Equal Treatment Between Men and Women

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Protective measures for pregnant workers

Dr. Síofra O'Leary*

I - Introduction

The purpose of this handout is to give you a broad overview of the protection afforded pregnant workers on the basis of provisions of the Treaty on the functioning of the European Union (TFEU, ex EC Treaty), EU secondary legislation and the case-law of the Court of Justice.

Having outlined the relevant provisions in secondary legislation dealing with sex equality generally and the protection of pregnant workers in particular, the handout outlines the principles established by the case-law of the Court on the following issues:

- Refusal to employ or dismissal of pregnant workers on grounds of pregnancy (III);
- Dismissal of pregnant workers due to absences from work arising from pregnancy related illness (IV);
- Entitlement of pregnant workers to equal pay (Article 157 TFEU) (V)
- Entitlement of pregnant workers to equal treatment as regards, in particular, working conditions (VI);
- Miscellaneous – new and a-typical cases and a-typical reasoning (VII).

* Référendaire, Court of Justice of the European Union; Visiting Professor, College of Europe (Bruges). The views expressed in this outline are purely personal to the author.

II – Legislative framework

Directive 76/207 (Equal Treatment Directive)

Article 2(3) of the Equal Treatment Directive provided simply for a derogation from the principle of equal treatment, stating that:

"[Directive 76/207] shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."

The Court has interpreted the scope of this derogation restrictively.

In **Case 22/84 *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651**, it had to interpret this provision in the context of a discrimination claim by a Northern Irish policewoman barred from using firearms in the course of her duty. Could the difference in treatment between male and female police officers in this regard be excused with reference to the derogation from the principle of equal treatment in Article 2(3) Directive 76/207?

The Court held that:

"Article 2(3) [of the Equal Treatment Directive] must be interpreted strictly. It is clear from the express reference to pregnancy and maternity that the directive is intended to protect a) a woman's biological condition and b) the special relationship which exists between a woman and her child. That provision does not allow women to be excluded from certain types of employment on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned."

Women may not be excluded from a certain type of employment solely because they are on average smaller and less strong than men, while men with similar physical features are accepted for that employment (**Case C-203/03 *Commission* v. *Austria* [2005] ECR I-935, para.46**). In that case, the Court held that Austrian legislation

prohibiting female employment in the underground mining industry went beyond what is necessary in order to ensure that women are protected within the meaning of Article 2(3) Directive 76/207. An absolute prohibition of women in diving work also went beyond what is permitted by Article 2(3).

Directive 2002/73, amending Directive 76/207

Article 2(3) of the original Equal Treatment Directive was replaced by Article 2(7) as a result of amendments introduced by Directive 2002/73. This amended provision of the Equal Treatment provides as follows:

"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 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."

For the jurisprudence of the Court on the protection of pregnant workers which developed on the basis of the Equal Treatment Directive, see below.

Directive 2006/54 (Recast Directive)

With effect from 15 August 2009, the Recast Directive repealed, inter alia, Directives 75/117 (Equal Pay), 76/207 (Equal Treatment) and 97/80 (Burden of Proof).

In the context of the protection of pregnant workers, it is worth noting a number of the recitals of the preamble to the Recast Directive:

"(23) It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.

(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85 […]."

The purpose of the Recast Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, i.e. access to employment, including promotion, and to vocational training; working conditions, including pay, and occupational social security schemes (see Articles 1 and 14 (1) of the Recast Directive).

Note that this Directive covers both pay within the meaning of Article 157 TFEU (ex 141 EC) and working conditions, despite the previous distinction drawn by EU legislation and in the case-law of the Court between cases relating to remuneration, and therefore falling within the scope of Article 157 TFEU (ex 141 EC) and those relating to access to employment/working conditions/dismissal which were covered by the Equal Treatment Directive (see, as regards this distinction, **Case C-342/93 *Gillespie* [1996] ECR I-475, para.24**).

Direct discrimination is defined in Article 2(1) as occurring where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

According to Article 2(2) of the Recast Directive, for the purposes of that Directive, discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85.

Article 28 of the Recast Directive reproduces the terms of the derogation contained in Article 2(3) of the Equal Treatment Directive (see also recital 24 and Articles 2(2)(c) and 15).

