JUDGMENT OF THE COURT (Third Chamber)

29 October 2009 *

In Case C-63/08,

REFERENCE for a preliminary ruling under Article 234 EC from the tribunal du travail d'Esch-sur-Alzette (Luxembourg), made by decision of 14 February 2008, received at the Court on 18 February 2008, in the proceedings

Virginie Pontin

v

T-Comalux SA,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting as President of the Third Chamber, P. Lindh, A. Rosas, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: French.

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 January 2009,

after considering the observations submitted on behalf of:

— Ms Pontin, by L. Dupong, avocat,

— T-Comalux SA, by A. Kronshagen and V. Tutak, avocats,

— the Luxembourg Government, by C. Schiltz, acting as Agent,

— the Italian Government, by I. Bruni, acting as Agent, and by W. Ferrante, avvocato dello Stato,

— the Commission of the European Communities, by M. van Beek, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 31 March 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 10 and 12 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 (10th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) and Article 2 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15), ('Directive 76/207').

2 The reference was made in the course of proceedings between Ms Pontin, and her former employer, T-Comalux SA ('T-Comalux') following Ms Pontin's dismissal in January 2007.

Legal context

Community law

Directive 92/85

3 The ninth recital in the preamble to Directive 92/85 states that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding must not result in women being treated unfavourably on the labour market nor work to the detriment of directives concerning equal treatment for men and women.

4 The purpose of that directive, as stated in Article 1(1) thereof, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.

5 A pregnant worker is defined in Article 2(a) of Directive 92/85 as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'.

6 Article 8(1) of that directive provides that Member States are to take the necessary measures to ensure that workers within the meaning of Article 2 of the directive 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.

7 Article 10 of Directive 92/85, headed 'Prohibition of dismissal', reads:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

8 Article 12 of Directive 92/85 provides:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who [consider] themselves wronged by failure to

comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities.'

Directive 76/207

9 As is stated in Article 1(1) of Directive 76/207, the purpose of that directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, vocational training and working conditions.

10 Article 2(1) of Directive 76/207 provides that that principle means that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'.

11 The first subparagraph of Article 2(7) of that directive provides that the latter 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'. The third subparagraph of Article 2(7) states that '[l]ess favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive [92/85] shall constitute discrimination within the meaning of this Directive'.

12 According to Article 3(1)(c) of Directive 76/207, application of the principle of equal treatment means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation in particular to employment and working conditions, including dismissals. Under Article 3(2)(a),

Member States are required to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

National law

13 Article L. 124-11(1) and (2) of the Luxembourg Code du travail ('Labour Code') provides:

'(1) A dismissal which is contrary to law or is not based on genuine and serious grounds related to the capacity or the conduct of the employee or based on the operational requirements of the undertaking, the establishment or the service is wrongful and constitutes a socially and economically unacceptable measure.

The same applies with regard to a dismissal which is contrary to the general criteria laid down in Article L. 423-1(3).

(2) Legal proceedings for compensation in respect of the wrongful termination of a contract of employment shall be brought before the court having jurisdiction in employment matters within three months of notification of dismissal or communication of the reasons, or else be time-barred. If no reasons are given, time shall run from the expiry of the period laid down in Article L. 124-5(2).

That period shall be validly suspended where a written complaint is submitted to the employer by the employee, his legal representative or his trade union. That complaint shall cause a new period of one year to commence and proceedings shall be time-barred at the end of that period.'

14 Article L. 124-12(4) of that code states:

'In cases in which as a matter of law a dismissal is regarded as null and void the court having jurisdiction in employment matters shall order the reinstatement of an employee within his undertaking if he so requests. …

In actions for nullity the provisions of Article L. 124-11 shall apply.'

15 Book III, Title III, of the Labour Code contains Chapter VII, headed 'Prohibition of dismissal', Article L. 337-1 of which reads:

'(1) An employer may not inform a female employee of the termination of her employment relationship or, where relevant, call her to attend a preliminary interview where she has been medically certified as being pregnant or within 12 weeks of her giving birth.

Where notice of termination of employment is given before the pregnancy has been medically certified, the female employee may, within eight days of notification of the dismissal, supply evidence of her condition in the form of a certificate sent by registered post.

Any dismissal notified contrary to the prohibition of dismissal as set out in the preceding two paragraphs — and, where relevant, any notification to attend a preliminary interview — shall be deemed null and void.

