OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 15 March 2007 [1]

I — Introduction

1. The present case constitutes an opportunity to specify further the legal position of pregnant workers under Community law.

2. In accordance with her request, child-care leave [2] was granted to a Finnish teacher, Ms Kiiski, to care for her first child. Even before that child-care leave began, Ms Kiiski discovered, however, that she was pregnant again. She proposed, therefore, to organise her child-care in a different way from that she had originally planned and requested a reduction in the duration of the child-care leave period which had previously been granted. Her employer refused to accede to that request, however, because the duration of a child-care leave period, once approved, may be amended only for good reason and the new pregnancy did not constitute such a reason. Her subsequent request, submitted during the course of child-care leave, by which Ms Kiiski sought termination of that leave and grant of maternity leave was rejected for the same reason, too.

3. Against that background, Ms Kiiski considers that she has suffered discrimination on grounds of her sex and that her rights as a pregnant worker have been infringed. In substance, on the basis of her pregnancy, she demands special treatment vis-à-vis other workers, regardless of their sex.

II — Legal framework

A — *Community law*

4. The Community law framework for this case is established, first, by Council Directive

1 — Original language: German.

2 — In Finnish: 'hoitovapaa'. As revealed at the hearing before the Court, in Finland that leave is included within the category of family leave to which parental leave ('vanhempainloma') and maternity leave also belong.

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 [3] as amended by Directive 2002/73/EC, [4] and, second, by 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. [5] Reference must be had also to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. [6]

5. Article 2 of Directive 76/207, as amended by Directive 2002/73, provides as follows:

'1. 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.

2. For the purposes of this Directive, the following definitions shall apply

— direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

— indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

...

7. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

A woman on maternity leave shall be entitled, after the end of her period of

3 — OJ 1976 L 39, p. 40 ('Directive 76/207').

4 — Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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 1992 L 269, p. 15; 'Directive 2002/73').

5 — OJ 1992 L 348, p. 1 ('Directive 92/85').

6 — OJ 1996 L 145, p. 4 ('Directive 96/34' or 'framework agreement on parental leave').

maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive.

This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC ... and Council Directive 92/85/EEC ...'

6. Article 8 of Directive 92/85 is worded as follows:

'Maternity leave

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 a 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.'

7. Article 11 of Directive 92/85 is worded, inter alia, as follows:

'Employment rights

In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognized 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.'

8. The framework agreement on parental leave annexed to Directive 96/34 contains in point 6 of its general recitals the following observation:

'Whereas measures to reconcile work and family life should encourage the introduction of new flexible ways of organising work and time which are better suited to the changing needs of society and which should take the needs of both undertakings and workers into account.'

9. Clause 2.3 of the framework agreement on parental leave provides that the conditions of access and detailed rules for applying parental leave are to be defined by law and/or collective agreement in the Member States, as long as the minimum requirements of the framework agreement are respected. In accordance with subclause (e) of that provision, Member States and/or management and labour may, in particular,

'define the circumstances in which an employer ... is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the undertaking (e.g. where work is of a seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for parental leave at the same time, where a specific function is of strategic importance). ...'

10. In addition, Clause 2.7 of the framework agreement on parental leave contains the following provision:

'Member States and/or management and labour shall define the status of the employment contract or employment relationship for the period of parental leave.'

B — *National law*

11. In accordance with Paragraph 29 of the Finnish Law on municipal servants, [7] municipal workers are entitled to an exemption from their duties for the purpose of child-care leave, as provided for in Paragraphs 1 to 8 of Chapter IV of the Finnish Law on the employment contract. [8]

12. As regards child-care leave, the general collective agreement applicable in the city of Tampere for 2003/2004 [9] ('collective agreement') refers to the Law on the employment contract. In addition, under Paragraphs 11 and 12 of Part V of that collective agreement, a municipal worker is entitled — where an unforeseen good reason exists — to an amendment in the timing and duration of a child-care leave period previously approved. Unforeseen fundamental changes in the circumstances relating to the child's care, which the worker was unable to take into account at the time of applying for child-care leave, are considered to constitute good reasons. [10]

13. According to the implementation guidelines to that collective agreement, a good reason is deemed to include, for example, serious illness or death of the child or the other parent or divorce. However, as a rule, transfer of a residence to another location, taking up another employment position or a new pregnancy, for example, do not constitute good reasons. On terminating child-care leave, workers must resume their duties.

