Judgment of the court (Fifth Chamber) 27 February 2003

Wiebke Busch v Klinikum Neustadt GmbH & Co. Betriebs KG

Reference for a preliminary ruling from the Arbeitsgericht Lübeck

Equal treatment for men and women – Article 2(1) of Directive 76/207/EEC – Protection of pregnant women

Case C-320/01

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In Case C-320/01,
REFERENCE to the Court under Article 234 EC by the Arbeitsgericht Lübeck (Germany) for a preliminary ruling in the proceedings pending before that court between
Wiebke Busch

And

Klinikum Neustadt GmbH & Co. Betriebs-KG,

on the interpretation of Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40),

THE COURT (Fifth Chamber),,

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, P. Jann, S. von Bahr and A. Rosas, Judges,
Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

– Wiebke Busch, by V. Gloe, Rechtsanwalt,
– Klinikum Neustadt GmbH & Co. Betriebs-KG, by J. Steinigen, Rechtsanwalt,
– the German Government, by W.-D. Plessing and M. Lumma, acting as Agents,
– the Commission of the European Communities, by N. Yerrell and H. Kreppel, acting as Agents

having regard to the Report for the Hearing,

after hearing the oral observations of Klinikum Neustadt GmbH & Co. Betriebs- KG and the Commission at the hearing on 23 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 21 November 2002,

gives the following

Judgment

1 By order of 6 August 2001, received at the Court on 20 August following, the Arbeitsgericht Lübeck referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).
2 Those questions were raised in a dispute between Ms Busch and Klinikum Neustadt GmbH & Co. Betriebs-KG (the clinic) concerning the interruption by her of parental leave in order to return to her paid work for the clinic.

Legal framework

Community rules
3 Directive 76/207 implements the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
4 Article 2(1) and (3) of that directive read as follows: 1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status....3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.
5 Article 3(1) of Directive 76/207 provides: Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.
6 Article 5(1) of that directive reads as follows: Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.
7 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) states in its ninth recital that it is particularly aimed at preventing women from being treated unfavourably on the labour market because of their pregnancy.
8 Article 4(1) of Directive 92/85 provides: For all activities liable to involve a specific risk of exposure to the agents, processes or working conditions of which a non-exhaustive list is given in Annex I, the employer shall assess the nature, degree and duration of exposure, in the undertaking and/or establishment concerned, of workers within the meaning of Article 2, either directly or by way of the protective and preventive services ... in order to:
— assess any risks to the safety or health and any possible effect on the pregnancy or breastfeeding of workers within the meaning of Article 2,
— decide what measures should be taken.
9 Article 5 of that directive adds:
1. ... if the results of the assessment referred to in Article 4(1) reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker within the meaning of Article 2, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.
2. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job.
3. If moving her 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.
4. The provisions of this Article shall apply *mutatis mutandis* to the case where a worker pursuing an activity which is forbidden pursuant to Article 6 becomes pregnant or starts breastfeeding and informs her employer thereof.

National legislation

10 Paragraph 3 of the Mutterschutzgesetz (Law on the Protection of Working Mothers, BGBl. 1997 I, p. 22) (the MuSchG) provides:
1. Pregnant women must not be employed if, as attested by a medical certificate, the life or health of the mother or child will be jeopardised if the mother continues to work.
2. Pregnant women must not be employed during the last six weeks preceding the birth, unless they expressly declare that they are willing to do so. The declaration may be revoked at any time.
11 Paragraph 4 of the MuSchG states:
1. Pregnant women must not be assigned heavy physical work or work exposing them to the harmful effects of hazardous substances or rays, dust, gases or steam, heat, cold or humidity, vibrations or noise.
2. In particular pregnant women must not be assigned:
(1) work involving the regular lifting, moving or carrying, by hand without mechanical assistance, of loads of more than 5 kg or, on occasion, of loads of more than 10 kg. If heavier loads must be lifted, moved or carried by hand with mechanical assistance, the physical effort required of the pregnant woman must not be greater than that required for the work referred to in the first sentence.
...
12 Paragraphs 11, 13 and 14 of the MuSchG deal, respectively, with the continuance of remuneration during work suspension periods when the worker is prohibited from working, the granting of the maternity allowance and supplementary allowance during maternity leave. The maternity allowance amounts to DEM 25 net per working day and the supplementary allowance, paid by the employer, is the difference between DEM 25 and the

average daily remuneration, minus the deductions required by law. The supplementary allowance is, however, paid only on the condition that the worker is entitled to remuneration, which is not the case during parental leave.

