JUDGMENT OF THE COURT
27 October 1998 *

In Case C-411/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Industrial Tribunal, Manchester (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

Margaret Boyle and Others

and

Equal Opportunities Commission

on the interpretation of Article 119 of the EC Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), 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 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),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn (Rapporteur), J.-P. Puissochet and P. Jann (Presidents of Chambers), C. Gulmann, J. L. Murray, D. A. O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet and R. Schintgen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mrs Boyle and Others, by Dinah Rose, Barrister, instructed by Alison Eddy, Solicitor,

— the Equal Opportunities Commission, by Peter Duffy QC, instructed by Alan Lakin, Solicitor,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by Eleanor Sharpston, Barrister,

— the Irish Government, by Michael A. Buckley, Chief State Solicitor, acting as Agent, and by Niamh Hyland, BL,

— the Commission of the European Communities, by Marie Wolfcarius and Carmel O'Reilly, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Boyle and Others, represented by Dinah Rose, of the Equal Opportunities Commission, represented by Peter Duffy QC, of the United Kingdom Government, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Eleanor Sharpston, of the Irish Government, represented by Brian Lenihan SC, and Niamh Hyland, of the Austrian Government, represented by Christine Pesendorfer, Oberrätin im Bundeskanzleramt, acting as Agent, and of the Commission, represented by Marie Wolfcarius and Carmel O'Reilly, at the hearing on 13 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 February 1998,

gives the following

Judgment

1 By order of 15 October 1996, received at the Court on 23 December 1996, the Industrial Tribunal, Manchester, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Article 119 of the EC Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), 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 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 Those questions were raised in proceedings between Mrs Boyle and Others and their employer, the Equal Opportunities Commission (hereinafter 'the EOC'), concerning the Maternity Scheme applied by the latter to its staff. The national court states that the EOC is agreed to be an emanation of the State for the purposes, as far as it is concerned, of the direct effect of the directive at issue.

The national legislation

3 In the United Kingdom, the Employment Rights Act 1996 grants female employees a general right to maternity leave. Section 72 provides that that leave commences either on the date which the employee notifies to her employer as the date on which she intends her period of absence from work to commence, or on the first day after the beginning of the sixth week before the expected week of childbirth on which she is absent from work wholly or partly because of pregnancy, whichever is the earlier.

4 Section 73(1) of the Act provides that the maternity leave period continues for the period of 14 weeks from its commencement or until the birth of the child, if later. In any event, an employee may not work during the period of two weeks commencing with the date of childbirth.

5 In addition, sections 79 to 85 of the Act grant employees who have the general right to maternity leave and who have been continuously employed for a period of not less than two years at the beginning of the 11th week before the expected week of childbirth, the right to return to work with their employer at any time during the period of 29 weeks from the beginning of the week in which childbirth occurred.

6 According to section 164 of the Social Security Contributions and Benefits Act 1992, pregnant employees who have worked for a continuous period of at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of confinement and whose earnings exceed a certain level are to be entitled to receive from their employer payments known as 'Statutory Maternity Pay' (hereinafter 'SMP') if they have ceased working, wholly or partly because of pregnancy or confinement.

7 Section 165(1) of that Act provides that SMP is to be payable for a maximum period of 18 weeks. For women who have worked for a continuous period of at least two years preceding the 14th week before the expected week of confinement for an employer required to pay them SMP, section 166 specifies that SMP is to be equivalent to nine-tenths of the woman's normal weekly earnings for the first six weeks, and for the following 12 weeks is to be payable at a prescribed rate. At the material time that prescribed rate was £54.55. Women who do not satisfy the condition relating to length of service receive the fixed rate for the whole 18 weeks.

8 Furthermore, sections 151 to 163 of the Social Security Contributions and Benefits Act 1992 grant male and female employees who are incapable of work the right to receive payments known as 'Statutory Sick Pay' (hereinafter 'SSP') from their employer for a period of up to 28 weeks, at the rate of £54.55 per week.

The dispute in the main proceedings

9 The six applicants in the main proceedings are all employees of the EOC of child-bearing age. They have completed at least one year's service with their employer and are not employed on a casual, standby or short-notice appointment, nor are

they employed on a fixed-term appointment of less than two years. At least three of them have taken maternity leave in the recent past.

10 The employment contract entered between EOC and its employees comprises, first, the Staff Handbook, which applies to all workers and, second, the Maternity Scheme, which applies to female workers.