14. According to the information provided in the order for reference, the collective agreement provides further that in the event of sickness workers are entitled to receive full pay for 60 days and two-thirds pay for 120 days.

7 — Laki kunnallisesta viranhaltijasta.

8 — Työsopimuslaki.

9 — Kunnallinen yleinen virka-ja työehtosopimus.

10 — That approach appears also to accord with the preparatory documents concerning Paragraph 4 of Chapter IV of the Law on the employment contract which governs the right to child-care leave. On that point the referring court and the Finnish Government make reference to draft law No 37/1998.

15. According to the supplementary information provided by the Finnish Government, an entitlement to maternity allowance in Finland exists, independently of whether the worker has been granted child-care leave. The amount of maternity allowance is income-related and is calculated according to the same rules as the per diem sickness benefit. The minimum rate amounts to EUR 15.20 per day.

III — Facts and main proceedings

16. Ms Kiiski is a teacher in a city grammar school in the Finnish city of Tampere [11] and as such enjoys the status of a municipal worker within the meaning of the relevant collective agreement.

17. On 3 May 2004, the headteacher granted her request for child-care leave for the period 11 August 2004 to 4 June 2005 to care for her first child born on 24 August 2003.

18. Even before that child-care leave began, Ms Kiiski discovered that she was pregnant again. Thereupon, on 1 July 2004, she informed the headteacher that she wished to take child-care leave only from 11 August 2004 to 22 December 2004 and requested that the decision granting her child-care leave be amended accordingly. In the absence of a good reason to do so, however, the headteacher declined that request.

19. On 9 August 2004, Ms Kiiski supplemented her request of 1 July 2004 with the information that she was pregnant and that such situation considerably changed the circumstances concerning the care of her child born in 2003. She wished to resume her duties on 23 December 2004. Her husband, the child's father, intended to take child-care leave in the Spring of 2005. By decision of 19 August 2004, the headteacher again refused her request, indicating that her new pregnancy did not constitute a good reason to amend the duration of the child-care leave period previously granted. In reaching that conclusion, he made reference to the implementation guidelines to the collective agreement and to the case-law of the Finnish courts.

20. Subsequently it emerged that Ms Kiiski's husband was, in fact, unable to take child-care leave in the Spring of 2005 since, according to the collective agreement for

11 — Tampereen Lyseon Lukio.

public servants [12] applicable to employees of the Finnish State, at any one time only one parent is entitled to parental leave. [13] Thereupon, on 22 November 2004, Ms Kiiski declared that she wished to terminate her child-care leave on 31 January 2005 and to take maternity leave from that date onwards, thereby enabling the child's father to take the child-care leave he desired. However, on 10 December 2004, the headteacher rejected that request of Ms Kiiski, too, indicating that the fact that the child's father would be otherwise unable to take child-care leave did not constitute a good reason to amend the duration of her child-care leave.

21. On 29 March 2005, Ms Kiiski's second child was born.

22. These facts give rise to the main proceedings which are now pending before the Tampereen käräjäoikeus [14] (or 'referring court'). Ms Kiiski has brought proceedings before that court against her employer, the city of Tampere, seeking compensation in the amount of EUR 5 000 and an amount of EUR 17 354.10 in respect of lost salary [15] and EUR 94 in relation to other losses plus default interest.

23. In substance, Ms Kiiski's argument is that she has suffered discrimination because her new pregnancy has not been recognised as a good reason for amending the duration of her child-care leave period.

