come to an end when maternity leave begins, since, in accordance with the distinction drawn in *Handels- og Kontorfunktionærernes Forbund*, and since confirmed, [57] illnesses manifesting themselves after the end of maternity leave are to be treated in the same way, for there is no reason to draw a distinction between those attributable to pregnancy or confinement and others. [58] I therefore think, in the light of those considerations, that the financial consequences of doing away with the discrimination at issue ought not to justify its remaining in existence.

72. Next, the objection based on the practical difficulties of establishing which cases of incapacity for work are really justified by a pregnancy-related illness is not a new argument either. Such a distinction was deliberately and expressly drawn by the Court in *Høj Pedersen and Others*, where it held that the loss of salary incurred by a pregnant woman absent from her work before the beginning of her maternity leave not because of a pathological condition or of any special risks for the unborn child giving rise to an incapacity for work attested by a medical certificate, but by reason either of routine pregnancy-related minor complaints or of mere medical recommendation, without there being any incapacity for work in either of those two situations, cannot be regarded as treatment based essentially on the pregnancy but rather as based on the choice made by the employee. [59] I do not deny that the distinction may in certain cases be difficult to draw, nor that it may sometimes

56 — As was declared in *Busch*, 'the Court has already held that discrimination on grounds of sex cannot be justified on grounds relating to the financial loss for an employer' (paragraph 44).

57 — *Brown*, paragraph 26.

58 — Paragraph 16 of the judgment.

59 — Paragraphs 48 and 49 of the judgment.

give rise to abuses. For all that, the instant case has revealed no precise detailed evidence to show that applying that distinction would run foul of serious difficulties in the various Member States. It seems to me that that objection too must be dismissed.

73. In consequence, I suggest that the Court's reply to the second question referred should be that it is contrary to Directive 76/207 for a sick-leave scheme to treat in exactly the same way workers suffering from a pregnancy-related illness and those who are victims of any other illness, in that periods of absence due to incapacity for work caused by a pregnancy-related illness and occurring during that pregnancy are set against entitlement to paid sick leave.

C — *On the consequences to be drawn from discrimination*

74. By its third question, the national court asks whether Directive 76/207 requires an employer such as the Board to put in place special provisions to cover absences from work due to incapacity for work caused by a pregnancy-related illness and arising during pregnancy.

75. It does not seem to me that I need dwell long on the answer to this question. I shall simply recall that Article 5 of Directive 76/207 requires the Member States to take the measures necessary to ensure that provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended. Furthermore, it is for all the authorities of the Member States to ensure observance of the rules of Community law within the sphere of their competence. [60] It therefore falls to the competent national authorities to take the measures necessary to put an end to the discrimination found in this case, by making fitting amendments to the provisions of the sick-leave scheme at issue. The national court has not asked the Court to define what those measures might be, and I think that it does not belong to the Court to do so.

60 — See, for example, Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 20.

V — Conclusion

76. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Labour Court as follows:

(1) A sick-leave scheme that treats in exactly the same way those employees who suffer from a pregnancy-related illness and those who are victims of any other illness, in that the periods of absence due to incapacity for work caused by a pregnancy-related illness and occurring during that pregnancy are set against entitlement to paid sick leave, falls within the ambit of 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 not within that of Article 141(1) and (2) EC and Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

(2) Such a scheme is contrary to Directive 76/207.

(3) It falls to the competent national authorities to take all the measures necessary to put an end to the discrimination entailed by such a scheme.