Within 15 days of the termination of the contract, the female employee may, by ordinary application, request the president of the court exercising jurisdiction in employment matters, as a matter of urgency and in summary proceedings, after the parties have been heard or have been duly summoned to attend, to declare the dismissal null and void and order her continued employment, and, where appropriate, her reinstatement in accordance with the provisions of Article L. 124-12(4).

…'

16 Article L. 337-6 of that code reads:

'A female employee who has been dismissed on the ground of her marriage may claim that her dismissal is null and void and apply for the employment relationship to continue, in a letter sent by registered post to her employer within two months following notification of such dismissal. In that case, the contract of employment shall continue and the worker shall continue to be entitled to receive her pay in full.

If the female employee has not claimed that her dismissal should be declared null and void and applied for the employment relationship to continue within the period specified above, she shall be entitled to the allowances [a severance allowance after a minimum of five years' continuous service for the same employer] referred to in Article L. 124-7(1). She may also bring legal proceedings for compensation in respect of the wrongful termination of her contract of employment under Articles L. 124-11 and L. 124-12.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 Ms Pontin was recruited by T-Comalux under a full-time contract for an indefinite period starting in November 2005.

18 By registered letter of 18 January 2007, which she received on 22 January 2007, Ms Pontin was informed of her dismissal and given a period of notice beginning 31 January and ending 30 March 2007. The reasons for the dismissal with notice are not apparent from the order of the referring court.

19 Ms Pontin claims before that court that on 19 January 2007 she sent a medical certificate to T-Comalux by ordinary post. The company denies before that court that it received any such certificate.

20 On 24 January 2007, Ms Pontin sent T-Comalux an e-mail informing it that her 'health [had] hardly improved', that she would not be able to return to the office the following day and that she would send a medical certificate as soon as possible.

21 By registered letter dated 25 January 2007, T-Comalux informed Ms Pontin that she was dismissed with immediate effect 'on grounds of serious misconduct' consisting of 'unauthorised absence for more than three days'.

22 By registered letter of 26 January 2007, received by T-Comalux on 30 January 2007, Ms Pontin stated that she was pregnant. She claimed that, as a result, the dismissal of which she had been notified by T-Comalux was null and void.

23 As she had not received a reply from T-Comalux to that letter, on 5 February 2007 Ms Pontin brought proceedings before the referring court seeking a declaration that her dismissal was null and void.

24 By judgment of 30 March 2007, that court, in a different composition from that in which it delivered the present order for reference, held that it did not have jurisdiction to hear Ms Pontin's application for a declaration that her dismissal of 18 January 2007 was null and void. According to the court thus composed, Article L. 337-1 of the Labour Code gives the president of the court dealing with labour matters, that is to say, the tribunal du travail (Labour Court), special jurisdiction to annul, as a matter of urgency and as a protective measure, a dismissal that has occurred at a time when the female worker is pregnant. Thus, Ms Pontin should have applied to the president of that court for a declaration that her dismissal was null and void. It is apparent from the case-file lodged at the Court of Justice that Ms Pontin, who does not appear to have been represented at that time by a lawyer, had sent her application, in the form of a letter, to the 'Tribunal du travail — For the attention of the President and his fellow Judges', and had begun her written observations with the salutation 'Mr President'.

25 Ms Pontin did not appeal against that judgment. At the hearing before the Court of Justice, she stated in that connection that she had chosen to avoid the risks associated with such an appeal. At the same time, she did not wish to allow the period of three months within which an employee may bring an action for damages for wrongful dismissal as provided for in Article L. 124-11(1) and (2) of the Labour Code ('the action for damages') to expire.

26 By a second action, brought on 18 April 2007, Ms Pontin claimed that the referring court should order T-Comalux to pay her damages. In support of that claim, she argues, inter alia, that both her dismissal with notice of 18 January 2007 and her subsequent dismissal with immediate effect are contrary to law and thus wrongful under Article L. 124-11.

27 T-Comalux contends that ordinary Luxembourg law relating to actions for damages does not apply to a pregnant worker. Under Article L. 337-1 of the Labour Code, such a worker does not have a choice between an action for nullity and reinstatement as provided for in that provision ('an action for nullity and reinstatement') and an action for damages, but must provide her employer with a medical certificate as evidence of her pregnancy within eight days of the dismissal being notified, as required by the second subparagraph of Article L. 337-1(1) ('the eight-day period'), and bring the action for nullity and reinstatement before the president of the tribunal du travail within 15 days of the contract being terminated, which is the period laid down in the fourth subparagraph of Article L. 337-1(1) ('the 15-day period').

