JUDGMENT OF THE COURT (Third Chamber)

11 October 2007 (*)

(Social policy − Protection of pregnant women − Directive 92/85/EEC − Article 10 − Prohibition on dismissal from the beginning of pregnancy to the end of maternity leave − Period of protection – Decision to dismiss a female worker during that period of protection − Notification and implementation of the decision to dismiss after the expiry of that period − Equal treatment for male and female workers − Directive 76/207/EEC − Articles 2(1), 5(1), and 6 − Direct discrimination on grounds of sex − Sanctions)

In Case C-460/06,

REFERENCE for a preliminary ruling under Article 234 EC by the tribunal du travail de Brussels (Belgium), made by decision of 6 November 2006, received at the Court on 17 November 2006, in the proceedings

Nadine Paquay

v

Société d'architectes Hoet + Minne SPRL,

THE COURT (Third Chamber),

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

Advocate General: Y. Bot,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Belgian Government, by L. Van den Broeck, acting as Agent,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

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

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(1), 5(1) and 6 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) and of 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

2 The request was made in the course of proceedings between Mrs Paquay ('the applicant') and the Société d'architectes Hoet + Minne SPRL ('the defendant') concerning the dismissal of the applicant.

Legal context

Community legislation

Directive 76/207

3 As is clear from Article 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, vocational training and working conditions.

4 Article 2(1) of Directive 76/207 provides that that principle 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.

5 Article 2(3) of that directive states that the directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

6 In the wording of Article 5(1) of Directive 76/207, 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.

7 In accordance with Article 6 of that directive Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 of that directive to pursue their claims by judicial process after possible recourse to other competent authorities.

Directive 92/85

8 It is apparent from the ninth recital of Directive 92/85 that the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not work to the detriment of women in the labour market or undermine directives concerning equal treatment for men and women

9 According to the 15th recital of that directive the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding and provision should be made for such dismissal to be prohibited.

10 Article 10 of Directive 92/85 states as follows:

'In order to guarantee workers, [pregnant workers, those who have recently given birth and those who are breastfeeding] 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.'

11 Under Article 12 of Directive 92/85, Member States are 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 to pursue their claims by judicial process (and/or, in accordance with national laws and/or national practices) by recourse to other competent authorities.

12 According to Article 14(1) of Directive 92/85, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than two years after the adoption thereof, which is 19 October 1994.

National legislation

13 Article 40 of the law on work of 16 March 1971 (*Moniteur belge* of 30 March 1971, p. 3931) states:

'An employer who employs a pregnant worker shall not take any steps to unilaterally end the employment relationship from the moment when he is informed of the pregnancy until the expiry of the period of one month after the end of the maternity leave, except on grounds which are unrelated to the physical condition resulting from the pregnancy or the child birth.

The burden of proof rests on the employer to show the grounds. At the worker's request the employer shall provide them to her in writing.

If the grounds relied upon for the dismissal do not comply with the terms of paragraph one, or, if there are no grounds, the employer shall pay the worker fixed-sum compensation equal to the gross remuneration for six months, without prejudice to any damages available to the worker for breach of the contract of employment.'

14 The law on economic readjustment of 4 August 1978 (*Moniteur belge* of 17 August 1978, p. 9106) transposed Directive 76/207 into Belgian law and Part V sets out measures of legal protection in case of discrimination on grounds of sex.

15 Article 131 of that law provides that all persons who consider themselves wronged may bring an action, before the competent court, seeking to enforce the provisions of Part V of the law of 4 August 1978.

16 It is apparent from the reference for a preliminary ruling that Part V of the law of 4 August 1978 does not provide a specific civil sanction in that regard.

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

17 The applicant, an employee with the defendant firm of architects since 24 December 1987, was on maternity leave from the month of September until the end of the month of December 1995.

18 Her maternity leave ended on 31 December 1995 and the period of protection against dismissal, running from the beginning of the pregnancy until the end of the maternity leave, ended, in accordance with Belgian law, on 31 January 1996.

19 The applicant was dismissed by registered letter dated 21 February 1996, at a time when the period of protection had ended, giving a notice period of six months running from 1 March 1996. The defendant ended the contract on 15 April 1996, making a compensatory payment for the balance of the notice period.

20 The referring court notes that the decision to dismiss the applicant was taken while she was pregnant and before 31 January 1996, namely before the end of the period of protection against dismissal, and that decision had been formed in a number of stages.