24. The city of Tampere, on the contrary, takes the view that Ms Kiiski has not suffered any discrimination on grounds of her sex or in relation to her pregnancy. It is merely the case that her new pregnancy does not constitute a good reason to amend the duration of her child-care leave period as originally granted. Her new pregnancy has not resulted in an unforeseen fundamental change to the circumstances concerning the care of her child born in 2003 which over a longer period might prevent her from benefiting from her child-care leave. Moreover, Ms Kiiski's premature return to her place of work would have caused her employer organisational difficulties in planning the curriculum. Additionally, the employer would have been faced with liability risks, since a replacement staff member had already been engaged to cover the period of Ms Kiiski's child-care leave whose salary the employer might have had to continue paying.

12 — Valtion virkaehtosopimus.

13 — According to the Finnish Government, it follows also from Paragraph 4(3) of the Finnish Law on the employment contract that both parents cannot simultaneously take child-care leave.

14 — Tampere District Court.

15 — The salary claim relates to the period between 23 December 2004 and 18 May 2005. If the child-care leave period had been amended in accordance with Ms Kiiski's original request, she would have resumed her duties on 23 December 2004 and her maternity leave of 72 working days would have commenced on 19 February 2005 and would have continued until 18 May 2005.

25. The referring court indicates that, according to information supplied by Ms Kiiski herself, between 29 December 2004 and 18 May 2005 she received payments totaling EUR 9 506.92. Those payments included a per diem sickness benefit, child-care allowance and maternity and parenting allowances, of which the maternity and parenting allowances for the period between 19 February 2005 and 18 May 2005 alone amounted to EUR 5 699.11. [16] For the period following 18 May 2005 Ms Kiiski received a monthly parenting allowance in the amount of EUR 1 951.75. By way of contrast, if Ms Kiiski had been in active service, her remuneration inclusive of all supplements and increases would have amounted to EUR 3 572.90 monthly.

IV — Reference for a preliminary ruling and procedure before the Court

26. By order of 24 February 2006, lodged at the Court's Registry on 28 February 2006, the Tampereen käräjäoikeus stayed proceedings, referring the following three questions to the Court for a preliminary ruling.

'(1) Is it direct or indirect discrimination contrary to Article 2 of the Equal Treatment Directive of 76/207, as amended by Directive 2002/73, for an employer to refuse to make changes to the date of child-care leave which has been granted to an employee or to interrupt it as a result of a new pregnancy of which the employee has become aware before the start of child-care leave, in accordance with the settled interpretation of national provisions according to which a new pregnancy is not generally an unforeseeable and justified ground on the basis of which the date and duration of child-care leave may be altered?

(2) May an employer sufficiently justify his conduct, described [in the first question], which possibly constitutes indirect discrimination, from the point of view of that directive, on the ground that ordinary rather than serious problems would arise in respect of teachers' working arrangements and continuity of teaching, or on the ground that the employer would under the national provisions have to compensate the person replacing the teacher on child-care leave for the loss of pay incurred if the teacher on child-care leave were to return to work before the end of their child-care leave?

(3) Can Directive 92/85 on the protection of pregnant workers and certain other workers be applicable, and, if so, is the employer's conduct described [in the first question] contrary to Articles 8 and

16 — 73 days at EUR 78.07 each.

11 of that directive, if, while remaining on child-care leave, the employee has lost her opportunity of enjoying the pay benefits of maternity leave based on her working relationship in the public sector?'

27. In the proceedings before the Court, in addition to Ms Kiiski and the city of Tampere, [17] the Italian and Finnish Governments and the Commission of the European Communities submitted written observations. Furthermore, the city of Tampere, the Finnish Government and the Commission participated in the hearing which was held before the Court on 8 February 2007.

V — Appraisal

28. Taken together, the three questions seek to establish whether a worker suffers discrimination on grounds of her sex and has her rights as a pregnant worker infringed, if, for justifiable operational reasons, she is refused the possibility of reducing — on the basis of her new pregnancy — a child-care leave period previously granted, in order to organise her child-care in a different way from that she had originally planned and to take advantage of maternity leave.