28 According to the referring court, it is to be inferred from the relevant Luxembourg law in this case that a pregnant employee who, for whatever reason, even one beyond her control, has allowed the periods of 8 days and 15 days to expire no longer has available a legal remedy to challenge her dismissal, so that once those periods have expired the dismissal of such a pregnant employee is neither null and void nor wrongful, but is perfectly valid. The order for reference also alludes to case-law of the Luxembourg courts, according to which the period within which an action for nullity must be brought begins to run not from the receipt of the letter of dismissal but from the time that letter is posted.

29 Against that background, the tribunal du travail d'Esch-sur-Alzette, uncertain whether that national legislation is in compliance with Community law and, in particular, with Directives 92/85 and 76/207, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 10 and 12 of [Directive 92/85] to be interpreted as not precluding the national legislature from making a legal action brought by a pregnant employee who has been dismissed during her pregnancy subject to time-limits fixed in advance, such as the eight-day period laid down in the second subparagraph of Article [L.] 337-1(1) of the [Luxembourg] Code du travail or the 15-day period laid down in the fourth subparagraph of [Article L. 337-1(1)]?

(2) If the answer to the first question is in the affirmative, are the 8- and 15-day periods to be regarded as being too short to allow a pregnant employee who has been dismissed during her pregnancy to take legal proceedings to safeguard her rights?

(3) Is Article 2 of [Directive 76/207] to be interpreted as not precluding the national legislature from denying a pregnant employee who has been dismissed during her pregnancy the right to bring an action for damages for wrongful dismissal, which is reserved, under Article L. 124-11(1) and (2) of the Code du travail, to other employees who have been dismissed?'

The questions referred for a preliminary ruling

30 It is apparent from the case-file lodged at the Court that, by its three questions, the referring court asks in essence whether Directives 92/85 and/or 76/207 preclude national legislation such as Article L. 337-1 of the Labour Code, which, specifically in connection with the prohibition of dismissal of pregnant workers and workers who have recently given birth or are breastfeeding laid down in Article 10 of Directive 92/85, restricts the remedies available to them to an action for nullity and reinstatement, subject to time-limits such as those applying in the main proceedings, and excludes in particular an action for damages.

31 In that context, the first two questions concern the preliminary point of whether procedural rules such as those contained in Article L. 337-1 comply with the requirements of Articles 10 and 12 of Directive 92/85 and, in particular, enable all workers who consider themselves wronged by failure to comply with the obligations arising from Article 10 to pursue their claims by judicial process. The answer to those two questions will affect the answer to the third question, which is in essence whether restriction of the legal remedies available in the event of dismissal during pregnancy solely to an action for nullity and reinstatement constitutes discrimination within the meaning of Directive 76/207.

Observations submitted to the Court

32 Ms Pontin contends that a pregnant employee's entitlement under Luxembourg law to exercise her rights does not meet the criteria laid down by Directive 92/85 in order to ensure genuine and effective protection of the rights of such an employee. So far as Directive 76/207 is concerned, she contends that a difference in treatment as regards dismissal, which denies a pregnant employee the option to bring an action for damages, has no reasonable justification and constitutes discrimination between a dismissed pregnant woman and other dismissed employees.

33 T-Comalux submits that Directive 92/85 does not preclude time-limits such as the eight-day and 15-day periods. Moreover, in its view, Directive 76/207 does not preclude a national legislature from denying a pregnant employee the option to bring an action for damages during her pregnancy. A pregnant employee dismissed during her pregnancy, who enjoys protective measures specific to her condition, is not subject to discrimination; on the contrary, she enjoys special protection through an action for annulment of her dismissal.

34 The Luxembourg Government contends that the present reference for a preliminary ruling is based on an incorrect interpretation of the national legislation at issue in the main proceedings, namely that a female employee who allows the eight-day- and 15-day periods to expire no longer has the option to bring an action before a court to challenge her dismissal. According to that government, where a female employee does not exercise that special right, or is unable to do so after the time-limits laid down in that law have expired, she may bring an action for damages. In that context, the time-limits within which an action for nullity and reinstatement must be brought are not too short.