Article 15 addresses the right of female workers to return to their job or an equivalent post after maternity leave. Article 16 relates to paternity and adoption leave.

The provisions of the Recast Directive on the burden of proof essentially reproduce the terms of the Burden of Proof Directive, now repealed. Article 19 provides that Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Article 19 (4) states that this paragraph shall also apply to the situations covered by Article 157 TFEU (ex 141 EC) and, insofar as discrimination based on sex is concerned, by Directive 92/85.

The Court has yet to hand down a decision interpreting the provisions of the Recast Directive.

<u>Directive 92/85 (Pregnancy and Maternity Directive)</u>

Purpose of the Directive

The purpose of the Pregnancy and Maternity Directive is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.

This is, however, in accordance with Article 152 TFEU (ex 137 EC), a minimum standards directive. Member States are not prevented, pursuant to Article 152(4) TFEU (ex 137(4) EC), from adopting rules providing for more favourable protection.

Member States may not rely on the adoption of Directive 92/85 to reduce the level of protection afforded to pregnant workers (Article 1(3) of Pregnancy and Maternity Directive).

Definition of pregnant worker

Article 2(a) provides that a pregnant worker within the meaning of this Directive shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice.

This definition may prove problematic in certain circumstances. It appears to indicate that a worker cannot benefit from the protection afforded by Directive 92/85 unless and until the employer has been informed by the pregnant employee herself of the pregnancy. In addition, a reference is made to national legislation and/or national practice, the effect of which is not entirely clear. An interpretation of this provision making, for example, the protection against dismissal conferred by Article 10 of the Directive contingent on an employer being expressly informed by the worker herself could be regarded as threatening the *effet utile* of this provision. Were an employer informed by a third party of the worker's pregnancy or were it to be established that he or she had realised the employee was pregnant, would the employee qualify as a pregnant worker within the meaning of the Directive? The Court has yet to deal with a case in which this was the central issue.

In **Case C-116/06 *Kiiski* [2007] ECR I-7643, paras.23-25,** the Court stated:

"23. According to [Article 2(a) Directive 92/85], 'pregnant worker' means a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice.

24. It follows that the [Union] legislature, with a view to the implementation of Directive 92/85, intended to give the concept of 'pregnant worker' a [Union] meaning, even if, in respect of one element of that definition, namely that relating to the method of communication of her condition to her employer, it refers back to national legislation and/or national practice.

25. As to the concept of worker, it must be borne in mind that, according to settled case-law, it may not be interpreted differently according to each national law but has a [Union] meaning. That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned."

The decision of the Court in **Case C-320/01 *Busch* [2003] ECR I-2041** (see further below) might be regarded as calling into question to what extent absence of information on the part of the employee regarding the pregnancy can interfere with the rights deriving, in particular, from Directive 92/85 for the pregnant worker. In that case, the Court held that the Equal Treatment Directive must be interpreted as precluding a requirement that an employee who, with the consent of her employer, wishes to return to work before the end of her parental leave *must inform her employer that she is pregnant* in the event that, because of certain legislative prohibitions, she will be unable to carry out all of her duties.

Recitals

The recitals of the Pregnancy and Maternity Directive contain a number of important considerations which have and may be used by the Court when interpreting individual provisions:

"[T]he protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women (recital 9);

Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited (recital 15);

Whereas measures for the organization of work concerning the protection of the health of pregnant workers, workers who have recently given birth or workers who are breastfeeding would serve no purpose unless accompanied by the maintenance of rights linked to the employment contract, including maintenance of payment and/or entitlement to an adequate allowance (recital 16);"

Substantive rights and obligations

The key substantive provisions of the Pregnancy and Maternity Directive are as follows:

- For all activities liable to involve a specific risk of exposure to certain agents, processes or working conditions (see non-exhaustive list in Annex I), an employer is obliged to assess the nature, degree and duration of exposure in order to assess any risks to the safety or health and any possible effect on pregnancy and decide what measures should be taken (Article 4).

- If the employer's assessment reveals a risk to the safety or health of the pregnant worker or an effect on the pregnancy, the employer must take one of three measures:

    - Adjust working conditions and/or the working hours of the worker concerned to avoid risk and exposure (Article 5(1));
    - If adjustment is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer must move the worker concerned to another job (Article 5(2));
    - If moving pregnant worker to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health (Article 5(3)).

- In all these cases, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance must be ensured in accordance with national legislation and/or national practice (Article 11(1)). The notion of adequate allowance in Article 11(2)(b) (see below) is defined in Article 11(3) as regards the period of maternity leave but not as regards Article 11(1) which concerns absences from work during pregnancy for health and safety reasons.

- Pregnant workers may under no circumstances be obliged to perform duties for which the assessment has revealed a risk of exposure, which would jeopardize safety or health, to certain agents and working conditions listed in Annex II, Section A (Article 6).

- Member States must take the necessary measures to ensure that pregnant workers are not obliged to perform night work during their pregnancy (Article 7). It is not entirely clear if the proviso relating to the need for a medical certificate applies also to night work.

- Pregnant workers 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. Two of these weeks are compulsory (Article 8). Since the Directive is a minimum standards directive, Member States are free to provide for longer periods of maternity leave under national law if they so wish.

- Pregnant workers are entitled to time off, without loss of pay, in order to attend ante-natal examinations, if such examinations have to take place during working hours (Article 9).

- Dismissal of pregnant workers and those on maternity leave is prohibited during the period from the beginning of their pregnancy to the end of the

maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent (Article 10). Note that the Charter of Fundamental Rights of the European Union, which is now attached to the TEU and TFEU and has the same legal value as the Treaties (Article 6(1) TEU) provides in Article 33(2) that "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child." The explanatory notes accompanying the Charter clarify that maternity within the meaning of Article 33(2) of the Charter covers the period from conception to weaning. This explanation would appear to go beyond the terms of the directive and the Court's case-law.

- When workers are on maternity leave, they must be ensured the rights connected with the employment contract and maintenance of a payment to, and/or entitlement to an adequate allowance. This 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 (Article 11(2)(a)(b) and (3)). Entitlement to this pay or allowance may be made subject to fulfilment of conditions of eligibility laid down under national law but under no circumstances can these conditions include a requirement of periods of previous employment in excess of 12 months immediately prior to the presumed date of confinement (Article 11(4)).

III - Refusal to employ and dismissal of pregnant workers

Dismissal or refusal to employ a pregnant worker on account of pregnancy constitutes direct discrimination on grounds of sex since only female workers can be dismissed from work or refused employment on this basis.

Such discrimination cannot be justified with reference to the financial loss experienced by the employer, by the fact that the employee will not be able,

temporarily, due to pregnancy and/or maternity leave, to perform the tasks for which she was employed, by the fact that the employee did not inform the employer of her pregnancy when she was employed, or by the fact that she is only employed on a fixed term contract.

Refusal to employ

The applicant in **Case C-177/88 *Dekker* [1990] ECR I-3941** had applied for a job and been recommended by the appointing body as the most qualified candidate. She was pregnant. The prospective employer contacted its insurers and was informed that they would not be covered for the cost of replacing her during her maternity leave. According to the employer she was not, for this reason, offered the job.

The Court of Justice in *Dekker* decided that since only women can be refused employment on grounds of pregnancy, such a refusal constitutes direct discrimination on grounds of sex contrary to the provisions of the Equal Treatment Directive. It held that such discrimination cannot be justified in terms of the financial loss which an employer might suffer during the maternity leave due to his insurer not covering the cost of a replacement.

The Court also held that there was no need for the applicant to show fault on the part of the employer or the absence of any grounds of justification recognised in national law.

It reiterated this finding in **Case C-32/93 *Webb* [1994] ECR I-3567**, a case concerning the dismissal of a pregnant worker herself recruited to replace a colleague on maternity leave.

Although the facts of this case did not fall to be covered by Directive 92/85, since they predated the adoption of that directive, the Court in *Webb* explained the rationale behind the protection of pregnant workers from dismissal:

"In view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are

breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, the [Union] legislature subsequently provided, pursuant to Article 10 of Council Directive 92/85 […] for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave."

According to the Court, while the availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract, the protection afforded by EU law to a woman during pregnancy and after childbirth cannot be dependent on whether her presence at work during the period corresponding to maternity leave is essential to the proper functioning of the undertaking in which she is employed. A contrary interpretation would render ineffective the provisions of Directive 76/207.

See also **Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 29**:

"The Court has already held […] that a refusal to employ a woman on account of her pregnancy cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave [*Dekker*, cited above, paragraph 12]. The same conclusion must be drawn as regards the financial loss caused by the fact that the woman appointed cannot be employed in the post concerned for the duration of her pregnancy [due to a statutory prohibition on employment attaching to the condition of pregnancy]."

Dismissal

In **Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657**, the applicant was a nurse who applied for a post working as a night attendant in a home for the aged. For family reasons, she was able to work at night only. An employment contract was concluded with her employer stipulating that she was to be assigned night-time work only. It subsequently transpired that the applicant was pregnant. Pursuant to the provisions of German law she was prohibited from working at night as a result.

The Court had to decide whether the annulment or avoidance of an employment contract in such circumstances constituted direct discrimination.

It recalled that the termination of an employment contract on account of the employee's pregnancy, whether by annulment or avoidance, concerns women alone and constitutes, therefore, direct discrimination on grounds of sex, as the Court has held in cases where a pregnant woman was denied employment or dismissed (e.g. *Dekker*).

The Court noted that the unequal treatment in this case is not based directly on the woman's pregnancy but is the result of the statutory prohibition on night-time work during pregnancy. It held that to acknowledge that a contract may be held to be invalid or may be avoided because of the temporary inability of the pregnant employee to perform the night-time work for which she has been engaged would be contrary to the objective of protecting such persons pursued by Article 2(3) of the Equal Treatment Directive, and would deprive that provision of its effectiveness.

Protection of pregnant workers and the duration of their contracts

Since the Court in *Webb*, *Habermann-Beltermann* and *Mahlburg* had stressed that the pregnant workers in those cases were employed on the basis of contracts of employment of indefinite duration, there was uncertainty as to whether the Court's case-law protecting pregnant workers against dismissal would extend to workers engaged on fixed term contracts.

In **Case C-109/00 *Tele Denmark* [2001] ECR I-6993**, the Court confirmed that it did.

The applicant in that case was recruited for a period of 6 months. Her employer was not informed of her pregnancy. According to the Court:

"Since the dismissal of a worker on account of pregnancy constitutes direct discrimination on grounds of sex, whatever the nature and extent of the economic loss incurred by the employer as a result of her absence because of pregnancy, whether the contract of employment was concluded for a fixed or an indefinite period has no

bearing on the discriminatory character of the dismissal. In either case the employee's inability to perform her contract of employment is due to pregnancy."

No distinction is made by Directives 76/207 and 92/85 as regards the scope of the principle of equal treatment for men and women according to the duration of the employment relationship in question. According to the Court, had the Union legislature wished to exclude fixed-term contracts, which represent a substantial proportion of employment relationships, from the scope of those directives, it would have done so expressly.

The Court held that Article 5(1) of Directive 76/207, which prohibits discrimination as regards dismissal, and Article 10 of Directive 92/85 are to be interpreted as precluding a worker from being dismissed on the ground of pregnancy where she was recruited for a fixed period, where she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded, and where, because of her pregnancy, she was unable to work during a substantial part of the term of that contract.

Note that, having regard to the objectives pursued by Directive 92/85 and, more specifically, to those pursued by Article 10, the Court has held that the prohibition on the dismissal of pregnant women and women who have recently given birth or are breastfeeding during the period of protection is not limited to the notification of that decision to dismiss. The protection granted by that provision to those workers excludes both the taking of a decision to dismiss and taking steps preparing for the dismissal, such as searching for and finding a permanent replacement for the relevant employee on the grounds of the pregnancy and/or the birth of a child (**Case C-460/06 *Paquay* [2007] ECR I-8511, para.33**).

IV - Dismissal due to pregnancy related illness

In this respect, a distinction has to be made between absences from work due to pregnancy related illness after the end of maternity leave and absences for this reason during the course of pregnancy and maternity leave.

In **Case C-179/88 *Hertz* [1990] ECR I-3979**, the Court held that 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 (para. 14). It then specified, in para. 16, that, 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 and 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.

In **Case C-394/96 *Brown* [1998] ECR I-4185**, the Court specified that "where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work." Dismissal of a worker at any time during pregnancy for absences due to incapacity for work caused by illness resulting from pregnancy is contrary to Articles 2(1) and 5(1) of Directive 76/207.

Dismissal of a woman during pregnancy cannot be based on her inability, as a result of her condition, to perform the duties which she is contractually bound to carry out. If such an interpretation were adopted, the protection afforded by EU law to a woman during pregnancy would be available only to pregnant women who were able to comply with the conditions of their employment contracts, with the result that the provisions of Directive 76/207 would be rendered ineffective

In reaching this conclusion in *Brown* the Court overruled a previous decision in **Case C-400/95 *Larsson* v *Føtex Supermarked* [1997] ECR I-2757**.

Note that the Court has repeatedly held that pregnancy is not comparable to a pathological condition.

V – Entitlement of pregnant workers to equal pay (Article 157 TFEU)

In **Case C-342/93 *Gillespie* [1996] ECR I-475**, a case involving an equal pay claim which arose prior to the expiry of the date for the transposition of Directive 92/85, the Court held that there was nothing in Article 157 TFEU (ex 141 EC) or in Directive 75/117 on equal pay which required that women should continue to receive full pay during maternity leave.

Nor did those provisions lay down any specific criteria for determining the amount of benefit to be paid to them during that period. The amount payable could not, however, be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth. In order to assess the adequacy of the amount payable from that point of view, the national court must take account, not only of the length of maternity leave, but also of the other forms of social protection afforded by national law in the case of justified absence from work. In adopting this reasoning, the Court aligned itself with the choice made by the Union legislature in Article 11 of Directive 92/85 as regards the entitlement to pay or an adequate allowance of workers on maternity leave.

This and subsequent cases on maternity pay (*Boyle* and *Alabaster*) will be dealt with in the course of a separate presentation on the rights of workers on maternity leave.

For the purposes of pregnant workers, *Gillespie* is interesting because it highlights the effect on maternity pay of the latter being calculated during a reference period preceding the maternity leave when the worker was a) pregnant and b) working.

In that case, a salary increase had been adopted during the course of the reference period. The Court held that to refuse a worker the benefit of the salary increase for the calculation of her maternity pay would be contrary to Article 157 TFEU (ex 141 EC):

"The benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise."

This contrasts markedly with the reasoning of the Court as regards entitlement to equal pay during maternity leave. In that regard the Court had stated:

"The present case is concerned with women taking maternity leave provided for by national legislation. They are in a special position which requires them to be afforded special protection, *but which is not comparable either with that of a man or with that of a woman actually at work*."

Very few cases on entitlement to equal pay *during pregnancy* have been decided by the Court.

In **Case C-66/96 *Pedersen* [1998] ECR I-7327**, the Court held that it is contrary to Article 157 TFEU (ex 141 EC) and Directive 75/117 for national legislation to provide that a pregnant woman who, before the beginning of her maternity leave, is unfit for work by reason of a pathological condition connected with her pregnancy, as attested by a medical certificate, is not entitled to receive full pay from her employer but benefits paid by a local authority, when in the event of incapacity for work on grounds of illness, as attested by a medical certificate, a worker is in principle entitled to receive full pay from his or her employer.

The fact that a woman in such a situation is deprived of her full pay must be regarded as treatment based essentially on the pregnancy and thus as discriminatory.

This decision raises two difficulties:

1) Although the Court has regularly stated that pregnancy is in no way comparable to a pathological condition (see, for example, the decisions in *Webb* and *Brown*), it appeared to chose here as a comparator, for the purposes of an equal pay claim, the remuneration received by a sick worker when absent from work.

2) Had the Danish legislation not provided full pay for sick workers absent for work by reason of illness, would it have been compatible with Article 157 TFEU (ex 141 EC) to refuse to provide pregnant workers, absent from work due to pregnancy related illness, with their full pay? If the correct comparator is indeed the pay received by a sick employee absent from work on sick leave, then the answer would appear to be no. However, in *Pedersen*, the Court identified the difference in treatment as essentially based on the fact of pregnancy; "but for" the pregnancy, the employee would not have been absent from work due to a pregnancy related illness.

In *Pedersen* the Court also distinguished between pregnant workers unable to work because of pregnancy related illness and those absent from work due to routine minor pregnancy-related complaints where there is no incapacity for work, or medical recommendation intended to protect the unborn child but not based on an actual pathological condition or on any special risks for the unborn child. The latter cannot claim pay discrimination contrary to Article 157 TFEU (ex 141 EC) as their differential treatment cannot be regarded as being based essentially on the pregnancy but rather is based on the choice made by the employee not to work.

Finally, in *Pedersen*, the Court held that it is contrary to Directive 76/207 for national legislation to provide that an employer may send home a woman who is pregnant, although not unfit for work, without paying her salary in full when he considers that he cannot provide work for her.

The Court's decision in **Case C-191/03 McKenna [2005] ECR I-7631** would suggest that in pay discrimination claims involving pregnant workers, the Court may indeed turn to a comparison with the pay received by a worker absent from work on sick leave:

"57. It does not necessarily follow from the finding that pregnancy-related illnesses are sui generis that a female worker who is absent by reason of a pregnancy-related illness is entitled to maintenance of full pay, whereas a worker absent by reason of an illness unrelated to pregnancy does not have such a right.

58. It is first necessary to point out in this regard that, so far as dismissals are concerned, the special nature of a pregnancy-related illness may only be accommodated by denying an employer the right to dismiss a female worker for that reason. By contrast, so far as pay is concerned, the full maintenance thereof is not the only way in which the special nature of a pregnancy-related illness may be accommodated. That special nature may, indeed, be accommodated within the context of a scheme which, in the event of the absence of a female worker by reason of a pregnancy-related illness, provides for a reduction in pay.

60. If a rule providing, within certain limits, for a reduction in pay to a female worker during her maternity leave does not constitute discrimination based on sex [the Court referred to Case C-342/93 Gillespie], a rule providing, within the same limits, for a reduction in pay to that female worker who is absent during her pregnancy by reason of an illness related to that pregnancy also cannot be regarded as constituting discrimination of that kind.

61. In those circumstances, it must be concluded that, as it stands at present, [Union] law does not require the maintenance of full pay for a female worker who is absent during her pregnancy by reason of an illness related to that pregnancy.

62. During an absence resulting from such an illness, a female worker may thus suffer a reduction in her pay, provided that she is treated in the same way as a male worker who is absent on grounds of illness, and provided that the amount of payment made is not so low as to undermine the objective of protecting pregnant workers."

In *McKenna*, the Court distinguished between dismissal of a pregnant worker absent from work due to pregnancy related illness and the pay entitlement of a pregnant worker absent from work for this reason. It regarded a prohibition of dismissal as

being the only way to protect the rights of the former but did not regard the maintenance of the employee's right to her full pay as being the only form of protection possible regarding the latter.

The extent of the right to pay of pregnant workers absent from work for reasons related to the pregnancy are now at the heart of two cases pending before the Court – **Case C-194/08 Gassmayr** – Opinion of Advocate General Poaires Maduro of 8th September 2009; and **Case C-471/08 Parviainen** – Opinion of Advocate General Mengozzi of 17th December 2009.

VI – Entitlement of pregnant workers to equality as regards working conditions

The applicant in **Case C-136/95 *Thibault* [1998] ECR I-2011, paras. 26-29**, had, as a result of maternity leave and absences from work due to pregnancy related illness, not fulfilled the number of days necessary to entitle her to an assessment of her performance at work. That assessment formed the basis for the determination of salary increases and career advancement.

The Court recalled that Article 2(3) of Directive 76/207 allowed Member States to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity. It emphasised that the conferral of rights, recognised by the Directive, is intended to ensure implementation of the principle of equal treatment for men and women regarding both access to employment (Article 3(1)) and working conditions (Article 5(1)). Therefore, the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. It stressed that the result pursued by the Directive is substantive, not formal, equality.

According to the Court, the right of any employee to have their performance assessed each year and, consequently, to qualify for promotion, forms an integral part of the conditions of their contract of employment within the meaning of Article 5(1) of the Directive:

"The principle of non-discrimination requires that a woman who continues to be bound to her employer by her contract of employment during maternity leave should not be deprived of the benefit of working conditions which apply to both men and women and are the result of that employment relationship. In circumstances such as those of this case, to deny a female employee the right to have her performance assessed annually would discriminate against her merely in her capacity as a worker because, if she had not been pregnant and had not taken the maternity leave to which she was entitled, she would have been assessed for the year in question and could therefore have qualified for promotion."

In **Case C-116/06 *Kiiski* [2007] ECR I-7643**, the applicant was absent from her job as a teacher on child-care leave. During that leave she became pregnant and applied for an alteration of her child-care leave arrangement to enable her to return to work while pregnant.

The applicable collective agreement provided for the possibility of such an alteration on a justified ground, defined as any unforeseeable and fundamental change in the conditions of caring for a child which the official was unable to take into account at the time when he applied for child-care leave (e.g. death, divorce, serious illness). Pregnancy was not considered to constitute such a ground.

The employer's refusal to interrupt the child-care leave deprived the applicant of the benefits linked to maternity leave provided for under Directive 92/85.

According to the Court in *Kiiski*:

"49. [T]he right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law. The [Union] legislature thus considered that the fundamental changes to the living conditions of the persons concerned during the period of at least 14 weeks preceding and after childbirth constituted a legitimate ground on which they could suspend their employment, without the public authorities or employers being allowed in whatever way to call the legitimacy of that ground into question.

50. […] the protection granted to mothers in the form of maternity leave aims to help them avoid multiple burdens. During the final stages of her pregnancy, the generous care which has to be given to the first child in accordance with the objective of the parental leave provided for under the framework agreement, constitutes for the mother a multiple burden of a comparable kind and degree. It is therefore quite reasonable to require that such a burden be capable of being avoided by allowing the person concerned, on the basis of their pregnancy, to alter the period of that leave.

51. On the basis of the foregoing, it follows that the period of at least 14 weeks preceding and after childbirth must be regarded as a situation which restricts the achievement of the purpose of the parental leave provided for under the framework agreement and therefore as a justified ground for authorising an alteration of the period of that leave.

52. Pregnancy is, however, in general excluded by provisions of national law such as those at issue in the main proceedings from the justified grounds listed, whereas the serious illness or death of the child or of the other parent, and divorce, are listed as such justified grounds for authorising an alteration of the period of child-care leave.

53. In those circumstances, by not treating in an identical manner a situation which, with regard to the objective of the parental leave provided for under the framework agreement and the restrictions which may compromise its achievement, is in fact comparable to that resulting from the serious illness or death of the child or of the spouse, or from divorce, such provisions prove to be discriminatory, without such treatment being objectively justified.

[…]

55. Because discriminatory treatment resulting from provisions such as those at issue in the main proceedings are capable of affecting women only, those provisions, which define the conditions applicable to the employment relationship maintained during the child-care leave, constitute direct discrimination on grounds of sex prohibited by Article 2 of Directive 76/207."

In **Case C-320/01 *Busch* [2003] ECR I-2041**, an employee who wished to return to work prior to the end of her parental leave did not inform the employer that she was pregnant.

The Court held that taking pregnancy into consideration in a decision to refuse to allow a worker to return to work before the end of parental leave constitutes direct discrimination on grounds of sex. As such, since the employer may not take the employee's pregnancy into consideration for the purpose of applying her working conditions, she is not obliged to inform the employer that she is pregnant. To accept that a pregnant employee may be refused the right the return to work before the end of parental leave due to temporary prohibitions on performing certain work duties for which she was hired would be contrary to the objective of protection pursued by Article 2(3) of Directive 76/207 and Articles 4(1) and 5 of Directive 92/85 and would rob them of any practical effect. Discrimination of this type cannot be justified on grounds relating to the financial loss for an employer.

VII - Miscellaneous – new and a-typical cases and a-typical reasoning

The reasoning adopted by the Court in its case-law is not without problems.

In **Case C-218/98 *Abdoulaye* [1999] ECR I-5723, paras.10-21**, male workers employed by Renault complained that the payment by the company to female employees of a lump sum payment, distinct from their maternity pay (which constituted 100 % of the employee's net salary), following the birth of a child, constituted discrimination contrary to Article 157 TFEU (ex 141 EC). They argued that, although the birth of a child concerns women alone from a strictly physiological point of view, it is, in at least equal measure, a social event which concerns the whole family, including the father, and to deny him the same allowance amounts to unlawful discrimination.

The Court held that the principle of equal pay laid down in Article 157 TFEU (ex 141 EC) does not preclude the making of a lump-sum payment exclusively to female workers who take maternity leave where that payment is designed to offset the

occupational disadvantages which arise for those workers as a result of their being away from work.

The occupational disadvantages being referred to were those put forward by Renault which it regarded as inherent in maternity leave and resulting from the absence of the female employee from work: the fact that a woman on maternity leave may not be proposed for promotion; the fact that, on her return, her period of service will be reduced by the length of her absence; the fact that a pregnant woman may not claim performance-related salary increases; the fact that a female worker on maternity leave may not take part in training, and the fact that, since new technology is constantly changing the nature of jobs, the adaptation of a female worker returning from maternity leave is complicated.

It is important to consider whether some of these occupational disadvantages - relied on by the Court either to indicate that male and female employees are not similarly situated regarding the birth of a child or to justify any differential treatment if they are – are not in fact themselves discriminatory and, as such, incapable of justifying discriminatory treatment. The *Thibault* case and the decision in **Case C-333/97 *Lewen* [1999] ECR I-7243**, which will no doubt be discussed in the presentation on maternity leave, suggest that some of them could be regarded as discriminatory.

It is clear from the wording of the Equal Treatment and Recast Directives that the latter interact with the Directive 92/85. Unfavourable treatment of a female employee on grounds of pregnancy or maternity within the meaning of Directive 92/85 constitutes direct discrimination within the meaning of the Recast Directive. The proposed amendment of Directive 92/85 contains a similar statement to this effect. The Court's answers to preliminary references often refer to the provisions of both the Pregnancy and Maternity and the Sex Equality Directives (see, for example, *Tele Denmark* on dismissal).

In **Case C-506/06 *Mayr* [2008] ECR I-1017**, the Court was asked a question on Directive 92/85 but found the answer in the Equal Treatment Directive.

The applicant was undergoing IVF treatment. It is not clear from the preliminary reference if the employer was aware of this fact. In the course of the IVF treatment, a follicular puncture was carried out on the applicant, extracting the necessary ova. She was given a sick certificate for 5 days by her doctor. While absent on sick leave, the applicant was informed by her employer that she was dismissed. By letter of the same date, she informed her employer that, in the course of the IVF treatment, the transfer of the fertilised ova into her uterus was planned for a few days later. It was common ground in the case that, at the date the applicant was given notice of her dismissal, the ova taken from her had already been fertilised with her partner's sperm cells and, therefore, in vitro fertilised ova already existed on that date.

Did the applicant benefit from the protection from dismissal provided by Article 10 of Directive 92/85?

The Court said that she did not:

"[…] even allowing, in regard to in vitro fertilisation, that the date [when protection from dismissal commences] is that of the transfer of the fertilised ova into the woman's uterus, it cannot be accepted, for reasons connected with the principle of legal certainty, that the protection established by Article 10 of Directive 92/85 may be extended to a worker when, on the date she was given notice of her dismissal, the in vitro fertilised ova had not yet been transferred into her uterus."

However, the Court then turned to the Equal Treatment Directive:

"50. […] the treatment in question in the main proceedings – namely a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilisation – directly affects only women. It follows that the dismissal of a female worker essentially because she is undergoing that important stage of in vitro fertilisation treatment constitutes direct discrimination on grounds of sex.

51. To allow an employer to dismiss a female worker in circumstances such as those in the main proceedings would, moreover, be contrary to the objective of protection

which Article 2(3) of Directive 76/207 pursues, in so far as, admittedly, the dismissal is essentially based on the fact of the in vitro fertilisation treatment and, in particular, on the specific procedures, outlined in the previous paragraph, which such treatment involves."

It was up to the national court to determine if the dismissal was, in this case, essentially based on the fact of the IVF.

Two cases pending before the Court should further clarify its case-law on the application of Article 157 TFEU (ex 141 EC) to pregnant workers and will, for the first time, interpret the provisions of Articles 5(2) and 11(1) of Directive 92/85 as regards the entitlement to pay or an adequate allowance of workers who, following a risk, assessment are obliged to change jobs for the duration of their pregnancy. See, respectively, **Cases C-194/08 Gassmayr (OJ 2008 C 197/9)** and **C-471/08 Parviainen (OJ 2009 C 19/13)**.