

JUDGMENT OF THE COURT (Third Chamber)

14 April 2005^{*}

In Case C-519/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 December 2003,

Commission of the European Communities, represented by D. Martin, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by S. Schreiner, acting as Agent, assisted by H. Dupong, lawyer,

defendant,

^{*} Language of the case: French.

THE COURT (Third Chamber),

composed of A. Borg Barthet (Rapporteur), acting for the President of the Third Chamber, J.-P. Puissechet, S. von Bahr, U. Löhmus and A. Ó Caoimh, Judges,

Advocate General: A. Tizzano,

Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing of 24 November 2004,

after hearing the Opinion of the Advocate General at the sitting on 18 January 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities is seeking a declaration by the Court that, by adopting Article 7(2) and the fifth paragraph of Article 19 of the Law of 12 February 1999 introducing parental leave and leave for

family reasons ('the Law of 1999'), incorporated into the Luxembourg legal system by Article XXIV of the Law of 12 February 1999, concerning the implementation of the 1998 national action plan on the promotion of employment opportunities (*Mémorial A* 1999, p. 190), articles which concern respectively:

- the substitution of maternity leave for parental leave, and

- the date from which an individual right to parental leave is granted,

the Grand Duchy of Luxembourg has failed to fulfil its obligations under Clause 2(1) of the framework agreement on parental leave ('the framework agreement') which appears in the Annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (O) 1996 L 145, p. 4).

The legal framework

Community legislation

- 2 Article 2(1) of Directive 96/34 provides that Member States were to bring into force the laws, regulations and administrative provisions necessary to comply therewith by 3 June 1998 at the latest.

3 Clause 2(1) of the framework agreement reads as follows:

‘This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.’

4 A — *National legislation*

Article 7(2) of the Law of 1999 provides:

‘In the event of pregnancy or adoption of a child during parental leave giving entitlement respectively to maternity leave or adoption leave, the latter shall replace parental leave which comes to an end.’

5 The fifth paragraph of Article 19 of that law provides:

‘The provisions of Chapter 1 on parental leave may be relied on by parents in respect of children born after 31 December 1998 or in respect of whom adoption proceedings have been initiated with the competent tribunal after that date.’

- 6 Under the sixth paragraph of Article 10 of the Law of 1999, in the version resulting from the Law of 21 November 2002 amending inter alia the Law of 12 February 1999 introducing parental leave and leave for family reasons (*Mémorial* A 2002, p. 3098, 'the Law of 2002'):

'A definitive rejection, by the (National Family Benefits) Fund, of an application for the allowance provided for by Article 8 shall be without prejudice to the possible grant of parental leave by the employer under the conditions laid down by Directive 96/34 ...'.

Pre-litigation procedure

- 7 By letter of 16 May 2001 constituting formal notice, the Commission informed the Grand Duchy of Luxembourg that it considered that Article 7(2) and the fifth paragraph of Article 19 of the Law of 1999 did not comply with Directive 96/34.
- 8 The Luxembourg Government replied to that formal notice by letter of 26 July 2001, in which it contested the failure to fulfil obligations with which it was charged.
- 9 On 13 November 2002, the Commission sent the Grand Duchy of Luxembourg a reasoned opinion in which it took the view that the Law of 1999 still did not comply with Community law as regards the substitution of maternity leave for parental leave and the date from which an individual right to parental leave is granted. In its

reasoned opinion, the Commission called on that Member State to adopt the measures necessary to comply therewith within two months from the date of notification.

10 On 19 May 2003, the Luxembourg authorities notified the Law of 2002 to the Commission. According to the Commission's Legal Service, it had not received that notification by the date on which this application was lodged.

11 Those were the circumstances in which the Commission, which had no other information as to whether the national provisions at issue had been brought into compliance with Directive 96/34, decided to bring this action.

The action

Admissibility

Arguments of the parties

12 The Luxembourg Government pleads that the action is inadmissible on the basis that it is devoid of purpose, because the Grand Duchy of Luxembourg has remedied the failure to fulfil obligations with which it was charged by the amendments to the Law of 1999 resulting from the Law of 2002, since the latter took effect before expiry of the two-month period set by the reasoned opinion.