21 It is apparent from the request for a preliminary ruling that, during the pregnancy, the defendant had placed in a newspaper, on 27 May 1995, a notice for the recruitment of a secretary and had indicated to a candidate, on 6 June 1995, that 'the post is available from mid-September 1995 until January 1996' which corresponded to the expected period of maternity leave, 'and then from August 1996', or from the expiry of the 6-month notice period notified in the usual way after the protection period. It is not disputed that, at the date of 27 May 1995, the company was aware of the pregnancy and that the notice concerned the post occupied by the applicant.

22 It is equally clear from the reference for a preliminary ruling that the defendant placed a second notice in October 1995, that is shortly after the beginning of the maternity leave, worded as follows: 'accountancy, McIntosch, available immediately, career prospects, working in a small team'. It is not disputed that the term 'pr carr.', means 'career prospects', which confirms the firm's intention to provide for the permanent replacement of the applicant and that the decision was, in that way, taken while the applicant was pregnant.

23 As regards the grounds for the dismissal, taking account of the burden of proof which rests with the employer, the referring court stated, in its judgment of 26 April 2006, that the explanation that the defendant attempted to give for the dismissal, namely a failure to adapt to the evolving profession of architecture, was not established, particularly in the light of certificates issued on 1 March 1996 indicating that the applicant always worked 'to the complete satisfaction of her employer'. That court therefore held that the applicant's dismissal was not unrelated to the pregnancy, or at least, to the fact of the birth of a child.

24 The referring court also held that Article 40 of the law of 16 March 1971, interpreted in light of its legislative history, does not prohibit the decision to dismiss being taken during the protection period, as long as the notification to the worker comes more than one month after the end of the maternity leave.

25 In those circumstances, the tribunal du travail de Bruxelles (the Employment Tribunal, Brussels) (Belgium) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 10 of the Directive [92/85] be interpreted as only prohibiting the notification of a decision of dismissal during the period of protection referred to in paragraph 1 of that article or does it also prohibit taking a decision of dismissal and attempting to find a permanent replacement for the employee before the end of the period of protection?

2. Is dismissal notified after the period of protection provided for in Article 10 of Directive 92/85, but which is not unrelated to the pregnancy and/or the birth of a child, contrary to Article 2(1) (or 5(1)) of the Directive [76/207] and, in such a case, must the sanction be at least equivalent to that laid down by national law in the implementation of Article 10 of Directive 92/85?'

The questions referred for a preliminary ruling

The first question

26 By its first question, the referring court asks, in essence, whether Article 10 of Directive 92/85 should be interpreted as prohibiting not only the notification of a decision to dismiss on the ground of pregnancy and/or the birth of a child during the period of protection provided for in paragraph 1 of that article but also the taking of such a decision to dismiss and preparing the permanent replacement of such a worker before the expiry of that period.

27 In that regard, it is necessary to recall that the objective of Directive 92/85 is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

28 In that area, the Court has also pointed out that the objective pursued by the Community law rules governing equality as between men and women in regard to the rights of pregnant women and women who have given birth, is to protect female workers before and after they have given birth (Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 42).

29 Before Directive 92/85 came into force, the Court had already held that, under the principle of non-discrimination and, particularly, Articles 2(1) and 5(1) of Directive 76/207, protection against dismissal should be granted to women not only during maternity leave, but also throughout the period of the pregnancy. According to the Court, a dismissal occurring during those periods affects only women and therefore constitutes direct discrimination on the grounds of sex (see, to that effect, Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 15; Case C-394/96 *Brown* [1998] ECR I-4185, paragraphs 24 to 27; and *McKenna*, paragraph 47).

30 It is precisely 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, that, pursuant to Article 10 of Directive 92/85, the Community legislature subsequently laid down special protection for women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave (Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 21; *Brown*, paragraph 18; C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 26; and *McKenna*, paragraph 48).

31 It is necessary to point out that during that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition of dismissing pregnant workers, save in exceptional cases not connected with their condition where the employer justifies the dismissal in writing (*Webb*, paragraph 22; *Brown*, paragraph 18; and *Tele Danmark*, paragraph 27).

32 Finally, it is necessary to point out that, in the context of the application of Article 10 of Directive 92/85, the Member States cannot amend the scope of the concept of ‘dismissal’ thereby negating the extent of the protection which that provision offers and compromising its effectiveness.