A — *Potential discrimination within the meaning of Directive 76/207 (first and second questions)*

29. The first two questions address the issue of possible discrimination on grounds of sex. By means of those questions, the referring court wishes to know whether a pregnant worker suffers discrimination on grounds of her sex if, for justifiable operational reasons, she is refused the possibility of reducing a period of child-care leave which has been previously granted.

30. According to Article 2(1) and (2) of Directive 76/207, the principle of equal treatment for men and women as regards their working conditions incorporates a prohibition on direct and, also, on indirect discrimination on grounds of sex. In that context, the Directive permits objective justification by way of a legitimate aim only in respect of indirect discrimination (second indent of Article 2(2) of Directive 76/207).

17 — Tampereen kaupunki.

1. Direct sex discrimination

31. *Direct discrimination* arises where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation (first indent of Article 2(2) of Directive 76/207).

32. Case-law recognises that such discrimination may exist in situtations where, on reaching a decision affecting a worker, an employer takes into consideration — to that worker's disadvantage — her pregnancy or the risks associated with her pregnancy. [18] In recasting Article 2 of Directive 76/207, the Community legislature has now also had regard to that concept and has expressly specified in paragraph 7 that the less favourable treatment of a woman related to her pregnancy or maternity leave constitutes discrimination within the meaning of that directive.

33. A case such as the present one stands out, however, by the fact that the employer precisely accorded no consideration to the new pregnancy of the worker concerned and did not treat her less favourably than other workers. In refusing the various requests of Ms Kiiski to reduce the duration of her child-care leave, the head teacher relied upon objective operational reasons which had nothing to do with her pregnancy or pregnancy-related risks but which, instead, could have been applied to all workers, regardless of their sex, since in the same situation, neither a man nor a woman who was not pregnant would have been treated any differently. Ms Kiiski's new pregnancy did not constitute the causal factor motivating the refusal to amend her child-care leave period in accordance with her request.

34. In truth, the various requests made by Ms Kiiski to reduce the duration of her child-care leave period constituted, in fact, an attempt, based on her new pregnancy, to obtain special treatment of a kind to which other workers would not be entitled.

35. Such special treatment is called for, however, only if, and in such cases, only to the extent that, by reason of her pregnancy, the position of a worker such as Ms Kiiski significantly differs from the situation of other workers. According to consistent case-law, the principle of equal treatment and non-discrimination, one of the fundamental principles of Community law, requires that comparable situations must not be treated

18 — See, for example, Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12; Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979, paragraph 13; Case C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 25; Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 47, and Case C-320/01 *Busch* [2003] ECR I-2041, paragraphs 39 and 40.

differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. [19] To the same effect, the legal definition of direct discrimination in the first indent of Article 2(2) of Directive 76/207 also makes express reference to the comparability of situations.

36. In order to determine whether and to what extent a worker's pregnancy must be taken into consideration in reaching a decision on her request to reduce her period of child-care leave, the spirit and purpose of child-care or parental leave must be taken as the starting point. As held by the Court, such leave is granted to parents 'to enable them to taken care of their child'. [20]

37. In that respect, the position of a pregnant worker does not differ significantly, however, from that of other workers, regardless of their sex, who, likewise, have been granted child-care leave. Admittedly, it is correct to assert that a new pregnancy during her child-care leave may impose multiple burdens on a worker at times, and, in particular, in the final stages of pregnancy and shortly after childbirth. It cannot be generally assumed, however, that by reason of pregnancy during her child-care leave it would become impossible, as a rule, for the worker concerned to use that leave as intended in caring for her first child.

38. Ms Kiiski hints at the fact that the circumstances concerning the care of her first child significantly changed as a result of her new pregnancy. However, at no point does she substantiate that claim in any detail. As can be concluded from the preliminary reference, in making her various requests to reduce the duration of the child-care leave period previously granted, Ms Kiiski was essentially aiming to organise her child-care other than as had originally been planned. In particular, she wanted to make it possible for her husband to take child-care leave himself.