11 According to the Staff Handbook, staff who are unfit to work because of illness are entitled to their full salary for a maximum of six months in any 12 month period. Thereafter, they receive half pay up to a maximum of 12 months in any four-year period. Another clause provides that any leave taken without pay reduces the annual leave entitlement by a proportion of the amount of unpaid leave taken.

12 The dispute in the main proceedings centres on the Maternity Scheme. The persons concerned applied to the Industrial Tribunal, Manchester, for a declaration that certain conditions of the scheme are void or unenforceable in so far as they discriminate against female employees and are thus contrary to Article 119 of the Treaty or Directives 75/117, 76/207 or 92/85.

13 According to one of those clauses, any member of staff who has rendered at least one year's paid service with the EOC and is not employed on a casual, standby or short-notice appointment, or employed on a fixed-term appointment of less than two years is entitled to three months and one week's maternity leave on full pay for the period of continuous absence before and after childbirth. However, in order to benefit from that right, the employee must state that she intends to return to work in the EOC after childbirth and agree to be liable to repay any payment made during that period (excluding SMP to which she is entitled in any event), should she fail to return.

14 According to another contested clause of the Maternity Scheme, a member of staff who is entitled to paid maternity leave may also qualify for supplementary unpaid maternity leave provided, *inter alia*, that the total of those two periods of leave do not exceed 52 weeks.

15 Furthermore, the Maternity Scheme provides that if a member of staff specifies that she wishes to begin her maternity leave during the six weeks before the expected week of childbirth, and is absent on account of a pregnancy-related sickness immediately before the date on which she asked to begin her maternity leave and childbirth occurs during that period of absence, the date on which paid maternity leave commences can be brought forward to whichever is the later of the sixth week before the expected week of childbirth and the beginning of the period of absence on account of sickness.

16 Furthermore, according to the Maternity Scheme, paid sick leave is not granted once paid maternity leave has begun or during a period of supplementary unpaid maternity leave. There may, however, be an entitlement to SSP during unpaid maternity leave. Where a member of staff provides at least three weeks notification of her intention to return to work on a specified date, she is entitled to paid sick leave from that date. Paid sick leave following childbirth terminates the maternity leave and the supplementary unpaid maternity leave arrangements.

17 Finally, the Maternity Scheme states that members of staff who are not entitled to paid leave of absence retain their contractual rights and benefits, except remuneration, during the first 14 weeks of leave. In particular, annual leave continues to accrue. The period of absence only accrues for pension purposes if the employee is in receipt of SMP.

18 The national court points out that, pursuant to the foregoing provisions, employees on any form of paid leave, apart from paid maternity leave, including sick leave and paid special leave, are not required to agree to repay any part of their salary if they do not return to work after the period of leave. Furthermore, it is agreed that substantially more women employees than men employees take periods of unpaid leave in the course of their careers, largely because they take supplementary maternity leave.

19 The Industrial Tribunal, Manchester, had doubts as to the compatibility of such provisions with Community law and decided to stay proceedings in order to refer the following questions to the Court for a preliminary ruling:

'In circumstances such as those of the present case, do any of the following matters infringe the prohibition of unfair and/or unfavourable treatment of women because of pregnancy, childbirth, maternity and/or sickness in relation thereto under EC law (in particular Article 119 of the Treaty of Rome and/or Council Directive 75/117/EEC and/or Council Directive 76/207/EEC and/or Council Directive 92/85/EEC):

(1) A condition that maternity pay, beyond the Statutory Maternity Pay, is paid only if the woman states that she intends to return to work and agrees to be liable to repay such maternity pay if she does not return to work for one month on the conclusion of maternity leave.

(2) A condition that where a woman, who is absent on paid sick leave with a pregnancy related illness, gives birth during such absence, her maternity leave may be backdated to the later date of either six weeks before the expected week of childbirth or when the sickness leave began.

(3) A prohibition on a woman, who is unfit for work for any reason whilst on maternity leave, from taking paid sick leave, unless she elects to return to work and terminate her maternity leave.

(4) A condition limiting the time during which annual leave accrues to the statutory minimum period of 14 weeks' maternity leave and accordingly excluding any other period of maternity leave.

(5) A condition limiting the time in which pensionable service accrues during maternity leave to when the woman is in receipt of contractual or statutory maternity pay and accordingly excluding any period of unpaid maternity leave?'