35 The Italian Government submits that periods such as those of 8 and 15 days must be regarded as too short to enable a pregnant worker dismissed during her pregnancy to exercise her rights effectively through legal proceedings. It also submits that Directive 76/207 precludes a national legislature from introducing discrimination against pregnant workers dismissed during their pregnancy by denying them the

possibility of bringing an action for damages, even though such an action is available for other workers who are dismissed.

36 The Commission of the European Communities submits that Articles 10 and 12 of Directive 92/85 do not in principle preclude national legislation that makes the bringing of an action based on Community law subject to time-limits fixed in advance, provided the principles of equivalence and effectiveness are observed. In that regard, it maintains that the 15-day period, since it is so short, infringes those principles and hence Articles 10 and 12. Moreover, the Commission contends that Directive 76/207 precludes national legislation denying a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages for wrongful dismissal where such an action is available to other employees who are dismissed.

Answer of the Court

First two questions

37 As a preliminary point, it should be noted that, unlike the 15-day period, the eight-day period does not appear to constitute a procedural time-limit within which a court must be seised. It is, where relevant, for the referring court to determine whether it is such a time-limit. As for the first two questions, these relate in essence to the principle of effective judicial protection of an individual's rights under Community law, as reflected in Articles 10(3) and 12 of Directive 92/85. Therefore the application of that principle in circumstances such as those at issue in the main proceedings should be examined in the light of a period such as the 15-day period. If the referring court were to consider that the eight-day period also constitutes a time-limit whose expiry is likely to prejudice the exercise of an individual's rights, it would be for it to apply, *mutatis mutandis*, the indications stemming from the present judgment concerning a 15-day period.

38 It should also be noted that the Court must take account, under the division of jurisdiction between the Community judicature and the national courts, of the factual and legislative context in which the questions put to it are set, as described in the order for reference (see, in particular, Case C-330/07 *Jobra* [2008] ECR I-9099, paragraph 17, and case-law cited). Therefore, irrespective of the criticism expressed by the Luxembourg Government in regard to the interpretation of national law adopted by the national court, this reference for a preliminary ruling must be considered in the light of that court's interpretation of that law (see, by analogy, Case C-346/05 *Chateignier* [2006] ECR I-10951, paragraph 22, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 51). The Court's answer to the first two questions must therefore be based on the premiss that an employee dismissed during her pregnancy has no remedy under Luxembourg law apart from an action for nullity and reinstatement.

39 In that regard, it should be noted, first of all, that Article 10(1) of Directive 92/85 provides that Member States must take the necessary measures to prohibit the dismissal of workers coming under that provision during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1) of that directive, save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.

40 In accordance with Article 12 of Directive 92/85, Member States are also required to introduce into their national legal systems such measures as are necessary to enable all workers who consider themselves wronged by failure to comply with the obligations arising from that directive, including those arising from Article 10 of the directive, to pursue their claims by judicial process. Article 10(3) of that directive specifically states that Member States must take the necessary measures to protect pregnant workers or those who have recently given birth or are breastfeeding from the consequences of dismissal which is unlawful by virtue of paragraph 1 of that article (see Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 47).

41 Those provisions, and in particular Article 12 of Directive 92/85, constitute a specific expression, in the context of that directive, of the principle of effective judicial protection of an individual's rights under Community law.

42 It is also apparent from case-law that, although the Member States are not bound under Article 12 of Directive 92/85 to adopt a specific measure, nevertheless the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered (see *Paquay*, paragraphs 45 and 49).

43 As regards the principle of effective judicial protection of an individual's rights under Community law, it is settled case-law that the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 46, and case-law cited).

44 Those requirements of equivalence and effectiveness embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law. They apply both as regards the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law and as regards the definition of detailed procedural rules (see *Impact*, paragraphs 47 and 48).

45 The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 41). However, that principle is not to be interpreted as requiring

Member States to extend their most favourable rules to all actions brought in the field of employment law (see *Levez*, paragraph 42). In order to establish whether the principle of equivalence has been complied with, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to determine whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions (see *Levez*, paragraphs 39 and 43, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 49). For that purpose, the national court must consider whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics (see, to that effect, *Preston and Others*, paragraph 57).