- 13 The Luxembourg Government argues that the action is also inadmissible by reason of the fact that the Commission based its application on erroneous premisses, since it did not take account of the reply to the reasoned opinion which it sent to the Commission, that reply having been mislaid by the services of that institution.
- 14 In its rejoinder, the Grand Duchy of Luxembourg adds that the period of two months which it was granted in the reasoned opinion to bring that national legislation into compliance with Directive 96/34 did not constitute a reasonable period, since it was impossible to make the legislative amendments required by the Commission in such a short space of time.
- 15 Firstly, the Commission regrets that the reply to the reasoned opinion that the Grand Duchy of Luxembourg sent to Commissioner Diamantopoulou on 13 June 2003 was not forwarded to the General Secretariat of that institution which could have forwarded it to its Legal Service.
- 16 The Commission then draws attention to the case-law of the Court, according to which the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion. That case-law confirms the right of the Commission to maintain its action in the event that the failure to fulfil obligations is remedied only after expiry of the period laid down in the reasoned opinion (see, to that effect, Case C-152/00 *Commission v France* [2002] ECR I-6973, paragraph 15). That right is reinforced in the event that the failure to fulfil obligations has not been eliminated after expiry of that period.
- 17 Finally, the Commission argues that the failure to take account of the reply of the Luxembourg authorities to the reasoned opinion has no bearing on the admissibility

of the action and does not constitute a breach of the rights of the defence (see, to that effect, Case C-3/96 *Commission v Netherlands* [1998] ECR I-3031, paragraph 20).

Findings of the Court

18 The Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-173/01 *Commission v Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission v France* [2003] ECR I-3783, paragraph 9).

19 It is also settled case-law that the Commission still has an interest in bringing an action under Article 226 EC even when the alleged infringement has been remedied after the expiry of the period prescribed in the reasoned opinion (see, to that effect, Case 283/86 *Commission v Belgium* [1988] ECR 3271, paragraph 6).

20 Firstly, in the present case, the question whether, before the end of the period prescribed in the reasoned opinion, the Law of 2002 had remedied the alleged failure to fulfil obligations, and whether, consequently, the action had become devoid of purpose before it was brought, is one that must be examined in the context of the analysis of the merits of the case.

21 Secondly, the Grand Duchy of Luxembourg cannot rely on the failure of the Commission to take account of its reply to the reasoned opinion, or on the late transmission of that reply to the General Secretariat of the Commission, in order to justify the plea of inadmissibility which it puts forward against the action. The Court

has already held that failure to take account of a reply to a reasoned opinion is not decisive. Thus, at paragraph 20 of its judgment in *Commission v Netherlands* (cited above), the Court held that, even assuming that the contentious procedure was opened by a Commission application which took no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion, that State's right to a fair hearing had not been infringed.

- 22 Finally, as regards the plea alleging that the two-month period allowed to the Grand Duchy of Luxembourg in the reasoned opinion was inadequate, that plea was first raised in the rejoinder and is not based on matters of law or of fact which came to light in the course of the procedure.
- 23 That plea is therefore inadmissible.
- 24 It follows that the Commission's application is admissible.

The merits of the action

The first complaint

— Arguments of the parties

- 25 By its first complaint, the Commission submits that Article 7(2) of the Law of 1999, according to which the right to maternity leave arising during parental leave replaces the latter which must then come to an end, does not comply with Clause 2(1) of the

framework agreement, to the extent that Article 7(2) provides that parental leave must obligatorily come to an end when maternity leave commences, without its being possible for the woman to defer the portion of leave which she was not able to take.

- 26 According to the Commission, parental leave is distinct from maternity leave and has a purpose different from the latter. A woman whose maternity leave begins during her parental leave must, in the light of the individual right to parental leave of at least three months conferred on her by Clause 2(1) of the framework agreement, be able to defer the portion of her parental leave which she has not been able to take because of her maternity leave.
- 27 Relying on the principle of non-discrimination, the Commission concludes that since the Grand Duchy of Luxembourg decided to grant full-time parental leave of 6 months' duration or part-time parental leave of 12 months' duration, it must also grant parental leave of the same duration to all persons covered by Directive 96/34, and is not therefore at liberty, in the absence of objective justification, to apply differential treatment to those persons.
- 28 The Luxembourg Government argues that the alleged infringement of the framework agreement occurs only in extremely rare cases. Since Article 3(4) of the Law of 1999 requires one of the parents to take parental leave immediately after maternity leave and, in the vast majority of cases, it is the mother who takes that leave, it is not biologically possible for her parental leave to be interrupted by maternity leave granted in respect of another pregnancy.