The Community legislation

20 Article 119 of the Treaty provides that Member States are required to ensure and to maintain 'the application of the principle that men and women should receive equal pay for equal work'.

21 According to Article 1 of Directive 75/117, the principle of equal pay laid down in Article 119 of the Treaty is intended to eliminate, for the same work or for work to which equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

22 According to Article 1(1) thereof, Directive 76/207 is intended 'to put into effect in the Member States the principle of equal treatment for men and women as regards

access to employment, including promotion, and to vocational training and as regards working conditions'.

23 Article 2(1) of that directive provides:

'For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.'

24 However, according to Article 2(3), Directive 76/207 is 'without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

25 Article 5(1) of that directive provides:

'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.'

26 As regards Directive 92/85, Article 8 of that directive, concerning maternity leave, provides:

'1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

27 As regards employment rights, Article 11 of Directive 92/85 states:

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

...

(2) in the case referred to in Article 8, the following must be ensured:

(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

(3) the allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation;

(4) Member States may make entitlement to pay or the allowance referred to in points 1 and 2(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation.

These conditions may under no circumstances provide for periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement.'

The first question

28 By its first question, the national court essentially asks whether Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directives 76/207 or 92/85, precludes a clause in an employment contract which makes the payment, during the period of maternity leave referred to by Article 8 of Directive 92/85, of pay higher than the statutory payments in respect of maternity leave conditional on the woman's undertaking to return to work after the birth of the child for at least one month, failing which she is required to repay the difference between the amount of the pay she will have received during the period of maternity leave, on the one hand, and the amount of those payments, on the other.

29 As regards, first, Directive 92/85, the Commission submits that Article 11(2)(b) and (3) requires the payment to a worker on maternity leave of an amount at least equivalent to that which that woman would receive under her employment contract if she were on sick leave. Where, as in this case, the employer has undertaken to pay workers on sick leave their full salary, women on maternity leave should, in accordance with the aforementioned provisions of the directive, receive an equivalent income. In those circumstances, it would be inconsistent with Article 11 of Directive 92/85 if female workers were required to repay the difference between the full salary they received from their employer during their maternity leave and the payments to which they are entitled during maternity leave under national legislation, in the event that they did not return to work after childbirth.

30 In that respect, it should be noted that it was in view of the risk that the provisions relating to maternity leave would be ineffective if rights connected with the employment contract were not maintained, that the Community legislature provided, in Article 11(2)(b) of Directive 92/85, that 'maintenance of a payment to, and/or entitlement to an adequate allowance' for workers to whom the directive applies must be ensured in the case of the maternity leave referred to in Article 8.

31 The concept of pay used in Article 11 of that directive, like the definition in the second paragraph of Article 119 of the Treaty, encompasses the consideration paid directly or indirectly by the employer during the worker's maternity leave in respect of her employment (see Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 12). By contrast, the concept of allowance to which that provision also refers includes all income received by the worker during her maternity leave which is not paid to her by her employer pursuant to the employment relationship.

32 According to Article 11(3) of Directive 92/85, the allowance 'shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected

with her state of health, subject to any ceiling laid down under national legislation'. This is intended to ensure that, during her maternity leave, the worker receives an income at least equivalent to the sickness allowance provided for by national social security legislation in the event of a break in her activities on health grounds.

33 Female workers must be guaranteed an income of that level during their maternity leave, irrespective of whether, in accordance with Article 11(2)(b) of Directive 92/85, it is paid in the form of an allowance, pay or a combination of the two.

34 Although the wording of Article 11 refers only to the adequate nature of the allowance, the income guaranteed to female workers during maternity leave must none the less also be adequate within the meaning of Article 11(3) of Directive 92/85 if it is paid in the form of pay or in conjunction with an allowance, as the case may be.

35 However, although Article 11(2)(b) and (3) requires the female worker to receive, during the period of maternity leave referred to in Article 8, income at least equivalent to the sickness allowance provided for under national social security legislation in the event of a break in her activities on health grounds, it is not intended to guarantee her any higher income which the employer may have undertaken to pay her, under the employment contract, should she be on sick leave.