39. Even from that perspective, however, her situation does not differ significantly from that of other workers, regardless of their sex, who for practical reasons wish to change the timing of their original plans, in particular, to involve the other parent more closely in child-care. The general reduction in the duration of child-care leave sought does not constitute an inevitable consequence of the renewed pregnancy, in particular, it is unconnected to the risks facing a worker which are inherent in pregnancy. Nor does it constitute a consequence of the worker's

19 — See simply Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 45; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 70; Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 71, and Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57.

20 — Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067, paragraph 32; see also Clause 2(1) of the framework agreement on parental leave.

pregnancy, if under the relevant national provisions the other parent cannot be granted child-care leave at the same time. Rather, the restriction facing the one parent simply arises from the fact that the other parent has taken up their child-care leave and, in particular, it arises wholly independently of that other parent's sex and of any pregnancy.

40. As the position of a pregnant worker, such as Ms Kiiski, does not significantly differ from that of other workers with regard to child-care leave, [21] neither, therefore, does the principle of equal treatment require her employer to give particular consideration to the pregnancy of the former in reaching a decision on reducing the child-care leave period as requested.

41. Nor does reference to *Busch*, [22] on which Ms Kiiski relied in the main proceedings, point to any other conclusion. Only on a superficial examination does that case appear to resemble the present proceedings, since both cases concern a pregnant worker who wished to terminate prematurely her child-care leave and to return to work in order to benefit from maternity provisions shortly thereafter. However, the two cases can, in fact, be fundamentally distinguished from one another: whereas in *Busch* the employer sought to prevent the worker's return to work precisely on account of her pregnancy, in the present case pregnancy in no way motivated the employer's refusal. Since a replacement member of staff had been engaged for the duration of Ms Kiiski's child-care leave, her employer simply had no operational interest in her premature return to work regardless of whether Ms Kiiski was now pregnant or not. Accordingly, it was not the employer, but Ms Kiiski, herself, who referred to the pregnancy — wrongly — in order to have a basis for her claims.

42. In *Busch*, the Court merely emphasises that a worker suffers discrimination on grounds of her sex if her employer wishes to prevent her premature return from child-care leave precisely on account of her pregnancy or on account of pregnancy-related risks. That finding does not preclude the possibility, however, that an employer, acting within the scope of its discretion, for justifiable operational reasons unconnected to a worker's pregnancy, may refuse to accede to that worker's premature return. *Busch* does not provide support for the proposition, for example, that a worker's new pregnancy, without more, entitles her on the basis of Community law, at a time of her choosing, to return to work prematurely from child-care leave.

21 — Moreover, in this connection, the issue, whether the worker already discovered that she was pregnant before the start of her child-care leave and informed her employer of that fact or did so only at a later point, is not decisive.

22 — Cited in footnote 18.

43. Thus, even on taking *Busch* into account, in a case such as the present, no indications of direct sex discrimination exist.

2. Indirect sex discrimination

44. *Indirect discrimination* on grounds of sex may exist where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex (second indent of Article 2(2) of Directive 76/207).

45. The provisions and criteria, in accordance with which decisions in Finland concerning a possible reduction in the duration of the child-care leave period previously granted must be taken, are in fact gender neutral. In a case such as the present, there are, however, no indications whatsoever that such provisions and criteria would be apt to place members of one sex — women — at a particular *disadvantage* compared with members of the other sex. [23] On the basis of the information supplied detailing the facts of the main proceedings, it cannot be assumed, therefore, that a situation of indirect discrimination exists.

