JUDGMENT OF THE COURT

30 June 1998 (1)

(Equal treatment for men and women Dismissal of a pregnant woman Absences due to illness arising from pregnancy)

In Case C-394/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the House ofLords for a preliminary ruling in the proceedings pending before that courtbetween

Mary Brown

and

Rentokil Limited

on the interpretation of Articles 2(1) and 5(1) of Council Directive 76/207/EEC of9 February 1976 on the implementation of the principle of equal treatment for menand women as regards access to employment, vocational training and promotion,and working conditions (OJ 1976 L 39, p. 40),

THE COURT,

composed of: C. Gulmann, President of the Third and Fifth Chambers, acting asPresident, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents ofChambers), G.F. Mancini, P.J.G. Kapteyn (Rapporteur), J.L. Murray, D.A.O.Edward, J.-P. Puissochet, P. Jann and L. Sevón, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. Von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Mrs Brown, by Colin McEachran QC, and Ian Truscott, Advocate,instructed by Mackay Simon, Solicitors,

- Rentokil Ltd, by John Hand QC, and Gerard F. McDermott, Barrister,instructed by Gareth T. Brown, Solicitor,

- the United Kingdom Government, by Stephanie Ridley, of the TreasurySolicitor's Department, acting as Agent, and Dinah Rose, Barrister,

- the Commission of the European Communities, by Pieter Jan Kuyper, LegalAdviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Brown, Rentokil Ltd, the UnitedKingdom Government and the Commission at the hearing on 16 December 1997,

after hearing the Opinion of the Advocate General at the sitting on 5 February1998,

gives the following

Judgment

1.

By order of 28 November 1996, received at the Court Registry on 9 December1996, the House of Lords referred to the Court for a preliminary ruling underArticle 177 of the EC Treaty two questions on the interpretation of Articles 2(1)and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on theimplementation of the principle of equal treatment for men and women as regardsaccess to employment, vocational training and promotion, and working conditions(OJ 1976 L 39, p. 40).

2.

Those questions have been raised in proceedings brought by Mary Brown againstRentokil Ltd (hereinafter 'Rentokil□) in connection with her dismissal whilstpregnant.

3.

According to the order for reference, Mrs Brown was employed by Rentokil as adriver. Her job was mainly to transport and change 'Sanitact□ units in shops andother centres. In her view, it was heavy work.

4.

In August 1990, Mrs Brown informed Rentokil that she was pregnant. Thereaftershe had difficulties associated with the pregnancy. From 16 August 1990 onwards,she submitted a succession of four-week certificates mentioning various pregnancy-related disorders. She did not work again after mid-August 1990.

5.

Rentokil's contracts of employment included a clause stipulating that, if anemployee was absent because of sickness for more than 26 weeks continuously, heor she would be dismissed.

6.

On 9 November 1990, Rentokil's representatives told Mrs Brown that half of the26-week period had run and that her employment would end on 8 February 1991if, following an independent medical examination, she had not returned to work bythen. A letter to the same effect was sent to her on that date.

7.

Mrs Brown did not go back to work following that letter. The parties agree thatthere was never any question of her being able to return to work before the endof the 26-week period. By letter of 30 January 1991, which took effect on 8February 1991, she was accordingly dismissed while pregnant. Her child was bornon 22 March 1991.

8.

At the time when Mrs Brown was dismissed, section 33 of the EmploymentProtection (Consolidation) Act 1978 provided that an employee who was absentfrom work wholly or partially because of pregnancy or confinement would, subjectto certain conditions, be entitled to return to work. In particular, the employee hadto have been in employment until immediately before the start of the 11th weekbefore the expected date of confinement and, at the beginning of the 11th week,have been continuously employed for a period of not less than two years.

9.

According to the order for reference, on the assumption that the date on whichMrs Brown's child was born was also the expected date of delivery, she was notentitled, because she had not been in employment for two years as at 30 December1990, to absent herself from work from the beginning of the 11th week beforedelivery pursuant to section 33 of the Employment Protection (Consolidation) Act1978, or to return to work at any time during the 29 weeks following delivery. Shewas, however, entitled to statutory maternity pay under sections 46 to 48 of theSocial Security Act 1986.

10.

By order dated 5 August 1991, the Industrial Tribunal dismissed Mrs Brown'sapplication under the Sex Discrimination Act 1975 concerning her dismissal. TheTribunal held that, where absence through pregnancy-related illness, but whichbegan long before the statutory maternity provisions could apply and subsistedcontinuously thereafter, is followed by dismissal, that dismissal does not fall into

thecategory of dismissals which must automatically be considered discriminatorybecause they are due to pregnancy.

11. By order of 23 March 1992, the Employment Appeal Tribunal dismissed MrsBrown's appeal.

12. By judgment of 18 January 1995, the Extra Division of the Court of Sessionreached the preliminary conclusion that in this case there was no discriminationwithin the meaning of the Sex Discrimination Act 1975. It pointed out that, sincethe Court of Justice had drawn a clear distinction between pregnancy and illnessattributable to pregnancy (Case C-179/88 *Handels- og KontorfunktionærernesForbund i Danmark* v *Dansk Arbejdsgiverforening* [1990] ECR I-3979 ('*Hertz*')), MrsBrown, whose absence was due to illness and who had been dismissed on accountof that illness, could not succeed.