36 It follows that a clause in an employment contract according to which a worker who does not return to work after childbirth is required to repay the difference between the pay received by her during her maternity leave and the statutory payments to which she was entitled in respect of maternity leave is compatible with Article 11(2)(b) and (3) of Directive 92/85 in so far as the level of those payments is not lower than the income which the worker concerned would receive, under the

relevant national social security legislation, in the event of a break in her activities on grounds connected with her state of health.

37 Next, as regards Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directive 76/207, the applicants in the main proceedings submit that the requirement that a woman must repay the contractual pay received by her during maternity leave, in so far as it exceeds SMP, if she does not return to work after childbirth constitutes discrimination against a woman for reasons of pregnancy, and is therefore contrary to the principle of equal pay. For other forms of paid leave, such as sick leave, workers in general are entitled to the agreed salary without having to undertake to return to work at the end of their leave.

38 Since the consideration paid by an employer under legislation or an employment contract to a woman on maternity leave is based on the employment relationship, it constitutes pay within the meaning of Article 119 of the Treaty and Article 1 of Directive 75/117 (see the judgment in *Gillespie and Others*, cited above, paragraph 14). It therefore cannot also fall within the scope of Directive 76/207.

39 Furthermore, it is settled case-law that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see the judgment in *Gillespie and Others*, cited above, paragraph 16, and Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30).

40 As the Community legislature acknowledged when adopting Directive 92/85, pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave.

41 The maternity leave granted to a worker is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, and Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 25).

42 A clause in an employment contract which makes the application of a more favourable set of rules than that prescribed by national legislation conditional on the pregnant woman, unlike any worker on sick leave, returning to work after childbirth, failing which she must repay the contractual maternity pay in so far as it exceeds the level of the statutory payments in respect of that leave, therefore does not constitute discrimination on grounds of sex for the purposes of Article 119 of the Treaty and Article 1 of Directive 75/117.

43 However, the level of those payments must satisfy the requirements laid down in Article 11(2)(b) and (3) of Directive 92/85.

44 In view of the foregoing, the answer to the first question must be that Article 119 of the Treaty, Article 1 of Directive 75/117 and Article 11 of Directive 92/85 do not preclude a clause in an employment contract which makes the payment, during the period of maternity leave referred to by Article 8 of Directive 92/85, of pay higher than the statutory payments in respect of maternity leave conditional on the worker's undertaking to return to work after the birth of the child for at least one month, failing which she is required to repay the difference between the amount of the pay she will have received during the period of maternity leave, on the one hand, and the amount of those payments, on the other.

The second question

45 By its second question, the national court essentially asks whether Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directives 76/207 or 92/85, precludes a clause in an employment contract from requiring an employee who has expressed her intention to commence her maternity leave during the six weeks preceding the expected week of childbirth, and is on sick leave with a pregnancy-related illness immediately before that date and gives birth during the period of sick leave, to bring forward the date on which her paid maternity leave commences either to the beginning of the sixth week preceding the expected week of childbirth or to the beginning of the period of sick leave, whichever is the later.

46 The applicants in the main proceedings submit that such a clause constitutes discrimination against women in so far as, unlike any other worker who is sick, a female worker who is unfit for work is not able to exercise her contractual right to unconditional paid sick leave if her illness is pregnancy-related and she gives birth while on sick leave. The female worker is thus required to take paid maternity leave on less favourable terms and, in particular, to repay a part of the salary received during that period if she does not return to work after the birth of the child.

47 It should be noted at the outset that, in so far as it concerns the determination of the beginning of the period of maternity leave, the question falls within the scope of Directive 76/207, in particular Article 5(1) thereof on working conditions, and not Article 119 of the Treaty or Directive 75/117.

48 Next, the contested clause applies to the case of a pregnant employee who has expressed her wish to commence her maternity leave during the six weeks preceding the expected week of childbirth.

49 In that respect, although Article 8 of Directive 92/85 provides for a continuous period of maternity leave of at least 14 weeks, including compulsory maternity leave of at least two weeks, it none the less leaves it open to the Member States to determine the date on which maternity leave is to commence.

50 Furthermore, pursuant to Article 2(3) of Directive 76/207, it is for every Member State, within the limits laid down in Article 8 of Directive 92/85, to fix periods of maternity leave so as to enable female workers to be absent during the period in which the disorders inherent in pregnancy and confinement occur (Case C-179/88 *Handels-og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 15).