46. I will add, only for the sake of completeness, that I consider it also to be objectively justified for a national provision to permit employers to insist on a good reason for reducing a child-care leave period previously granted and otherwise to refuse that reduction on operational grounds. In this context, I refer, in particular, to the assessment made by the representatives of management and labour at European level on which — with the approval of the Community legislature — they based the framework agreement on parental leave and of which express note is to be taken also within the framework of Directive 76/207. [24]

47. Thus, the sixth general recital in the framework agreement on parental leave emphasises equally the needs of undertakings and workers. Moreover, Clause 2.3(e) of that framework agreement hints at the fact that justifiable operational reasons may entitle an employer to postpone a parental leave which has been requested, because, for example, no replacement can be found at short notice for the worker concerned. All the more so it must be possible at a later

23 — The mere fact, that in certain cases more women than men take child-care leave, in no way constitutes a sufficient basis on which to assume the existence of indirect discrimination.

24 — See the fourth subparagraph of Article 2(7) of Directive 76/207, as amended by Directive 2002/73, according to which that directive is expressed to be without prejudice to the provisions of Directive 96/34.

stage, for justifiable operational reasons, for an employer to refuse a reduction in the duration of the child-care leave as originally granted because, for example, it has now found a replacement for the worker concerned whose employment it cannot prematurely terminate without more.

3. Interim conclusion

48. Thus, as an interim conclusion concerning the first and second questions it must be held:

A national provision according to which for justifiable operational reasons an employer may refuse the reduction in the child-care leave period previously granted to a worker which she requested on the basis of her new pregnancy results in neither direct nor indirect discrimination on grounds of sex within the meaning of Article 2 of Directive 76/207, as amended by Directive 2002/73.

B — *Protection of pregnant workers under Directive 92/85 (third question)*

49. By its third question the referring court essentially wishes to know whether under Directive 92/85 a worker suffers an infringement of her rights as a pregnant worker if for justifiable operational reasons that worker is refused the possibility of reducing her child-care leave period previously granted in favour of maternity leave.

50. Directive 76/207 applies without prejudice to the provisions of Directive 92/85. [25] Therefore, in a case such as the present, even if the principle of equal treatment within the meaning of the former directive is not infringed, the worker concerned may be affected in the enjoyment of her rights as a pregnant worker accorded by the latter directive. That argument presupposes, however, that both in personal and material terms Directive 92/85 applies.

25 — See the fourth subparagraph of Article 2(7) of Directive 76/207, as amended by Directive 2002/73.

1. Personal scope of Directive 92/85

51. The question of whether a person in Ms Kiiski's position must be considered a *worker* even during her child-care leave, falling, thus, within the personal scope of Directive 92/85, crucially depends on the status of her employment contract during such a period of leave.

52. That is a matter for national law to determine. Community law lays down no specifications whatsoever in that respect, an observation which holds true whether the *child-care leave* [26] taken by Ms Kiiski must be regarded as corresponding to *parental leave* [27] within the meaning of Directive 96/34 or goes beyond such leave. Even in the case of *parental leave* for which the framework agreement sets at least certain minimum requirements from a Community law point of view, Clause 2.7 expressly leaves it to the Member States and/or management and labour to define the status of the employment contract or employment relationship.

53. It is for the national court to undertake a detailed examination of the status — under national law — of Ms Kiiski's employment relationship during her child-care leave. The information provided in the order for reference suggests that even during her child-care leave her employment relationship continued to exist and that merely the principal obligations arising from that relationship were suspended. In such a case, even during that period, Ms Kiiski would fall within the personal scope of Directive 92/85.

2. Material scope of Directive 92/85

54. It is disputed in the present case whether a worker is still entitled to maternity leave within the meaning of Article 8 of Directive 92/85, if in the period for which she requests maternity leave she is no longer in active service but on child-care leave. The answer to that question depends on the material scope of Directive 92/85 and its provisions on maternity leave.

55. Since an examination of the wording of Article 8 of Directive 92/85 is to that extent unproductive, the meaning and scope of the entitlement to maternity leave guaranteed by

26 — In Finnish: 'hoitovapaa'.

27 — In Finnish: 'vanhempainloma'.

