JUDGMENT OF THE COURT
8 November 1990 *

In Case C-179/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Højesteret (Supreme Court of Denmark) for a preliminary ruling in the proceedings pending before that court between

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz

and

Dansk Arbejdsgiverforening, acting on behalf of Aldi Marked K/S,

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

THE COURT,

composed of: O. Due, President, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris and F. Grévisse, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator,

after considering the written observations submitted on behalf of

* Language of the case: Danish.

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz, the appellant in the main proceedings, by L. S. Andersen, of the Århus Bar,

Dansk Arbejdsgiverforening, acting on behalf of Aldi Marked K/S, the respondent in the main proceedings, by J. P. Buhl, Advokat, Copenhagen,

the United Kingdom, by J. A. Gensmantel, of the Treasury Solicitor's Department, acting as Agent,

the Italian Government, by P. G. Ferri, avvocato dello Stato, acting as Agent,

the Commission of the European Communities, by I. Langermann, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Handels- og Kontorfunktionærernes Forbund i Danmark, the Dansk Arbejdsgiverforening, the United Kingdom, the Italian Government and the Commission at the hearing on 3 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 November 1989,

gives the following

Judgment

1 By decision of 30 June 1988, which was received at the Court on 4 July 1988, the Danish Højesteret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 L 39, p. 40; hereinafter referred to as 'the Directive')

2 Those questions arose in the context of proceedings between Mrs Birthe Vibeke Hertz, a part-time cashier and saleswoman, and her former employer, Aldi Marked K/S. Mrs Hertz was appointed by Aldi Marked on 15 July 1982. She gave birth to a child in June 1983 after a pregnancy marked by 'complications' for most of which, with the consent of her employer, she was on sick leave.

3 On the expiry of her maternity leave which, in accordance with the provisions of the applicable Danish law, ran for 24 weeks after the birth, Mrs Hertz resumed her work in late 1983. She had no health problems until June 1984. Between June 1984 and June 1985, however, she was once more on sick leave, for 100 working days. It is common ground between the parties that Mrs Hertz's illness was a consequence of her pregnancy and confinement.

4 By letter of 27 June 1985, Aldi Marked informed Mrs Hertz that it was terminating her contract of employment with the statutory four months' notice. Aldi Marked subsequently stated that Mrs Hertz's periods of absence were the ground for her dismissal and that it was normal practice to dismiss workers who were often absent owing to illness.

5 The Sø- og Handelsret (Maritime and Commercial Court) dismissed the action brought by Mrs Hertz against the dismissal, whereupon she appealed to the

Højesteret. In the proceedings before the Højesteret the Handels- og Kontorfunktionærernes Forbund i Danmark (Danish Union of Shop and Office Employees) acted on behalf of Mrs Hertz, and the Dansk Arbejdsgiverforening (Danish Employers' Association) acted on behalf of Aldi Marked. The H jesteret took the view that the case raised difficulties as to the interpretation of Council Directive 76/207 and therefore referred the following questions to the Court for a preliminary ruling:

'(1) Do the provisions of Article 5(1), in conjunction with Article 2(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 encompass dismissal as a consequence of absence due to illness which is attributable to pregnancy or confinement?

(2) If the answer is affirmative, is protection against dismissal due to illness caused by pregnancy or confinement unlimited in time?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

7 The observations submitted to the Court reveal the extent of the difficulties raised by the national court's question.

8 On the one hand it is claimed that the dismissal of a woman on account of pregnancy, confinement or repeated periods of absence due to an illness attributable to pregnancy or confinement is — irrespective of the time when that illness occurs — contrary to the principle of equal treatment, since a male worker is not subject to such disorders and hence cannot be dismissed on that ground.

9 On the other hand it is contended that an employer cannot be prohibited from dismissing a female worker on account of her frequent periods of sick leave solely because the illness is attributable to pregnancy or confinement. Dismissal on that ground is insufficient proof of infringement of the principle of equal treatment. Such a prohibition, which would apply to an employer for many years after the confinement, would be liable to entail not only administrative difficulties and unfair consequences for the employers but also negative repercussions on the employment of women. Furthermore, although Article 2(3) of the Directive allows Member States to introduce provisions designed to protect women in connection with pregnancy and maternity, it gives no guidance as to the exact content of such provisions.

10 It should be noted at the outset that the purpose of the Directive, according to Article 1(1), is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

11 Article 2(1) of the Directive provides that '. . . the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. Under Article 5(1) 'application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex'.

12 Article 2(3) of the Directive further states: 'This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

13 It follows from the provisions of the Directive quoted above that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, as is a refusal to appoint a pregnant woman (see judgment of today's date in Case C-177/88 *Dekker* v *VJM-Centrum* [1990] ECR I-3941).

14 On the other hand, the dismissal of a female worker on account of repeated periods of sick leave which are not attributable to pregnancy or confinement does not constitute direct discrimination on grounds of sex, inasmuch as such periods of sick leave would lead to the dismissal of a male worker in the same circumstances.

15 The Directive does not envisage the case of an illness attributable to pregnancy or confinement. It does, however, admit of national provisions guaranteeing women specific rights on account of pregnancy and maternity, such as maternity leave. During the maternity leave accorded to her pursuant to national law, a woman is accordingly protected against dismissal due to absence. It is for every Member State to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur.

16 In the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness. Such a pathological condition is therefore covered by the general rules applicable in the event of illness.

17 Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex.

18 Similarly, in such a case there is no reason to consider the question whether women are absent owing to illness more often than men, and whether there exists therefore any indirect discrimination.

19 Accordingly, the answer to be given to the first question is that, without prejudice to the provisions of national law adopted pursuant to Article 2(3) of Council

Directive 76/207 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, Article 5(1) of that directive, in conjunction with Article 2(1) thereof, does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.

Second question

20 In view of the answer to the first question, there is no need to rule on the second question.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Danish Højesteret, by decision of 30 June 1988, hereby rules:

Without prejudice to the provisions of national law adopted pursuant to Article 2(3) 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, Article 5(1) of that directive, in conjunction with Article 2(1) thereof, does not preclude dismissals which are the result of absences due to an illness attributable to pregnancy or confinement.

Due Moitinho de Almeida Rodríguez Iglesias

Díez de Velasco Slynn Kakouris Grévisse

Delivered in open court in Luxembourg on 8 November 1990.

J.-G. Giraud
Registrar

O. Due
President