51 National legislation may therefore, as here, provide that the period of maternity leave commences with the date notified by the person concerned to her employer as the date on which she intends to commence her period of absence, or the first day after the beginning of the sixth week preceding the expected week of childbirth during which the employee is wholly or partly absent because of pregnancy, should that day fall on an earlier date.

52 The clause to which the second question relates merely reflects the choice made in such national legislation.

53 Furthermore, for the reasons described at paragraphs 42 and 43 above, the requirement that a female worker on maternity leave undertake to repay the pay received under her contract during her maternity leave, in so far as it exceeds the level of the payments provided for by national legislation during that leave, if she fails to return to work after childbirth cannot constitute unfavourable treatment of that worker.

54 The answer to the second question must therefore be that Article 8 of Directive 92/85 and Article 5(1) of Directive 76/207 do not preclude a clause in an employment contract from requiring an employee who has expressed her intention to commence her maternity leave during the six weeks preceding the expected week of childbirth, and is on sick leave with a pregnancy-related illness immediately before that date and gives birth during the period of sick leave, to bring forward the date on which her paid maternity leave commences either to the beginning of the sixth week preceding the expected week of childbirth or to the beginning of the period of sick leave, whichever is the later.

The third question

55 By its third question, the national court asks whether Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directives 76/207 and 92/85, precludes a clause in an employment contract from prohibiting a woman from taking sick leave during the minimum period of 14 weeks' maternity leave to which a female worker is entitled pursuant to Article 8 of Directive 92/85 or any supplementary period of maternity leave granted to her by the employer, unless she elects to return to work and thus terminate her maternity leave.

56 First, as regards Directive 92/85, a distinction must be drawn between, on the one hand, the period of maternity leave of at least 14 weeks referred to by Article 8 of that directive and, on the other, any supplementary leave which, as in the present case, the employer is prepared to offer pregnant workers, and workers who have recently given birth or are breastfeeding.

57 In so far as the clause at issue prohibits a woman from taking sick leave during the period of maternity leave referred to by Article 8 of Directive 92/85 — which, in

the United Kingdom is, in principle, 14 weeks — unless she terminates that leave, it must be examined in the light of that provision.

58 In that respect, although the Member States are required, pursuant to Article 8 of the aforesaid directive, to take the necessary measures to ensure that workers are entitled to a period of maternity leave of at least 14 weeks, those workers may waive that right, with the exception of the two weeks compulsory maternity leave provided for in paragraph 2, which, in the United Kingdom, commence on the day on which the child is born.

59 Furthermore, Article 8 of Directive 92/85 provides that the period of maternity leave provided for therein must be at least 14 continuous weeks, allocated before and/or after confinement. It follows from the purpose of that provision that the woman cannot interrupt or be required to interrupt her maternity leave and return to work, and complete the remaining period of maternity leave later.

60 In contrast, if a woman becomes ill during the period of maternity leave referred to by Article 8 of Directive 92/85 and places herself under the sick leave arrangements, and that sick leave ends before the expiry of the period of maternity leave, she cannot be deprived of the right to continued enjoyment, after that date, of the maternity leave provided for by the aforementioned provision until the expiry of the minimum period of 14 weeks, that period being calculated from the date on which the maternity leave commenced.

61 Any other interpretation would compromise the purpose of maternity leave, in so far as that leave is intended to protect not only the woman's biological condition but also the special relationship between a woman and her child over the period which follows pregnancy and childbirth. The continuous period of maternity leave of at least 14 weeks, allocated before and/or after confinement, is intended

in particular to provide the woman with the guarantee that she can look after her new-born baby in the weeks following childbirth. Except in exceptional circumstances, she cannot therefore be deprived of that guarantee for reasons of health.

62 In so far as it prohibits a woman from taking sick leave during any leave granted by the employer in addition to the period of maternity leave provided for by Article 8 of Directive 92/85, unless she terminates that leave, such a clause does not fall within the scope of that provision.

63 The third question also seeks to ascertain whether the clause at issue constitutes discrimination as regards the right to sick leave and, therefore, falls within the scope of Directive 76/207, in particular Article 5(1) thereof, concerning conditions of employment. Article 119 of the Treaty and Directive 75/117 are therefore not in point. In view of the foregoing, the third question need be examined only in so far as the clause of the employment contract referred to therein applies to the supplementary period of maternity leave granted by the employer to female workers.