46 It is apparent from case-law that in order to decide whether procedural rules are equivalent the national court must establish objectively, in the abstract, whether the rules at issue are similar taking into account the role played by those rules in the procedure as a whole, the conduct of that procedure and any special features of those rules (see, to that effect, *Preston and Others*, paragraphs 61 to 63).

47 As regards the principle of effectiveness, it is apparent from the Court's case-law that cases which raise the question whether a national procedural provision renders the exercise of an individual's rights under the Community legal order practically impossible or excessively difficult must similarly be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (see Case C-426/05 *Tele2 Telecommunication* [2008] ECR I-685, paragraph 55, and case-law cited).

48 The Court has thus recognised that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty, since

such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by Community law (see Case C-255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 34, and Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 58, and case-law cited). As regards limitation periods, the Court has also held that, in respect of national legislation which comes within the scope of Community law, it is for the Member States to establish those periods in the light of, inter alia, the significance for the parties concerned of the decisions to be taken, the complexities of the procedures and of the legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration (see, to that effect, Case C-349/07 *Sopropé* [2008] ECR I-10369, paragraph 40).

49 Lastly, as is apparent from settled case-law, it is not for the Court to rule on the interpretation of national law, that being exclusively for the national court, which must, in the present case, determine whether the requirements of equivalence and effectiveness are met by the provisions of the relevant national legislation (see *Angelidaki and Others*, paragraph 163). However, the Court, when giving a preliminary ruling, may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 54; Case C-180/04 *Vassallo* [2006] ECR I-7251, paragraph 39; and the order of 12 June 2008 in Case C-364/07 *Vassilakis and Others*, paragraph 143).

50 It is by reference to those considerations that the referring court's first two questions must be answered.

51 In that regard, it is apparent from the order for reference that Article L. 337-1 of the Labour Code was adopted pursuant to Article 10 in conjunction with Article 12 of Directive 92/85.

52 As both the Italian Government and the Commission maintain, and as follows from paragraph 42 above, Articles 10 and 12 of Directive 92/85 do not in principle preclude a national legislature from providing, in respect of the dismissal of pregnant workers and workers having recently given birth or breastfeeding, specific legal proceedings that must be brought within time-limits laid down in advance.

53 However, since Member States are responsible for ensuring that rights which individuals derive from Community law are effectively protected in each case (see, in particular, *Impact*, paragraph 45, and case-law cited), the rules governing such proceedings must comply with the requirements laid down in the case-law cited in paragraphs 39 to 48 above.

54 That conclusion is not weakened by the argument put forward by T-Comalux at the hearing that, unlike an action for damages, available where the dismissal is considered 'wrongful' within the meaning of the national legislation, or an action available in the event of dismissal 'on account of' marriage, introduced by Article L. 337-6 of the Labour Code ('action available in the event of dismissal on account of marriage'), an action for nullity and reinstatement is available almost automatically, irrespective of whether there is wrongful conduct on the part of the employer. Contrary to what that company appears to claim, the mere fact that, when implementing Articles 10 and 12 of Directive 92/85 through the introduction of a specific remedy for pregnant workers, a Member State decides — under the option provided for in Article 10(1) — not to provide for exceptions to the principle of prohibition of dismissal not connected with the condition of being pregnant, having recently given birth or breastfeeding, cannot result in the procedural rules governing that remedy being exempt from the requirements of the principle of effective judicial protection of an individual's rights under Community law.

55 With regard, first, to whether the principle of equivalence is complied with in the present case, it is apparent from the order for reference that both actions in employment law matters mentioned by the referring court, that is to say, an action for damages and an action available in the event of dismissal on account of marriage, appear at first sight to be comparable to an action for nullity and reinstatement. As

stated in paragraph 45 above, it is for the national court to determine whether this is so as regards their purpose, cause of action and essential characteristics.

56 If it emerges that one or more of the actions referred to in the order for reference, or even other national remedies that have not been put before the Court, are similar to an action for nullity and reinstatement, it would also be for the referring court to consider whether such actions involve more favourable procedural rules.

57 In that regard, it would be necessary to take into account the fact that an action for nullity and reinstatement appears to require the matter to be referred to a specific forum, the 'president of the court exercising jurisdiction in employment matters'. It is apparent from paragraph 24 above that that particular requirement seems to be given a literal and particularly strict interpretation. As appears from the facts in the main proceedings, such a requirement is apt to have unfavourable consequences for the individuals concerned, particularly in view of the especially short time-limit for bringing the action, making it difficult to obtain advice or assistance from a specialist legal adviser.