13. Mrs Brown appealed to the House of Lords, which referred the following questionsto the Court for a preliminary ruling:

'1 (a) Is it contrary to Articles 2(1) and 5(1) of Directive 76/207 of theCouncil of the European Communities ('the Equal TreatmentDirective') to dismiss a female employee, at any time during herpregnancy, as a result of absence through illness arising from thatpregnancy?

(b) Does it make any difference to the answer given to Question 1(a) thatthe employee was dismissed in pursuance of a contractual provisionentitling the employer to dismiss employees, irrespective of gender,after a stipulated number of weeks of continued absence?

2. (a) Is it contrary to Articles 2(1) and 5(1) of the Equal TreatmentDirective to dismiss a female employee as a result of absence throughillness arising from pregnancy who does not qualify for the right toabsent herself from work on account of pregnancy or childbirth forthe period specified by national law because she has not beenemployed for the period imposed by national law, where dismissaltakes place during that period?

(b) Does it make any difference to the answer given to Question 2(a) thatthe employee was dismissed in pursuance of a contractual provisionentitling the employer to dismiss employees, irrespective of gender,after a stipulated number of weeks of continued absence?'

The first part of the first question

14. It should be noted at the outset that the purpose of Directive 76/207, according toArticle 1(1), is to put into effect in the Member States the principle of equaltreatment for men and women as regards access to employment, vocational trainingand promotion, and working conditions.

15. Article 2(1) of the Directive provides that '... the principle of equal treatment shallmean that there shall be no discrimination whatsoever on grounds of sex eitherdirectly or indirectly by reference in particular to marital or family status'. According to Article 5(1) of the Directive, '[a]pplication of the principle of equaltreatment with regard to working conditions, including the conditions governingdismissal, means that men and women shall be guaranteed the same conditionswithout discrimination on grounds of sex'.

16. According to settled case-law of the Court of Justice, the dismissal of a femaleworker on account of pregnancy, or essentially on account of pregnancy, can affectonly women and therefore constitutes direct discrimination on grounds of sex (seeCase C-177/88 *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, paragraph 12; *Hertz*, cited above, paragraph 13;Case C-421/92 *Habermann-Beltermann* v *Arbeiterwohlfahrt Bezirksverband* [1994]ECR I-1657, paragraph 15; and Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECRI-3567, paragraph 19).

17. As the Court pointed out in paragraph 20 of its judgment in *Webb*, cited above, byreserving to Member States the right to retain or introduce provisions which areintended to protect women in connection with 'pregnancy and maternity□, Article2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equaltreatment, first, of protecting a woman's biological condition during and afterpregnancy and, second, of protecting the special relationship between a woman andher child over the period which follows pregnancy and childbirth.

18. It was precisely in view of the harmful effects which the risk of dismissal may haveon the physical and mental state of women who are pregnant, women who haverecently given birth or women who are breastfeeding, including the particularlyserious risk that pregnant women may be prompted voluntarily to terminate theirpregnancy, that the Community legislature, pursuant to Article 10 of CouncilDirective 92/85/EEC of 19 October 1992 on the introduction of measures toencourage improvements in the safety and health at work of pregnant workers andworkers who have recently given birth or are breastfeeding (tenth individualDirective adopted within the meaning of Article 16(1) of Directive 89/391/EEC)(OJ 1992 L 348, p. 1), which was to be transposed into the laws of the MemberStates no later than two years after its adoption, provided for special protection tobe given to women, by prohibiting dismissal during the period from the beginning

of their pregnancy to the end of their maternity leave. Article 10 of Directive 92/85provides that there is to be no exception to, or derogation from, the prohibition ofdismissal of pregnant women during that period, save in exceptional cases notconnected with their condition (see, in this regard, paragraphs 21 and 22 of thejudgment in *Webb*, cited above).

19. In replying to the first part of the first question, which concerns Directive 76/207,account must be taken of that general context.

20. At the outset, it is clear from the documents before the Court that the questionconcerns the dismissal of a female worker during her pregnancy as a result ofabsences through incapacity for work arising from her pregnant condition. AsRentokil points out, the cause of Mrs Brown's dismissal lies in the fact that she wasill during her pregnancy to such an extent that she was unfit for work for 26 weeks. It is common ground that her illness was attributable to her pregnancy.

21. However, dismissal of a woman during pregnancy cannot be based on her inability,as a result of her condition, to perform the duties which she is contractually boundto carry out. If such an interpretation were adopted, the protection afforded byCommunity law to a woman during pregnancy would be available only to pregnantwomen who were able to comply with the conditions of their employment contracts,with the result that the provisions of Directive 76/207 would be rendered ineffective(see *Webb*, cited above, paragraph 26).