Community law may only be determined by regard to the objectives of Directive 92/85 and the context of its provisions. [28]

56. The spirit and purpose of maternity leave is to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. [29] Grant of maternity leave within the meaning of Article 8 of Directive 92/85, together with the financial guarantees provided by Article 11(2) of the same directive, is intended to help prevent a worker from subjecting herself and her child to particular burdens and dangers arising through the continuation of her work.

57. Maternity leave is specially tailored, therefore, to address the multiple burdens of pregnancy and employment. However, precisely *those* multiple burdens do *not* confront a worker, if in the period for which she requests maternity leave she is already on child-care leave or parental leave and not in active service.

58. Admittedly, if during child-care leave a worker is (again) pregnant, likewise, multiple burdens may no doubt arise from time to time during that period. Thus, above all, in the final stages of pregnancy and shortly after the birth of the second child there is a high probability that the mother will temporarily be limited in the care she can give to her first child.

59. However, maternity leave is not of any help in dealing with the latter form of multiple burden either, rather quite the opposite is true, since even a worker on maternity leave would potentially have to deal with her pregnancy and to care for her first child simultaneously and to that extent would be confronted with multiple burdens.

60. Moreover, nor is that form of multiple burden included within the protective purpose of Directive 92/85 or of the maternity leave which the Directive guarantees. As follows from its legal basis in Article 118a of the EEC Treaty and from its first, fifth and sixth recitals, the aim of Directive 92/85, in

28 — See to that effect, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41, Case C-212/04 *Adeneler* [2006] ECR I-6057, paragraph 60, and Case C-36/05 *Commission* v *Spain* [2006] ECR I-10313, paragraph 25.

29 — *Commission* v *Luxembourg*, cited in footnote 20, paragraph 32; see also Case C-411/96 *Boyle* [1998] ECR I-6401, paragraph 41, Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 32; to the same effect, Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 43.

fact, is to encourage the improvement in working conditions and in so doing, in particular, to protect the safety and health of pregnant workers *at work*.

61. On the contrary, the — incontestably important — protection of the safety and health of pregnant workers *outside* the direct sphere of their employment, for example, during child-care or parental leave, does not fall within the scope of Directive 92/85. That protection — at least according to Community law as it stands at present — can be ensured only by way of national law, that is to say through action taken by Member States and/or management and labour.

62. Nor does anything to the contrary follow from the judgment in *Commission* v *Luxembourg*. [30] Admittedly, in that case the Court held 'that a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law'. For workers who are not in active service, but are on child-care or parental leave, as I have explained, maternity leave is, however, not even a 'period of leave guaranteed by Community law'. Since the worker concerned has no Community law entitlement during that period to maternity leave in any event, nor is it possible for such an entitlement to be affected by the continuation of another period of leave, in particular, parental leave or child-care leave.

63. The judgment in *Commission* v *Luxembourg* merely states that a worker must receive credit for that part of her parental leave which she did not take, *if*, as a matter of national law, maternity leave is granted during that period. [31] The intention underlying that finding is to prevent part of that worker's previously granted parental leave from expiring unused. On the contrary, I can find no indication in that judgment that Community law grants workers who are on parental or child-care leave in all cases a *legal right* to maternity leave. Although the Member States or management and labour — having regard to *Commission* v *Luxembourg* — may extend maternity leave also to cover such cases, [32] Community law does not, however, require them to do so.

30 — Cited in footnote 20, paragraph 33. To the same effect, see the earlier case of *Merino Gómez*, cited in footnote 29, paragraph 41.

31 — In that case the Court considered Luxembourg to have infringed its Treaty obligations 'by providing that the right to maternity leave or adoption leave arising during parental leave replaces the latter which must then come to an end, without its being possible for the parent to defer the portion of the parental leave which he or she was unable to take' (*Commission* v *Luxembourg*, cited in footnote 20, paragraph 34 read together with point 1 of the operative part).

32 — Directive 92/85 merely provides for a common minimum standard, as already follows from its legal base (see Article 118a(2) of the EEC Treaty) and is also reflected in the wording ('at least') of Article 8 of the Directive.