33 Having regard to the objectives pursued by Directive 92/85 and, more specifically, to those pursued by its Article 10, it is necessary to point out that the prohibition on the dismissal of pregnant women and women who have recently given birth or are breastfeeding during the period of protection is not limited to the notification of that decision to dismiss. The protection granted by that provision to those workers excludes both the taking of a decision to dismiss as well as the steps of preparing for the dismissal, such as searching for and finding a permanent replacement for the relevant employee on the grounds of the pregnancy and/or the birth of a child.

34 As the Italian Government correctly noted, an employer, such as the employer in the present case, who decides to replace a pregnant worker or a worker who has recently given birth or is breastfeeding, on the grounds of her condition, and who, from the moment when he first had knowledge of the pregnancy, takes concrete steps with a view to finding a replacement, is pursuing the objective which is specifically prohibited by Directive 92/85, that is to dismiss a worker on the grounds of her pregnancy and/or the birth of a child

35 A contrary interpretation, restricting the prohibition to only the notification of the decision to dismiss during the period of protection set down in Article 10 of Directive 92/85, would deprive that article of its effectiveness and could give rise to a risk that employers will circumvent the prohibition to the detriment of the rights of pregnant women and women who have recently given birth or are breastfeeding, enshrined in Directive 92/85.

36 Nevertheless it must be recalled, as is clear from paragraph 31 of the present judgment, that a pregnant worker, or a worker who has recently given birth or is breastfeeding, in accordance with the provisions of Article 10(1) of Directive 92/85, may be dismissed during the period of protection provided for in that provision in exceptional cases not connected with her condition, allowed under national laws or practices.

37 Moreover, regarding the burden of proof applicable in circumstances such as those in the present case, it is a matter for the national court to apply the relevant provisions of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6) which, under its Article 3(1)(a), applies to situations covered by Directive 92/85 insofar as discrimination on grounds of sex is concerned. It is apparent from Article 4(1) of Directive 97/80 that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

38 Having regard to the above, the reply to the first question must be that Article 10 of Directive 92/85 must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that article but also the taking of preparatory steps for such a decision before the end of that period.

The second question

39 By its second question, the referring court essentially asks, first, whether a dismissal decision, on the grounds of pregnancy and/or the birth of a child, notified after the end of the period of protection set down in Article 10 of Directive 92/85, is contrary to Articles 2(1) and 5(1) of Directive 76/207 and, secondly, in circumstances where a violation of those provisions of Directive 76/207 is proved, whether the measure chosen by the Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to that provided for by the national law implementing Articles 10 and 12 of Directive 92/85.

40 As regards the first part of the second question, it is necessary to recall, as is clear from paragraph 29 of the present judgment, that the Court has already held that protection against dismissal should be granted to women not only during maternity leave, but also throughout the period of the pregnancy. The dismissal of a female worker during her pregnancy or during her maternity leave for reasons linked to the pregnancy and/or the birth of a child constitutes direct discrimination on the grounds of sex contrary to Articles 2(1) and 5(1) of Directive 76/207.

41 As is clear from the Court's response to the first question and, in particular, paragraphs 35 and 38 of the present judgment, the fact that such a decision to dismiss is notified after the period of protection set down in Article 10 of Directive 92/85 is irrelevant. Any other interpretation of Articles 2(1) and 5(1) of Directive 76/207 would restrict the scope of the protection afforded by Community law, to pregnant women or women who have recently given birth or are breastfeeding, contrary to the broad logic and evolution of the rules of Community law governing equality between men and women in that area.

42 The reply to the first part of the second question must therefore be that a decision to dismiss on the grounds of pregnancy and/or the birth of a child is contrary to Articles 2(1) and 5(1) of Directive 76/207 irrespective of the moment when that decision to dismiss is notified and even if it is notified after the expiry of the period of protection set down in Article 10 of Directive 92/85.

43 As regards the second part of the second question it is necessary to recall that, under Article 6 of Directive 76/207, the Member States are bound to take the necessary measures to enable all persons who consider themselves wronged by discrimination, such as that in the present case, contrary to Articles 2(1) and 5(1) of that directive, to pursue their claims by judicial process. Such obligation implies that the measures in question should be sufficiently effective to achieve the objective of the directive and should be capable of being effectively relied upon by the persons concerned before national courts (Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 22).