22. Although pregnancy is not in any way comparable to a pathological condition(*Webb*, cited above, paragraph 25), the fact remains, as the Advocate Generalstresses in point 56 of his Opinion, that pregnancy is a period during whichdisorders and complications may arise compelling a woman to undergo strictmedical supervision and, in some cases, to rest absolutely for all or part of herpregnancy. Those disorders and complications, which may cause incapacity forwork, form part of the risks inherent in the condition of pregnancy and are thus aspecific feature of that condition.

23. In paragraph 15 of its judgment in *Hertz,* cited above, the Court, on the basis ofArticle 2(3) of Directive 76/207, also pointed out that that directive admits ofnational provisions guaranteeing women specific rights on account of pregnancy andmaternity. It concluded that, during the maternity leave accorded to her undernational law, a woman is protected against dismissal on the grounds of her absence.

24. Although, under Article 2(3) of Directive 76/207, such protection against dismissalmust be afforded to women during maternity leave (*Hertz*, cited above, paragraph15), the principle of non-discrimination, for its part, requires similar protectionthroughout the period of pregnancy. Finally, as is clear from paragraph 22 of thisjudgment, dismissal of a female worker during pregnancy for absences due toincapacity for work resulting from her pregnancy is linked to the occurrence of risksinherent in pregnancy and must therefore be regarded as essentially based on the

fact of pregnancy. Such a dismissal can affect only women and thereforeconstitutes direct discrimination on grounds of sex.

25. It follows that Articles 2(1) and 5(1) of Directive 76/207 preclude dismissal of afemale worker at any time during her pregnancy for absences due to incapacity forwork caused by an illness resulting from that pregnancy.

26. However, where pathological conditions caused by pregnancy or childbirth ariseafter the end of maternity leave, they are covered by the general rules applicablein the event of illness (see, to that effect, *Hertz*, cited above, paragraphs 16 and 17). In such circumstances, the sole question is whether a female worker's absences,following maternity leave, caused by her incapacity for work brought on by suchdisorders, are treated in the same way as a male worker's absences, of the sameduration, caused by incapacity for work; if they are, there is no discrimination ongrounds of sex.

27. It is also clear from all the foregoing considerations that, contrary to the Court'sruling in Case C-400/95 *Larsson* v *Føtex Supermarked* [1997] ECR I-2757, paragraph23), where a woman is absent owing to illness resulting from pregnancy orchildbirth, and that illness arose during pregnancy and persisted during and aftermaternity leave, her absence not only during maternity leave but also during theperiod extending from the start of her pregnancy to the start of her maternity leavecannot be taken into account for computation of the period justifying her dismissalunder national law. As to her absence after maternity leave, this may be taken intoaccount under the same conditions as a man's absence, of the same duration,through incapacity for work.

28. The answer to the first part of the first question must therefore be that Articles2(1) and 5(1) of Directive 76/207 preclude dismissal of a female worker at any timeduring her pregnancy for absences due to incapacity for work caused by illnessresulting from that pregnancy.

The second part of the first question

29. The second part of the first question concerns a contractual term providing that anemployer may dismiss workers of either sex after a stipulated number of weeks ofcontinuous absence.

30. It is well settled that discrimination involves the application of different rules tocomparable situations or the application of the same rule to different situations(see, in particular, Case C-342/93 *Gillespie and Others* v *Northern Health and SocialServices Board and Others* [1996] ECR I-475, paragraph 16).

31. Where it is relied on to dismiss a pregnant worker because of absences due toincapacity for work resulting from her pregnancy, such a contractual term, applyingboth to men and to women, is applied in the same way to different situations since,as is clear from the answer given to the first part of the first question, the situationof a pregnant worker who is unfit for work as a result of disorders associated withher pregnancy cannot be considered to be the same as that of a male worker whois ill and absent through incapacity for work for the same length of time.

32. Consequently, application of that contractual term in circumstances such as thepresent constitutes direct discrimination on grounds of sex.

33. The answer to the second part of the first question must therefore be that the factthat a female worker has been dismissed during her pregnancy on the basis of acontractual term providing that the employer may dismiss employees of either sexafter a stipulated number of weeks of continuous absence cannot affect the answergiven to the first part of the first question.

The second question

34. In view of the answer given to the first question, it is unnecessary to answer thesecond question.

Costs

35. The costs incurred by the United Kingdom Government and by the Commission,which have submitted observations to the Court, are not recoverable. Since theseproceedings are, for the parties to the main proceedings, a step in the proceedingspending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 28November 1996, hereby rules:

Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1976, on theimplementation of the principle of equal treatment for men and women as regardsaccess to employment, vocational training and promotion, and working conditions,preclude dismissal of a female worker at any time during her pregnancy forabsences due to incapacity for work caused by illness resulting from thatpregnancy.

The fact that a female worker has been dismissed during her pregnancy on thebasis of a contractual term providing that the employer may dismiss employees ofeither sex after a stipulated number of weeks of continuous absence does not affectthe answer given.

Gulmann

Ragnemalm Wathelet
Schintgen

Mancini

Kapteyn Murray
Edward

Puissochet

Jann
Sevón

Delivered in open court in Luxembourg on 30 June 1998.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

1: Language of the case: English.