64 In that respect, the principle of non-discrimination laid down in Article 5 of Directive 76/207 does not require a woman to be able to exercise simultaneously both the right to supplementary maternity leave granted to her by the employer and the right to sick leave.

65 Consequently, in order for a woman on maternity leave to qualify for sick leave, she may be required to terminate the period of supplementary maternity leave granted to her by the employer.

66 The answer must therefore be that a clause in an employment contract which prohibits a woman from taking sick leave during the minimum period of 14 weeks'

maternity leave to which a female worker is entitled pursuant to Article 8(1) of Directive 92/85, unless she elects to return to work and thus terminate her maternity leave, is not compatible with Directive 92/85. By contrast, a clause in an employment contract which prohibits a woman from taking sick leave during a period of supplementary maternity leave granted to her by the employer, unless she elects to return to work and thus terminate her maternity leave, is compatible with Directives 76/207 and 92/85.

The fourth question

67 By its fourth question, the national court essentially seeks to ascertain whether Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directives 76/207 or 92/85, precludes a clause in an employment contract from limiting the period during which annual leave accrues to the minimum period of 14 weeks' maternity leave to which female workers are entitled under Article 8 of Directive 92/85 and from providing that annual leave ceases to accrue during any period of supplementary maternity leave granted to them by their employer.

68 First, the accrual of annual leave constitutes a right connected with the employment contract of workers for the purposes of Article 11(2)(a) of Directive 92/85.

69 It follows from that provision that such a right need only be ensured during the period of maternity leave of at least 14 weeks to which workers are entitled under Article 8 of Directive 92/85.

70 Here, the duration of that period of leave is, in principle, fixed at 14 weeks in the United Kingdom.

71 Consequently, the directive does not preclude a clause, such as that to which the question referred to the Court relates, according to which annual leave ceases to accrue during any period of supplementary maternity leave granted by employers to pregnant workers or workers who have recently given birth or who are breast-feeding.

72 Second, the particular rules concerning the accrual of annual leave constitute an integral part of working conditions within the meaning of Article 5(1) of Directive 76/207 and cannot therefore also fall within the scope of Article 119 of the Treaty or Directive 75/117.

73 In that respect, the applicants point out that, according to the EOC's Staff Handbook, if unpaid leave is taken (sick leave, special leave or supplementary maternity leave), the annual leave entitlement is reduced by a proportion of the amount of unpaid leave taken. However, since a substantially greater proportion of women than men take periods of unpaid leave because they take supplementary maternity leave, that rule — which is ostensibly gender-neutral — constitutes indirect discrimination against women, contrary to Article 5(1) of Directive 76/207.

74 First, as is clear from the documents before the Court, all employees of EOC who take unpaid leave cease to accrue annual leave during that period. According to the EOC Staff Handbook, unpaid leave includes both sick leave and special leave, which are available to any worker, as well as supplementary maternity leave granted by EOC in addition to the 14 weeks' maternity leave provided for by the Employment Rights Act 1996.

75 Such a clause therefore does not constitute direct discrimination since the accrual of annual leave during the period of unpaid leave is interrupted for both men and for women who take unpaid leave. It is therefore necessary to consider whether such a clause can constitute indirect discrimination.

76 The Court has consistently held that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, in particular, Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30, and Case C-100/95 *Kording* [1997] ECR I-5289, paragraph 16).

77 In that respect, it should be noted that, as the national court points out, substantially more women than men take periods of unpaid leave during their career because they take supplementary maternity leave, so that, in practice, the clause at issue applies to a greater percentage of women than men.

78 However, the fact that such a clause applies more frequently to women results from the exercise of the right to unpaid maternity leave granted to them by their employers in addition to the period of protection guaranteed by Article 8 of Directive 92/85.

79 Female workers who exercise that right subject to the condition that annual leave ceases to accrue during the period of unpaid leave cannot be regarded as at a disadvantage compared to male workers. The supplementary unpaid maternity leave constitutes a special advantage, over and above the protection provided for by Directive 92/85 and is available only to women, so that the fact that annual leave ceases to accrue during that period of leave cannot amount to less favourable treatment of women.

80 The answer must therefore be that Directives 92/85 and 76/207 do not preclude a clause in an employment contract from limiting the period during which annual leave accrues to the minimum period of 14 weeks' maternity leave to which female workers are entitled under Article 8 of Directive 92/85 and from providing that annual leave ceases to accrue during any period of supplementary maternity leave granted to them by their employer.