- 29 The Luxembourg Government concedes that if, on the other hand, it was the father who applied for parental leave on the expiry of the woman's maternity leave, it could not then be ruled out that during the parental leave taken in turn by the mother at a later date, pregnancy might subsequently intervene, and therefore maternity leave, which would bring the parental leave to a premature end.
- 30 The Grand Duchy of Luxembourg argues that it has, however, remedied any failure to fulfil its obligations by adopting, before the expiry of the period which it was granted by the reasoned opinion, the Law of 2002 which inserted into the Law of 1999 a new version of Article 10 of that law. The sixth paragraph of that article provides that 'the definitive rejection, by the [National Family Benefits] Fund, of an application for the allowance provided for by Article 8 shall not prejudice the possible grant of parental leave by the employer under the conditions laid down by Directive 96/34 ...'.

— Findings of the Court

- 31 Clause 2(1) of the framework agreement grants men and women workers an individual right to parental leave of at least three months.
- 32 Pursuant to paragraph 9 of the General Considerations of that framework agreement, parental leave is distinct from maternity leave. Parental leave is granted to parents to enable them to take care of their child. This leave may be taken until the child has reached a given age up to 8 years. Maternity leave has a different purpose. It is intended to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows

pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (see, to that effect, Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 43).

33 It follows that each parent is entitled to parental leave of at least three months' duration and that this may not be reduced when it is interrupted by another period of leave which pursues a purpose different from that of parental leave, such as maternity leave. The Court has already held that a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law. Thus, in Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 41, the Court ruled that taking maternity leave could not affect the right to full annual leave.

34 Clearly, by requiring that parental leave come obligatorily to an end at the date on which it is interrupted by maternity leave or adoption leave without its being possible for the parent to defer the portion of that parental leave which he or she was not able to take, the Grand Duchy of Luxembourg has not ensured that all parents may take parental leave of at least three months' duration. Consequently, that Member State has failed to fulfil its obligations under Directive 96/34.

35 That finding is not called in question by the fact that there is slight probability that maternity leave or adoption leave will bring parental leave to a premature end. Such a situation has no effect on the existence of the alleged failure to fulfil obligations, but merely on its extent. In that regard, at paragraph 14 in Case C-209/88 *Commission v Italy* [1990] ECR I-4313, the Court ruled that the failure to comply with an obligation imposed by a rule of Community law is itself sufficient to constitute the breach, and the fact that such a failure had no adverse effects is irrelevant.

- 36 It must however be examined whether the amendments made to the Law of 1999 by the Law of 2002 put an end to that failure to fulfil obligations.
- 37 Those amendments inserted into the Law of 1999 a new version of its Article 10, and, in particular, a sixth paragraph of that article. However, that provision does not grant a right to parental leave but merely provides for the possibility that such leave may be granted by an employer, at the latter's discretion.
- 38 It must accordingly be held that the sixth paragraph of Article 10 of the Law of 1999 has not put an end to the alleged failure to fulfil obligations resulting from Article 7 (2) of that law.
- 39 Consequently, the first complaint put forward by the Commission in support of its action must be considered well founded.

The second complaint

— Arguments of the parties

- 40 The Commission asserts that the fifth paragraph of Article 19 of the Law of 1999, which provides that the right to parental leave exists only in respect of children born after 31 December 1998 or in respect of whom adoption proceedings were initiated after that date, does not comply with Directive 96/34.

