JUDGMENT OF THE COURT (Fifth Chamber)

14 July 1994 *

In Case C-32/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before that court between

Carole Louise Webb

and

EMO Air Cargo (UK) Ltd

on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse (Rapporteur) and M. Zuleeg, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Carole Louise Webb, by Laura Cox and Deborah King, Barristers, instructed by Susan James, Solicitor, Hillingdon Legal Resource Centre,

— the United Kingdom, by John Collins, of the Treasury Solicitor's Department, acting as Agent, and by Derrick Wyatt QC, of the Bar of England and Wales,

— the Commission of the European Communities, by Nicholas Khan, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Webb, the United Kingdom and the Commission at the hearing on 21 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 1 June 1994,

gives the following

Judgment

1 By order of 26 November 1992, received at the Court on 4 February 1993, the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

2 That question was raised in proceedings between Mrs Webb and EMO Air Cargo (UK) Ltd (hereinafter 'EMO').

3 It appears from the order for reference that in 1987 EMO employed 16 persons. In June one of the four employees working in the import operations department, Mrs Stewart, found that she was pregnant. EMO decided not to wait until her departure on maternity leave before engaging a replacement whom Mrs Stewart could train during the six months prior to her going on leave. Mrs Webb was recruited with a view, initially, to replacing Mrs Stewart following a probationary period. However, it was envisaged that Mrs Webb would continue to work for EMO following Mrs Stewart's return. The documents before the Court show that Mrs Webb did not know she was pregnant when the employment contract was entered into.

4 Mrs Webb started work at EMO on 1 July 1987. Two weeks later, she thought that she might be pregnant. Her employer was informed of this indirectly. He then called her in to see him and informed her of his intention to dismiss her.

Mrs Webb's pregnancy was confirmed a week later. On 30 July she received a letter dismissing her in the following terms: 'You will recall that at your interview some four weeks ago you were told that the job for which you applied and were given had become available because of one of our employees becoming pregnant. Since you have only now told me that you are also pregnant I have no alternative other than to terminate your employment with our company.'

5 Mrs Webb then brought proceedings before the Industrial Tribunal, pleading direct discrimination on grounds of sex and, in the alternative, indirect discrimination.

6 The relevant national legislation in this case is the Sex Discrimination Act 1975. It is apparent from the documents before the Court that Mrs Webb cannot rely either on section 54 of the Employment Protection (Consolidation) Act 1978, which prohibits unfair dismissal, or on section 60 of that statute, which provides that dismissal on the ground of pregnancy constitutes unfair dismissal. Under section 64, workers who have been employed for less than two years are not entitled to claim that protection.

7 Section 1(1) of the Sex Discrimination Act provides:

'A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if:

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man ...'.

8 Section 2 provides:

'(1) Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.

(2) In the application of subsection (1) no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth.'

9 Under section 5(3):

'A comparison of the cases of persons of different sex or marital status under section 1(1) ... must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.'

10 Lastly, section 6(2) of the Sex Discrimination Act provides:

'It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her —

...

(b) by dismissing her, or subjecting her to any other detriment.'

11 The Industrial Tribunal dismissed Mrs Webb's action. It held that she had not been directly discriminated against on grounds of sex. In its view, the real and significant reason for Mrs Webb's dismissal was her anticipated inability to carry out the primary task for which she had been recruited, namely to cover the job of Mrs Stewart during the latter's absence on maternity leave. According to the Industrial Tribunal, if a man recruited for the same purpose as Mrs Webb had told his employer that he would be absent for a period comparable to the likely absence of Mrs Webb, he would have been dismissed.

12 The Industrial Tribunal also held that Mrs Webb had not suffered indirect discrimination. More women than men were likely to be unable to do the job for which they had been recruited because of the possibility of pregnancy. However, according to the Industrial Tribunal, the employers had shown that the reasonable needs of their business required that the person recruited to cover for Mrs Stewart during her maternity leave be available.