44 That Article 6 does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the directive, depending on the different situations which may arise (Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 18, and *Marshall*, paragraph 23).

45 However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. Those measures must guarantee real and effective judicial protection and have a real deterrent effect on the employer (*Marshall*, paragraph 24).

46 Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. Where financial compensation is the measure adopted in order to achieve the objective previously indicated, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules (*Marshall*, paragraphs 25 and 26).

47 It is necessary to recall that, in accordance with Article 12 of Directive 92/85, Member States are also bound to take the necessary measures to enable all workers who consider themselves wronged by failure to comply with the obligations arising from that directive, including those arising from its Article 10, to pursue their claims by judicial process. Article 10(3) of Directive 92/85 specifically states that Member States shall 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 provision.

48 It is apparent from the Court's replies to the first question and to the first part of the second question that notification of a dismissal decision, taken by reason of the pregnancy and/or the birth of a child, to a worker during the period of protection set down in Article 10 of Directive 92/85, and the taking of such a decision during that period of protection, even in the absence of notification, and the preparation of a permanent replacement of that female worker on the same grounds, are contrary to Articles 2(1) and 5(1) of Directive 76/207 as well as Article 10 of Directive 92/85.

49 While recognising that the Member States are not bound, under Article 6 of Directive 76/207 or Article 12 of Directive 92/85, to adopt a specific measure, nevertheless the fact remains, as is clear from paragraph 45 of the present judgment, that 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.

50 If, under Articles 10 and 12 of Directive 92/85 and to comply with the requirements established by the case-law of the Court on the issue of sanctions, a Member State chooses to sanction the failure to respect obligations arising under Article 10 by granting a fixed amount of pecuniary damages, it follows, as the Italian Government pointed out in the present case, that the measure chosen by the Member State, in the case of infringement, in identical circumstances, of the prohibition on discrimination under Articles 2(1) and 5(1) of Directive 76/207 must be at least equivalent to that amount.

51 If the compensation chosen by a Member State under Article 12 of Directive 92/85 is judged necessary to protect the relevant workers, it is difficult to understand how a reduced level of compensation adopted to comply with Article 6 of Directive 76/207 could be deemed adequate for the injury suffered if the injury was brought about by a dismissal in identical circumstances and contrary to Articles 2(1) and 5(1) of that latter directive.

52 Moreover, as the Court has already stated, in choosing the appropriate solution for guaranteeing that the objective of Directive 76/207 is attained, the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance (Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 24, and Case C-180/95 *Draehmpaehl* [1997] ECR I-2195, paragraph 29). That reasoning applies *mutatis mutandis* to infringements of Community law of a similar nature and importance.

53 It is therefore necessary to reply to the second part of the second question that, since a decision to dismiss on the grounds of pregnancy and/or the birth of a child, notified after the end of the period of protection set down in Article 10 of Directive 92/85, is contrary both to that provision of Directive 92/85 and to Articles 2(1) and 5(1) of Directive 76/207, the measure chosen by a Member State under

Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85.

54 Having regard to the above, the reply to the second question must be that a decision to dismiss on the grounds of pregnancy and/or the birth of a child is contrary to Articles 2(1) and 5(1) of Directive 76/207 irrespective of the moment when that decision to dismiss is notified and even if it is notified after the end of the period of protection set down in Article 10 of Directive 92/85. Since such a decision to dismiss is contrary to both Article 10 of Directive 92/85 and Articles 2(1) and 5(1) of Directive 76/207, the measure chosen by a Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85.

Costs

55 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. **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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as prohibiting not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that article but also the taking of preparatory steps for such a decision before the end of that period.**

2. **A decision to dismiss on the grounds of pregnancy and/or child birth is contrary to Articles 2(1) and 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 irrespective of the moment when that decision to dismiss is notified and even if it is notified after the end of the period of protection set down in Article 10 of Directive 92/85. Since such a decision to dismiss is contrary to both Article 10 of Directive 92/85 and Articles 2(1) and 5(1) of Directive 76/207, the measure chosen by a Member State under Article 6 of that latter directive to sanction the infringement of those provisions must be at least equivalent to the sanction set down in national law implementing Articles 10 and 12 of Directive 92/85.**

[Signatures]

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* Language of the case: French.