- 41 According to the Commission, that directive requires Member States to recognise the right to parental leave for parents of all minors of a given age up to 8 years and which the Grand Duchy of Luxembourg has set at 5 years, irrespective of whether they were born before or after 3 June 1998, the time-limit laid down for transposition of that directive.
- 42 The Commission takes the view that by requiring that the child must have been born after 31 December 1998 or that the adoption proceedings must have been initiated with the competent tribunal after that date, the Grand Duchy of Luxembourg has, in transposing Directive 96/34 into its national law, made entitlement to parental leave subject to an additional condition which is not authorised by Directive 96/34.
- 43 The Luxembourg Government replies, on the one hand, that the event which triggers the right to parental leave is the birth or adoption of a child, an event which must occur after Directive 96/34 came into force in the Member State concerned in order to form the basis of entitlement to parental leave.
- 44 On the other hand, the Luxembourg Government considers that the Commission's interpretation implies that Directive 96/34 has retroactive effect. It draws attention to the case-law of the Court, according to which Community measures do not have retroactive effect unless, exceptionally, it is clear from the terms of the measure that that is the Community legislature's intention. That is not the case here since the Member States had, on the contrary, provided for progressive introduction of the provisions of that directive into their national legal systems.
- 45 In addition, the Grand Duchy of Luxembourg argues that it has put an end to the alleged failure to fulfil obligations by the insertion in the Law of 1999 of the sixth paragraph of the new Article 10.

— Findings of the Court

- 46 It should be noted that Clause 2(1) of the framework agreement grants workers an individual right to parental leave to enable them to take care of their child and that leave may be taken until a given age up to 8 years to be defined by Member States. Under the rules, that leave can be taken until the child reaches the age of 5.
- 47 It follows that the right to parental leave is granted by Directive 96/34 to all parents having a child below a certain age limit. Since that directive provides that entitlement to parental leave is available during a certain period, until the child has reached the age set by the Member State concerned, the fact that the child was born before or after the time-limit laid down for the implementation of that directive is not relevant in this regard. The right to parental leave is not connected with the birth or adoption of the child considered as facts which, by reason of the date at which they occurred, give rise to entitlement to such leave. It is true that the text of the framework agreement states that the right to parental leave is conferred 'on the grounds of the birth or adoption' of a child, but such wording reflects only the fact that the grant of parental leave is subject to the condition that a child has been born or adopted. This does not imply that for the right to parental leave to be justified, the birth or adoption of the child must have occurred after that directive has come into force in the Member State concerned.
- 48 By requiring that a child in respect of whom a parent may be entitled to parental leave must have been born after 31 December 1998 or that adoption proceedings in respect of the child must have been initiated after that date, the Grand Duchy of Luxembourg has made it impossible for parents of children born or adopted before that date, but who had not reached the age of 5 on the date on which the Law of 1999 came into force, to avail themselves of such a right. Such a rule for

implementing Directive 96/34 is contrary to the purpose of that directive, which is intended to grant a right to parental leave to parents of children who have not yet reached a given age. Accordingly, that Member State has added a condition to the right to parental leave laid down by that directive which is not authorised by the latter.

49 As the Advocate General rightly observed at point 73 of his Opinion, that analysis does not in any way confer retroactive effect on Directive 96/34. It is merely a question of that directive being immediately applicable to situations arising prior to its entry into force (see, to that effect, Case C-162/00 *Pokrzepowicz-Meyer* [2002] ECR I-1049, paragraph 50).

50 As regards the Grand Duchy of Luxembourg's argument that it has put an end to that failure to fulfil obligations by the insertion of the sixth paragraph of the new Article 10 of the Law of 1999, it should be noted that the latter does not grant a right to parental leave, but merely affords the employer the possibility of offering the worker parental leave. In those circumstances, that provision has not put an end to the alleged failure to fulfil obligations.

51 It follows from all the foregoing that the second complaint put forward by the Commission in support of its action must also be considered well founded.

52 Consequently, it must be held that, by providing that the right to maternity leave or adoption leave arising during parental leave replaces the latter which must then come to an end, without its being possible for the parent to defer the portion of the parental leave which he or she was unable to take and by limiting the grant of the right to parental leave to parents of children born after 31 December 1998 or in

respect of whom adoption proceedings were initiated after that date, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Directive 96/34.

Costs

- 53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Declares that, by providing that the right to maternity leave or adoption leave arising during parental leave replaces the latter which must then come to an end, without its being possible for the parent to defer the portion of the parental leave which he or she was unable to take and by limiting the grant of the right to parental leave to parents of children born after 31 December 1998, or in respect of whom adoption proceedings were initiated after that date, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC;**
- 2. Orders the Grand Duchy of Luxembourg to pay the costs.**

[Signatures]