13 Appeals by Mrs Webb, first to the Employment Appeal Tribunal and then to the Court of Appeal, were unsuccessful. Mrs Webb was granted leave by the Court of Appeal to appeal to the House of Lords.

14 The House of Lords found that the special feature of this case lay in the fact that the pregnant woman who was dismissed had been recruited precisely in order to replace, at least initially, an employee who was herself due to take maternity leave. The national court is uncertain whether it was unlawful to dismiss Mrs Webb on

the ground of her pregnancy, or whether greater weight should be attached to the reasons for which she was recruited.

15 Taking the view that it should construe the applicable domestic legislation so as to accord with the interpretation of Directive 76/207, as laid down by the Court, the House of Lords stayed proceedings and submitted the following question for a preliminary ruling:

'Is it discrimination on grounds of sex contrary to Directive 76/207 for an employer to dismiss a female employee ("the appellant")

(a) whom he engaged for the specific purpose of replacing (after training) another female employee during the latter's forthcoming maternity leave,

(b) when, very shortly after appointment, the employer discovers that the appellant herself will be absent on maternity leave during the maternity leave of the other employee, and the employer dismisses her because he needs the job holder to be at work during that period,

(c) had the employer known of the pregnancy of the appellant at the date of appointment, she would not have been appointed, and

(d) the employer would similarly have dismissed a male employee engaged for this purpose who required leave of absence at the relevant time for medical or other reasons?'

16 As is apparent from the documents before the Court, the question submitted for a preliminary ruling relates to a contract of employment concluded for an indefinite period.

17 According to Article 1(1), the purpose of Directive 76/207 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, and vocational training and as regards working conditions.

18 Article 2(1) of the directive states that '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'. Under Article 5(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'.

19 As the Court ruled in paragraph 13 of its judgment in Case C-179/88 *Handels- og Kontorfunktionærernes Forbund i Danmark* [1990] ECR I-3979 (hereinafter 'the *Hertz* judgment') and confirmed in paragraph 15 of its judgment in Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex.

20 Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with 'pregnancy and maternity', Article 2(3) of Directive 76/207 recognizes the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and

childbirth (*Habermann-Beltermann*, cited above, paragraph 21, and Case 184/83 *Hoffmann* v *Barmer Ersatzkasse* [1984] ECR 3047, paragraph 25).

21 In view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, the Community legislature subsequently provided, pursuant to Article 10 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 (OJ 1992 348, p. 1), for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave.

22 Furthermore, Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition on the dismissal of pregnant women during that period, save in exceptional cases not connected with their condition.

23 The answer to the question submitted by the House of Lords, which concerns Directive 76/207, must take account of that general context.

24 First, in response to the House of Lords' inquiry, there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of

performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.

25 As Mrs Webb rightly argues, pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex. Moreover, in the *Hertz* judgment, cited above, the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy but manifests itself after the maternity leave. As the Court pointed out (in paragraph 16), there is no reason to distinguish such an illness from any other illness.

26 Furthermore, contrary to the submission of the United Kingdom, dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, 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. Any contrary interpretation would render ineffective the provisions of the directive.

27 In circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work

for which she has been engaged (see the judgment in *Habermann-Beltermann*, cited above, paragraph 25, and paragraphs 10 and 11 of the Advocate General's Opinion in this case).

28 The fact that the main proceedings concern a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment cannot affect the answer to be given to the national court.

29 Accordingly, the answer to the question submitted must be that Article 2(1) read with Article 5(1) of Directive 76/207 precludes dismissal of an employee who is recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave and who cannot do so because, shortly after recruitment, she is herself found to be pregnant.

Costs

30 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the House of Lords by order of 26 November 1992, hereby rules:

Article 2(1) read with Article 5(1) 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 precludes dismissal of an employee who is recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave and who cannot do so because, shortly after her recruitment, she is herself found to be pregnant.

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 14 July 1994.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber