

PROTECTIVE MEASURES FOR PREGNANT WORKERS

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The legislation

- 1) There are two relevant Directives: The Pregnant Workers Directive (92/85/EEC) and the Recast Directive: 2006/54/EC).

Pregnant Workers Directive

- 2) The purpose of the Pregnant Workers Directive (92/85/EEC) is expressed in its long title: that is to introduce “*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*”. In other words, the ambit of the Pregnant Workers Directive (PWD) applies to other situations than dismissal such as working conditions.
- 3) The Preamble to the PWD states:

“Whereas the Community Charter of the fundamental social rights of workers, adopted at the Strasbourg European Council on 9 December 1989 by the Heads

of State or Government of 11 Member States, lays down, in paragraph 19 in particular, that:

'Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made';

Whereas the Commission, in its action programme for the implementation of the Community Charter of the fundamental social rights of workers, has included among its aims the adoption by the Council of a Directive on the protection of pregnant women at work;

Whereas Article 15 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (5) provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them;

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;

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;

Recast Directive

4) The purpose of the Recast Directive (2006/54/EC), set out in the long title, is to implement “*the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*”.

5) The preamble to the Recast Directive (2006/54/EC) states:

- a) Recital 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.”*
- b) Recital 24 *“The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a women’s biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality.”*

Direct discrimination and Dismissal

6) Article 10 PWD states:

*“Article 10
Prohibition of dismissal*

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

- 1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;*
- 2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;*

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.”

7) ECJ jurisprudence has shown that pregnancy discrimination amounts to sex discrimination.

8) The understanding that pregnancy discrimination amounts to sex discrimination derives from the cases of Dekker, Hertz, and Habermann-Beltermann¹. These cases establish that a refusal to recruit a woman, the dismissal of a woman, or subjecting a woman to a detriment on the grounds of pregnancy constitutes direct discrimination on the ground of sex contrary to the principle of equal treatment.

a) In Dekker, the ECJ observed, at #12:

“12 In that regard it should be observed that only women can be refused employment on the ground of pregnancy and such a refusal therefore constitutes direct discrimination on the ground of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination 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.”

b) It concluded (at #14, repeated in the ruling at #1):

¹ Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus (Case 177/88) [1992] ICR 325; Handels- og Kontorfunktionærernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening (acting for Aldi Marked K/S) (Case 179/88) [1991] IRLR 31; Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb/Opf eV (Case C-421/92) [1994] IRLR 364.

“14 It follows from the foregoing that the answer to be given to the first question is that an employer is in direct contravention of the principle of equal treatment embodied in articles 2(1) and 3(1) of Council Directive (76/207/E.E.C.) 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 if he refuses to enter into a contract of employment with a female candidate whom he considers to be suitable for the job where such refusal is based on the possible adverse consequences for him of employing a pregnant woman, owing to rules on unfitness for work adopted by the public authorities which assimilate inability to work on account of pregnancy and confinement to inability to work on account of illness.”

c) The ECJ confirmed the approach in Dekker in Hertz (#13).

d) In Habermann-Beltermann, the ECJ held, at ##15, 21-22 and 25:

“[15] It is clear 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: see Case C-177/88, Dekker v. Vjv-Centrum 17 and Case C-179/88, Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening.

“[21] In the first place, so far as concerns the purpose of Article 2(3) of the directive, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with “pregnancy and maternity”, that article recognises the legitimacy, in terms of the principle of equal treatment, of protecting, first, a woman's biological condition during and after pregnancy, and secondly, the special relationship between a woman and her child over the period

which follows pregnancy and childbirth: Case 184/83, Hofmann v. Barmer Ersatzkasse.

“[22] As the Court has held (see Hofmann cited above) the directive leaves Member States with a discretion as to the social measures which must be adopted in order to guarantee, within the framework laid down by the directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment.

“[25] Accordingly, the termination of a contract without a fixed term on account of the woman's pregnancy, whether by annulment or avoidance, cannot be justified on the ground that a statutory prohibition, imposed because of pregnancy, temporarily prevents the employee from performing night-time work.”

9) Recent ECJ cases:

- a) The removal of a Board Member on account of her pregnancy was direct discrimination: Dita Danosa v LKB Lzings SIA (Case C-232/09)
- b) The provision of a 15 day limitation period in which to lodge an action for dismissal protection was incompatible with Articles 10 and 12 of PWD if the duration of that period fails to respect the principle of effective legal protection and the principles of equivalence and effectiveness: Virginie Pontin v T-Comailux SA (Case C-63/08)

10) A woman does not necessarily have to be available to enjoy the protection from dismissal:

- a) In Webb v Emo Air Cargo (U.K.) Ltd [1994] ICR 770 the claimant was engaged by the employer to cover for another employee taking maternity leave. However, the claimant herself then became pregnant.

- b) The English senior court, the House of Lords, held that to dismiss a woman simply because she was pregnant or to refuse to employ a woman of childbearing age because she may become pregnant amounted to automatic direct sex discrimination on the basis that childbearing and the capacity for childbearing are unique characteristics to the female sex. However, the employer argued that it was not the fact that she was pregnant that was the problem, but the fact that she had been hired to cover someone else's maternity leave – a condition which, as a result of her own maternity leave, she would not be able to fulfill. Their Lordships asked the ECJ to decide whether a court should regard the principal reason for dismissal or refusal to engage a woman in these circumstances as being her unavailability for work, as opposed to her pregnancy.
- c) The ECJ ruled that the protection afforded by European Law to a woman during pregnancy and after childbirth cannot be dependent upon whether her presence during maternity leave is essential to the proper functioning of the undertaking which employs her. Any contrary interpretation would render the provisions of the Equal Treatment Directive (now the Recast Directive 2006/54) ineffective.
- d) The ECJ held (at ##19-20 and 24-28):

“[19] As the Court ruled in paragraph [13] in Case C-179/88, Handels- og Kontorfunktionærernes Forbund I Danmark 15 ; (hereinafter “the Hertz judgment”) and confirmed in paragraph [15] in Case C-421/92,

*Habermann-Beltermann, 16 the dismissal of a *742 female worker on account of pregnancy constitutes direct discrimination on grounds of sex.*

[20] Furthermore, by reserving to Member States the right to retain or introduce provisions which are intended to protect women in connection with “pregnancy and maternity” , Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, secondly, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth: Habermann-Beltermann, cited above, 17 and Case 184/83, Hoffmann v. Barmer Ersatzkasse. 18

[24] First, in response to the House of Lords' inquiry, there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.

*[25] As Mrs Webb rightly argues, pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex. Moreover, in Hertz, cited above, the Court drew a clear distinction between pregnancy and illness, even where the illness is attributable to pregnancy but manifests itself after the maternity leave. As the Court pointed out (in paragraph [16]), there is no reason to distinguish such an illness from any other illness. *743*

[26] Furthermore, contrary to the submission of the United Kingdom, dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the employer, a precondition for the proper performance of the employment contract. However, the protection afforded by Community law to a woman during pregnancy and after childbirth

cannot be dependent on whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed. Any contrary interpretation would render ineffective the provisions of the directive.

[27] In circumstances such as those of Mrs Webb, termination of a contract for an indefinite period on grounds of the woman's pregnancy cannot be justified by the fact that she is prevented, on a purely temporary basis, from performing the work for which she has been engaged: see Habermann-Beltermann. 20

[28] The fact that the main proceedings concern a woman who was initially recruited to replace another employee during the latter's maternity leave but who was herself found to be pregnant shortly after her recruitment cannot affect the answer to be given to the national court."

- 11) Does the principle in Webb (that protection is given to women during pregnancy and after childbirth regardless of the employer's need for her presence in the workplace) extend to fixed term contracts?

- 12) The matter is now settled by the ECJ's decision in Tele Danmark A/S v Handels- og Kontorfunktionaerernes Forbund i Danmark (HK), acting on behalf of Brandt-Nielsen (C-109/00) [2002] 1 CMLR 5 (ECJ) and Jimenez Melgar v Ayuntamiento de Los Barrios (C-438/99) [2003] 3 CMLR 4.
 - a) In the Jimenez Melgar case the Court held that Article 10 of the Pregnant Workers Directive (which prohibits dismissal during pregnancy and maternity leave) applies to women on fixed term contracts. Accordingly, the non-renewal of a fixed term contract is sex discrimination.

b) In Tele Danmark, a woman was recruited to perform a six month contract. At the time she was recruited, she knew she was pregnant but kept this information from her employer until she was in post. She was entitled to maternity leave half way through the term of the contract. When she told her employer about the pregnancy she was dismissed. The employer argued that, by concealing the pregnancy, she acted in bad faith.

c) The ECJ held, at ##25-30:

“25 As the Court has held on several occasions, the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex, contrary to Article 5(1) of Directive 76/207.35

26 It was also in view of the risk that a possible dismissal may pose for the physical and mental state of pregnant workers, workers who have recently given birth or those who are breastfeeding, including the particularly serious risk that they may be encouraged to have abortions, that the Community legislature, in Article 10 of Directive 92/85, laid down special protection for those workers by prohibiting dismissal during the period from the start of pregnancy to the end of maternity leave.

27 During that period, Article 10 of Directive 92/85 does not provide for any exception to, or derogation from, the prohibition of dismissing pregnant workers, save in exceptional cases not connected with their condition where the employer justifies the dismissal in writing.

28 The Court has held, moreover, 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, and that 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.

29 In paragraph 26 of Webb, the Court also held that, 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 Community 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.

30 Such an interpretation cannot be altered by the fact that the contract of employment was concluded for a fixed term.”

- d) The ECJ noted that the Equal Treatment Directive (now the Recast Directive 2006/54) and the Pregnant Workers Directive do not make any distinction according to the duration of the employment relationship.
- 13) The upshot is that any dismissal or less favourable treatment on the ground of pregnancy will constitute direct sex discrimination, whatever the duration of the contract, whatever the impact on the employer and whether or not the woman concealed the pregnancy at the time of recruitment.
- 14) The effect of a woman’s pregnancy on a business is irrelevant. Financial considerations do not justify sex discrimination.

15) In Webb, the ECJ said that the protection afforded to women by EC law does not depend on whether the woman's presence during her maternity leave period was essential to the proper functioning of the business.

16) In Tele Danmark, the employee was unable to complete a substantial part of the six-month contract on which she had been engaged. The ECJ said that the dismissal of a worker on the ground of pregnancy constitutes direct sex discrimination whatever the nature and extent of the economic loss incurred by the employer as a result of her absence.

a) The ECJ observed (at #31):

"31 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."

17) In Mahlburg v Land Mecklenburg-Vorpommern (C207/98) [2000] IRLR 276 (ECJ), the employee applied for a permanent job but was refused because national laws relating to pregnant women that she would not be able to take up the post until after the birth of her child. The ECJ held that this refusal amounted to sex discrimination (##28-29)

“28 At the hearing observations were put forward concerning the possible financial consequences of an obligation to take on pregnant women, in particular for small and medium-sized undertakings.

29 The Court has already held, in that regard, 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.29 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.”

- 18) In Busch v Klinikum Neustadt GmbH und Co Betriebs- KG Case No. C-320/01 (ECJ), the fact that a pregnant nurse would have been unable to perform certain aspects of her duties did not permit an employer to prevent her returning early from a career break.

*“35 Moreover, according to the settled case law of the Court, discrimination against women cannot be justified by the existence of measures in place to protect pregnant women. 36 Nor can the financial *503 loss suffered by the employer justify refusing employment on grounds of pregnancy, 37 even when the contract of employment is for a fixed term. 38*

38 Article 5(1) of Directive 76/207 prohibits discrimination on grounds of sex as regards conditions of employment, which includes the conditions applicable to employees returning to work following parental leave.

39 When an employer takes an employee's pregnancy into consideration in the refusal to allow her to return to work before the end of her parental leave, that constitutes direct discrimination on grounds of sex.

44 As regards the financial consequences which might ensue for the employer from the obligation to reinstate a pregnant employee unable for the duration of the pregnancy, to carry out all her duties, the Court has already held that

discrimination on grounds of sex cannot be justified on grounds relating to the financial loss for an employer.

47 In the light of the foregoing, the answer to the first question must be that Art.2(1) of Directive 76/207 is to 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.”

- 19) The reason that the jurisprudence does not want to consider the effect of a pregnancy on the employer’s business is two-fold: sexual equality and health and safety. In Brown v Stockton-on-Tees Borough Council [1988] IRLR 263, HL, Lord Griffiths said that the “*considerable inconvenience*” of keeping a woman’s job open while she had a baby “*is a price that has to be paid as a part of the social and legal recognition of the equal status of women in the workplace.*” In Tele Danmark, the Court referred to the risk that a possible dismissal may encourage women to have abortions.

When is a woman protected: special rights during a Protected Period

- 20) The Hertz case established the concept of a “*protected period*” running from the inception of pregnancy to the end of a woman’s statutory maternity leave.
- 21) In Sabine Mayr v Backerei und Konditorei Gerhard Flockner OHG (C-506/06) [2008] 2 CMLR 27 the ECJ confirmed, in the context of IVF, that the protected period begins with the transplantation of the fertilised ova into the woman’s uterus and ends when the pregnancy fails.

- 22) In Mayr the claimant was employed as a waitress and was going through In Vitro Fertilisation (“IVF”). The treatment lasted about a one and half months, and there were complications. She was certified of sick by her medical practitioner, and whilst off sick was dismissed by her employer.
- 23) The ECJ was required to consider whether or not she could claim the protection of the Pregnant Workers Directive, and whether or not the prohibition on the dismissal of pregnant workers would extend to a woman undergoing IVF, in a case where the eggs have been fertilised in vitro, but have not yet been transferred to her uterus at the point of dismissal.
- 24) The ECJ found that it does not stretch this far. The purpose of the directive is to protect the special condition of pregnancy, and until that condition exists, the protection does not come into play. She was not therefore protected under the Pregnant Workers Directive.
- 25) However, the ECJ also pointed out that to dismiss a woman because she is undergoing IVF, which is essentially something that only affects women, would be direct sex discrimination. She is protected by the Equal Treatment Directive (the Recast Directive 2006/54). The Equal Treatment Directive [and by analogy the Recast Directive 2006/54] covers women who are “*at an advanced stage*” of IVF (between the follicular puncture and the immediate transfer of the fertilised ova into the uterus).

26) At para 33, 39 and 46 the ECJ in Mayr stated:

“Before Directive 92/85 came into force, the Court had already held that, under the principle of non-discrimination and, in particular, Articles 2(1) and 5(1) of Directive 76/207, protection against dismissal must be granted to women not only during maternity leave, but also throughout the period of the pregnancy. According to the Court, a dismissal occurring during those periods affects only women and therefore constitutes direct discrimination on the grounds of sex (see, to that effect, Case C-179/88 Handles – og Kontorfunktionaerernes Forbund [1990] ECR I-3979, paragraph 13; Case C-394/96 Brown [1998] ECR I-4185, paragraph 16,24 and 25; McKenna, paragraph 47 and Pacquay, paragraph 29).”

“It is apparent from the 15th recital in the preamble to Directive 92/85 that the objective of the prohibition of dismissal provided for in Article 10 of that directive is to avoid the risk of a dismissal, for reasons linked to the pregnancy, having harmful effects on the physical and mental state of pregnant workers”

“As is clear from paragraph 33 of this judgment, the Court has already held that, under the principle of non-discrimination and, in particular, Articles 2(1) and 5(1) of Directive 76/207, protection against dismissal must be granted to women ... throughout the period of the pregnancy.”

27) The decision of Mayr makes it clear that where treatment directly affects only women then a dismissal because a woman is undergoing such treatment is direct sex discrimination under the Equal Treatment Directive (now Recast Directive 2006/54): see paragraph 50 which states:

“It is true that workers of both sexes can be temporarily prevented from carrying out their work on account of the medical treatment they must receive. Nevertheless, 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.”

- 28) Accordingly, no comparator is necessary, certainly during the protected periods.
- 29) It is arguable that no comparator is necessary, even during the Non-Protected Period, because the Recast Directive states (Directive 2006/54) that “*direct discrimination*” is less favourable treatment “*on grounds of sex*” which does not require a statutory comparator (Art 2(1)(a)).
- 30) Contrast the approach taken by the English courts in London Borough of Greenwich v Robinson (EAT/745/94), where the first layer of appeals in employment cases, the Employment Appeal Tribunal, mooted a comparator of a man undergoing a vasectomy. The decision in Mayr has rendered Robinson incorrect.
- 31) In Paguay v Societe d’architects Hoet + Minne SPRL (C-460/06) [2008] 1 CMLR 12, the ECJ held that the protection against dismissal afforded during the “*protected period*” was held to apply where an employer advertised the employee’s job during the protected period but gave notice only once the protected period had finished. The PWD was interpreted as requiring that steps preparatory to a decision to dismiss were unlawful.

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

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

Health risks

32) Article 11 of Directive 92/85 , entitled “Employment rights”, reads as follows

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

- 1. in the cases referred to in Articles 5, 6 and 7, the employment rights relating to the employment contract, including the maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2, must be ensured in accordance with national legislation and/or national practice;*
- 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."

33) A pregnant worker who has been temporarily transferred on account of her pregnancy to a job in which she performs tasks other than those she performed prior to the transfer is not entitled to the pay she received prior to transfer: Parviainen v Finnair Oyj (Case C-471/08) [2011] 1 CMLR 8.

a) Given the wording of art.11(1) and the Directive's objective of protecting the health and safety of pregnant workers, a pregnant worker whose pay had been made up of a basic salary and a number of supplementary allowances, some of which depended on the performance of specific functions, and who had been transferred in accordance with art.5(2) to a job in which she performed different tasks to those she had previously performed, was not entitled under art.11(1) to the same pay as she had received on average prior to the transfer.

b) The wording of art.11(1) referred to maintenance of "a" payment and not "the pay" of the worker concerned.

- c) In addition, art.11(4) empowered the Member States to impose conditions of eligibility on entitlement to pay or the allowance referred to in art.11(1) (see paras 49-51 of judgment). Member States, and where appropriate, management and labour had a degree of discretion under art.11(1) in determining implementing rules for the entitlement of pregnant workers transferred in accordance with art.5(2); however, in defining the pay components which had to be maintained during the transfer, they were bound by the nature of the various supplementary allowances paid by the employer.
- d) Consequently, a pregnant worker transferred pursuant to art.5(2) to another job was entitled to her basic salary and any pay components or supplementary allowances which related to her professional status, such as those relating to seniority, length of service and professional qualifications, but not those which depended on the performance of specific functions in particular circumstances and which were intended essentially to compensate for the disadvantages related to that performance (paras 59-61). A method of calculating remuneration based on the average amount of allowances linked to the working conditions of all air crew in the same pay grade during a given period was not precluded by art.11(1) except to the extent that it failed to take account of the pay components or supplementary allowances related to the transferred worker's professional status (paras 68-69). (Note the AG's opinion, at #AG72 makes this point more clearly).

Risk Assessments

- 34) Provisions relating to risk assessments appear at PWD ##3-7, Annex I, Annex II.
- 35) In O'Neill v Buckinghamshire CC [2010] IRLR 384 (EAT), the appellant (O) appealed against a decision of the employment tribunal to dismiss her claim against the respondent (B) for pregnancy-related sex discrimination. O, who had been employed by B as a teacher at a junior school, had asserted that the school's head teacher (C) had failed to carry out a risk assessment after being informed that she was pregnant. The EAT dismissed the appeal:
- a) There was no general obligation to carry out a risk assessment in respect of pregnant employees, and a failure to carry out such an assessment would not be discrimination per se, Madarassy v Nomura International Plc [2007] EWCA Civ 33, [2007] I.C.R. 867 followed. The obligation to carry out a risk assessment of a pregnant worker arose only where (a) the employee notified the employer in writing that she was pregnant, (b) the work was of a kind which could involve a risk of harm or danger to the health and safety of a new or expectant mother or her baby and (c) the risk arose from any processes or working conditions, or physical, biological or chemical agents, including those specified in Annexes I and II of Directive 92/85. There had been no material before the tribunal from which it could have concluded that the kind of work carried out by O involved a risk of harm or danger to her as a pregnant worker as defined by the Directive and the 1999 Regulations.
 - b) There was nothing in either the Directive or the Regulations to indicate that a meeting with the employee was required when a risk assessment was carried out. The tribunal had therefore been correct in its alternative view that a risk

assessment had been carried out notwithstanding that a meeting had not taken place.

c) Where there was an obligation to conduct a risk assessment, proof of detriment was not necessary, Hardman v Mallon (t/a Orchard Lodge Nursing Home) [2002] 2 C.M.L.R. 59 followed.

36) In Queen Victoria Seamen's Rest v Ward UKEAT/0465/08/MAA, the appellant employer (Q) appealed against an employment tribunal's finding that it had discriminated against the respondent employee (W) on the ground of her pregnancy, contrary to the Sex Discrimination Act 1975 s.3A. The tribunal found that Q had failed to assess the risk W was at in her job either before or after she had informed it that she was pregnant. Q had also failed to assess her health and safety when she was assaulted orally and physically in the workplace, and it had provided her with an inappropriate work station. The tribunal further found that the contrast between the support which Q gave W before her pregnancy and the lack of support afterwards confirmed a change in attitude. It also found that Q had failed to follow the correct procedure after W raised a grievance. The tribunal concluded that in relation to those and other matters, Q had subjected W to less favourable treatment on the ground of her pregnancy. Q's continuing course of conduct was in breach of the implied term of trust and confidence and W was constructively and unfairly dismissed. Q submitted that the tribunal had applied a "*but for*" test rather than a "*reason why*" test.

37) The Appeal was dismissed by the EAT. In every discrimination case it was necessary to enquire as to the reason why the complainant had received less

favourable treatment, Nagarajan v London Regional Transport [2000] 1 A.C. 501 applied. "*On the ground of*" under s.3A(1)(a) meant the reason why, and did not require an investigation of motive, purpose, or cause and effect, English v Thomas Sanderson Blinds Ltd [2008] EWCA Civ 1421, [2009] 2 All E.R. 468 applied. The tribunal in the instant case had kept well in mind the legal test required under s.3A. Its conclusion that W was discriminated against on the ground of pregnancy in the ways identified was unimpeachable, and therefore its decision as to constructive unfair dismissal was not undermined.

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