64. Thus, Article 8 of Directive 92/85 does not preclude a national provision by which an employer for justifiable operational reasons may refuse to allow a worker a reduction in her previously granted childcare leave, where she requested that reduction on the basis of her new pregnancy in order to take maternity leave.

3. Financial guarantees during maternity leave in accordance with Article 11 of Directive 92/85

65. Even if one assumes, however, that a worker such as Ms Kiiski, who is on childcare leave, is entitled to take maternity leave in that period, the nature of the financial guarantees resulting from Directive 92/85 applicable to such a maternity leave remains to be determined.

66. It follows from Ms Kiiski's written observations that for the period of 72 days for which she sought maternity leave she claims an entitlement to full pay. [33] The issue whether — in the event of maternity leave being granted — such an entitlement in fact exists, is a matter of national law, for the national court to determine where appropriate. Community law in no way requires that payment be maintained to that extent.

67. In accordance with points 2(b) and 3 of Article 11 of Directive 92/85, there is no requirement to ensure that during maternity leave remuneration is necessarily maintained at the full rate, instead the Member States may simply provide for *entitlement to an adequate allowance*, such allowance being 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.

68. As Community law stands at present, no general provision or principle thereof requires that women should continue to receive full pay during maternity leave, provided that the amount of remuneration payable is not so low as to undermine the Community-law objective of protecting female workers, in particular before giving birth. [34]

33 — In making that claim, Ms Kiiski relies on the applicable collective agreement.

34 — *McKenna*, cited in footnote 18, paragraph 59; to the same effect, the earlier judgment in Case C-342/93 *Gillespie* [1996] ECR I-475, paragraph 20.

69. Although women on maternity leave doubtless are in need of special protection, their position is not comparable to that of individuals who are actually at work, that is to say, in active service. [35] That finding is all the more applicable in cases such as the present in which the worker already before the actual start of her maternity leave was no longer performing active service but was already on parental or child-care leave. In that case, her position is, in fact, more comparable to that of a person not in employment than to that of a person in active service.

70. Therefore, if a worker such as Ms Kiiski — contrary to my observations above [36] — is granted an entitlement to maternity leave, Community law, at the very least, does not require full pay to be maintained during that leave.

71. Accordingly, nor does Article 11 of Directive 92/85 preclude a national provision by which an employer for justifiable operational reasons may refuse to allow a worker a reduction in her previously granted child-care leave, where she has requested that reduction by reference to her new pregnancy in order to take maternity leave.

35 — To the same effect *Gillespie*, cited in footnote 34, paragraph 17, Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 37, and *McKenna*, cited in footnote 18, paragraphs 50 and 59; see further my Opinion in Case C-220/02 *Österreichischer Gewerkschaftsbund* [2004] ECR I-5907, points 95 and 96.

36 — Points 54 to 64 of this Opinion.

4. Interim conclusion

72. Thus, as an interim conclusion concerning the third question, it must be held:

Articles 8 and 11 of Directive 92/85 do not preclude a national provision by which an employer for justifiable operational reasons may refuse to allow a worker a reduction in her previously granted child-care leave, where she has requested that reduction by reference to her new pregnancy, even if the worker is denied thereby certain employment-based financial benefits associated with maternity leave.

VI — Conclusion

73. On the basis of the foregoing, I propose that the Court should reply to the Tampereen käräjäoikeus as follows:

(1) A national provision, according to which for justifiable operational reasons an employer may refuse the reduction in the child-care leave period previously granted to a worker which she requested on the basis of her new pregnancy results in neither direct nor indirect discrimination on grounds of sex within the meaning of Article 2 of Directive 76/207/EEC, as amended by Directive 2002/73/EC.

(2) Nor do Articles 8 and 11 of Directive 92/85/EEC preclude such a provision even if the worker is denied thereby certain employment-based financial benefits associated with maternity leave.