58 In the event that an action for damages and an action for nullity and reinstatement are regarded as similar, it should be noted that the 15-day limitation period applying to the latter action is substantially shorter than the three-month limitation period applying to an action for damages. As regards the action available in the case of dismissal on grounds of marriage, the relevant period within which a national court must be seised is not apparent from the case-file lodged with the Court. That being so, it should be observed that, under Article L. 337-6 of the Labour Code, a female employee has two months within which to request her employer to continue the employment relationship and, if she has not within that period claimed that her dismissal is null and void and requested that her employment relationship continue, she is entitled to severance allowances and may also bring an action for damages.

59 In the light of the evidence brought before the Court, it does not at first sight appear that procedural rules such as those concerning an action for nullity and reinstatement laid

down in the fourth subparagraph of Article L. 337-1(1) of the Labour Code comply with the principle of equivalence, although that is a matter for the referring court to determine, taking into account the case-law cited in paragraphs 43, 45 and 46 above.

60 As regards, secondly, the principle of effectiveness, it should be observed that, as the Italian Government and the Commission have in essence submitted and as is apparent from paragraphs 47 and 48 above, a relatively short period for bringing an action seeking reinstatement of an unlawfully dismissed female employee within the undertaking concerned might in principle be regarded as legitimate. As T-Comalux and the Luxembourg Government point out, it may be in the interests of legal certainty, both for the dismissed pregnant worker and for the employer, that the opportunity for bringing such actions before a court should be subject to a time-bar, particularly in view of the consequences for all of the parties concerned of reinstatement taking place after a significant period of time.

61 Hence, in the light of the principle of legal certainty in particular, the requirements of the principle of effectiveness do not preclude, in principle, with regard to an action seeking reinstatement of a dismissed pregnant woman with her employer, the introduction of a shorter limitation period than that laid down for an action for damages.

62 However, it should be noted in that regard that, as is apparent from paragraph 58 above, the 15-day period for bringing an action for nullity and reinstatement must be regarded as being particularly short, in view inter alia of the situation in which a woman finds herself at the start of her pregnancy.

63 In addition, it appears from the case-file that some of the days included in that 15-day period may expire before the pregnant woman receives her letter of dismissal and is thus notified of the dismissal. According to an opinion expressed by an association of private sector employees on the draft law that inserted Article L. 337-1 into the Labour

Code, the terms of which are reproduced in the order for reference, the 15-day period begins to run, according to the case-law of the Luxembourg courts, from the time the letter of dismissal is posted.

64 The Luxembourg Government, it is true, has pointed out that under Article 1 of the Law of 22 December 1986 on restoring rights that have been lost as a result of the expiry of a time-limit for bringing legal proceedings (*Mémorial* A 1986, p. 2745), limitation periods do not start to run if the female employee has not been in a position to act.

65 However, even if that provision were to limit the effects of that case-law relating to the posting of the letter of dismissal, which, where necessary, it is for the referring court to decide, it would however be very difficult for a female worker dismissed during her pregnancy to obtain proper advice and, if appropriate, prepare and bring an action within the 15-day period.

66 Moreover, since, as was noted in paragraph 57 above, the requirement to refer the matter to the 'president of the court having jurisdiction in employment matters' seems to be given a particularly strict interpretation, a pregnant worker who, for whatever reason, has allowed the 15-day period to expire, ceases — as was noted by the referring court — to have a legal remedy available in order to assert her rights following her dismissal.

67 In those circumstances, it appears that rules such as those laid down in Article L. 337-1(1) of the Labour Code relating to an action for nullity and reinstatement, by giving rise to procedural problems likely to make exercise of the rights that pregnant women derive from Article 10 of Directive 92/85 excessively difficult, do not comply with the requirements of the principle of effectiveness. However, that is a matter for the referring court to determine.

68 As follows from paragraphs 43 and 44 above, if that court were to find that the rules at issue in the main proceedings fail to comply with the principles of equivalence and/or effectiveness, those rules would not be considered to meet the requirement of effective judicial protection of an individual's rights under Community law, and in particular those conferred by Articles 10 and 12 of Directive 92/85.