The fifth question

81 It appears from the documents before the Court that, by its fifth question, the national court essentially seeks to ascertain whether Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directives 92/85 or 76/207, precludes a clause in an employment contract from limiting, in the context of an occupational scheme wholly financed by the employer, the accrual of pension rights during maternity leave to the period during which the woman receives the pay provided for by that employment contract or national legislation.

82 The accrual of pension rights in the context of an occupational scheme wholly financed by the employer constitutes one of the rights connected with the employment contracts of the workers for the purposes of Article 11(2)(a) of Directive 92/85.

83 As stated at paragraph 69 above, in accordance with that provision, such rights must be ensured during the period of maternity leave of at least 14 weeks to which female workers are entitled under Article 8 of Directive 92/85.

84 Although, in accordance with Article 11(4) of Directive 92/85, it is open to Member States to make entitlement to pay or the adequate allowance referred to in Article 11(2)(b) conditional upon the worker concerned fulfilling the conditions of eligibility for such benefits laid down under national legislation, no such possibility exists in respect of rights connected with the employment contract within the meaning of Article 11(2)(a).

85 The accrual of pension rights under an occupational scheme during the period of maternity leave referred to by Article 8 of Directive 92/85 cannot therefore be made conditional upon the woman's receiving the pay provided for by her employment contract or SMP during that period.

86 Since the clause to which the fifth question relates is contrary to Directive 92/85, it is not necessary to interpret Article 119 of the Treaty, as given specific expression by Directive 75/117 and Directive 76/207.

87 The answer to the fifth question must therefore be that Directive 92/85 precludes a clause in an employment contract from limiting, in the context of an occupational scheme wholly financed by the employer, the accrual of pension rights during the period of maternity leave referred to by Article 8 of that directive to the period during which the woman receives the pay provided for by that contract or national legislation.

Costs

88 The costs incurred by the United Kingdom Government, the Irish Government and the Austrian Government, and by the Commission, 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 proceedings pending 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 Industrial Tribunal, Manchester, by order of 15 October 1996, hereby rules:

1) **Article 119 of the EC Treaty, Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women and Article 11 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 Council Directive 89/391/EEC) do not preclude a clause in an employment contract which makes the payment, during the period of maternity leave referred to by Article 8 of Directive 92/85, of pay higher than the statutory payments in respect of maternity leave conditional on the worker's undertaking to return to work after the birth of the child for at least one month, failing which she is required to repay the difference between the amount of the pay she will have received during the period of maternity leave, on the one hand, and the amount of those payments, on the other.**

2) **Article 8 of Directive 92/85 and 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 do not preclude a clause in an employment contract from requiring an employee who has expressed her intention to commence her maternity leave during the six weeks preceding the expected week of childbirth, and is on sick leave with a pregnancy-related illness immediately before that date and gives birth during the period of sick leave, to bring forward the date on which her paid maternity leave commences either to the beginning of the sixth week preceding the expected week**

of childbirth or to the beginning of the period of sick leave, whichever is the later.

3) **A clause in an employment contract which prohibits a woman from taking sick leave during the minimum period of 14 weeks' maternity leave to which a female worker is entitled pursuant to Article 8(1) of Directive 92/85, unless she elects to return to work and thus terminate her maternity leave, is not compatible with Directive 92/85. By contrast, a clause in an employment contract which prohibits a woman from taking sick leave during a period of supplementary maternity leave granted to her by the employer, unless she elects to return to work and thus terminate her maternity leave, is compatible with Directives 76/207 and 92/85.**

4) **Directives 92/85 and 76/207 do not preclude a clause in an employment contract from limiting the period during which annual leave accrues to the minimum period of 14 weeks' maternity leave to which female workers are entitled under Article 8 of Directive 92/85 and from providing that annual leave ceases to accrue during any period of supplementary maternity leave granted to them by their employer.**

5) **Directive 92/85 precludes a clause in an employment contract from limiting, in the context of an occupational scheme wholly financed by the employer, the accrual of pension rights during the period of maternity leave referred to by Article 8 of that directive to the period during which the woman receives the pay provided for by that contract or national legislation.**

Rodríguez Iglesias Kapteyn Puissochet Jann

Gulmann Murray Edward Ragnemalm

Sevón Wathelet Schintgen

Delivered in open court in Luxembourg on 27 October 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President