69 In the light of the foregoing, the answer to the first two questions must be that Articles 10 and 12 of Directive 92/85 must be interpreted as not precluding legislation of a Member State which provides a specific remedy concerning the prohibition of dismissal of pregnant workers or workers who have recently given birth or are breastfeeding laid down in that Article 10, exercised according to procedural rules specific to that remedy, provided however that those rules are no less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render practically impossible the exercise of rights conferred by Community law (principle of effectiveness). A 15-day limitation period, such as that laid down in the fourth subparagraph of Article L. 337-1(1) of the Labour Code, does not appear to meet that condition, but that is a matter for the referring court to determine.

Third question

70 By its third question, the referring court asks in essence whether Article 2 of Directive 76/207 precludes legislation of a Member State, such as that introduced by Article L. 337-1(1) of the Labour Code, which denies pregnant workers and workers who have recently given birth or are breastfeeding, who are dismissed during their pregnancy, the option to bring an action for damages, whereas such an action is available to any other employee who has been dismissed.

71 In that regard, it should be noted that, under the third subparagraph of Article 2(7) of Directive 76/207, inserted in that directive by Article 1(2) of Directive 2002/73, any less

favourable treatment of a woman related to pregnancy constitutes discrimination within the meaning of that directive.

72 Moreover, it has not been suggested in the context of the present reference for a preliminary ruling that an action for damages does not comply with the principle of effective judicial protection of an individual's rights under Community law.

73 However, according to the referring court, the only remedy open to a pregnant woman dismissed during pregnancy is an action for nullity and reinstatement, to the exclusion of all other remedies under employment law, such as an action for damages.

74 Therefore, if it emerges, after verification by the referring court on the basis of the information provided in response to the first two questions, that an action for nullity and reinstatement does not comply with the principle of effectiveness, such an infringement of the requirement to provide effective judicial protection laid down in particular in Articles 12 of Directive 92/85 would constitute '[l]ess favourable treatment of a woman related to pregnancy', within the meaning of the third subparagraph of Article 2(7) of Directive 76/207, and should therefore be regarded as discrimination within the meaning of Directive 76/207.

75 If the referring court were thus to find there had been such an infringement of the principle of equal treatment, within the meaning of Article 3(1) of Directive 76/207, it would have to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of a pregnant woman's rights under Community law (see, by analogy, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 17; Case C-185/97 *Coote* [1998] ECR I-5199, paragraph 18; and *Impact*, paragraph 54).

76 In the light of the foregoing, the answer to the third question must be that Article 2, in conjunction with Article 3, of Directive 76/207 is to be interpreted as precluding legislation of a Member State, such as that introduced by Article L. 337-1(1) of the Labour Code, which is specific to the protection provided for in Article 10 of Directive 92/85 in the event of the dismissal of a pregnant worker or of a worker who has recently given birth or is breastfeeding, and which denies a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages whereas such an action is available to any other employee who has been dismissed, where such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy. That would be the case in particular if the procedural rules relating to the only action available in the case of dismissal of such workers do not comply with the principle of effective judicial protection of an individual's rights under Community law, a matter which it is for the referring court to determine.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **Articles 10 and 12 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 (10th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as not precluding legislation of a Member State which provides a specific remedy concerning the prohibition of dismissal of pregnant workers or workers who have recently given birth or are breastfeeding laid down in that Article 10, exercised according to procedural rules specific to that remedy, provided however that those rules are no less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render practically**

impossible the exercise of rights conferred by Community law (principle of effectiveness). A 15-day limitation period, such as that laid down in the fourth subparagraph of Article L. 337-1(1) of the Luxembourg Labour Code, does not appear to meet that condition, but that is a matter for the referring court to determine.

2. **Article 2, in conjunction with Article 3, of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as precluding legislation of a Member State, such as that introduced by Article L. 337-1(1) of the Luxembourg Labour Code, which is specific to the protection provided for in Article 10 of Directive 92/85 in the event of the dismissal of a pregnant worker or of a worker who has recently given birth or is breastfeeding, and which denies a pregnant employee who has been dismissed during her pregnancy the option to bring an action for damages whereas such an action is available to any other employee who has been dismissed, where such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy. That would be the case in particular if the procedural rules relating to the only action available in the case of dismissal of such workers do not comply with the principle of effective judicial protection of an individual's rights under Community law, a matter which it is for the referring court to determine.**

[Signatures]