13 Paragraph 15(1) of the Bundeserziehungsgeldgesetz (Federal Law on Parental Allowance and Parental Leave, BGBl. 1994 I, p. 180), as amended by a law of 21 September 1997 (BGBl. I, p. 2390) (the BErzGG), provides that workers are entitled to parental leave until the date of the third birthday of a child born after 31 December 1991. Under Paragraph 5 of that law, the monthly parental allowance is DEM 600.

14 Paragraph 16 of the BErzGG provides:

1. Workers must request the parental leave from their employer no later than four weeks before the date on which they wish to begin taking it and, at the same time, declare the period or periods for which they intend to take it.

...

3. The parental leave may be terminated early or extended pursuant to Paragraph 15(1), subject to approval by the employer. ...

15 In addition, Paragraph 123(1) of the Bürgerliches Gesetzbuch (German Civil Code) (the BGB) provides: A person who has been caused to make a declaration of intent by deceit or duress may contest that declaration.

16 Paragraph 119 of the BGB provides:

1. A person who, when making a declaration of intent, was mistaken about its content or had no intent to make a declaration with such content, may contest that declaration if it can be assumed that he would not have made it if he had had knowledge of the facts and a reasonable appraisal of the matter.

2. Any mistake about such characteristics of a person or a matter which are considered essential is also considered a mistake as to the content of the declaration.

The main proceedings and the questions referred for a preliminary ruling

17 Ms Busch has worked as a nurse for the clinic since April 1998. After the birth of her first child in June 2000, she took parental leave which was supposed to be for three years. In October 2000, she became pregnant again.

18 By letter of 30 January 2001, Ms Busch made a request for permission to terminate her parental leave early and return to full-time work as a nurse, which was accepted by her employer after there was a job vacancy in a ward in March 2001. Ms Busch was to resume working in a ward with 39 beds looked after by three nurses per shift and in which there was an urgent need of staff. Her employer did not ask if she was pregnant.

19 Ms Busch thus returned to work on 9 April 2001. The next day, she informed her employer for the first time that she was seven months pregnant.

20 Pursuant to Paragraph 3(2) of the MuSchG, her maternity leave was to start on 23 May 2001, six weeks prior to the expected date of birth. The clinic released her from her obligation to work with effect from 11 April 2001 and, by letter of 19 April 2001, rescinded its consent to her returning to work, on grounds of fraudulent misrepresentation and mistake as to an essential characteristic.

21 In support of its position, the clinic submits that, having regard to the prohibitions on working under Paragraph 4(2) of the MuSchG, Ms Busch would not have been able to carry out her duties effectively.

22 The documents before the court show that Ms Busch wished to end her parental leave so that she would receive a maternity allowance, which is higher than the allowance paid during parental leave, and also the supplements to the maternity allowance.

23 Ms Busch argued in the main proceedings before the Arbeitsgericht Lübeck that she was not required to declare that she was pregnant and that she would have been able to carry out her duties as a nurse, with some restrictions, until the start of her maternity leave, as she had done during her first pregnancy.

24 The national court notes that the employer could legally contest the validity of its consent to the shortened parental leave on the basis of Paragraphs 119(2) or 123(1) of the BGB.

25 However, the Arbeitsgericht Lübeck questioned the compatibility of German law with the principle of equal treatment for men and women as guaranteed by Directive 76/207, and decided to suspend the proceedings and refer the following two questions to the Court for a preliminary ruling:

1. Does it constitute illegal discrimination on grounds of sex, within the meaning of Article 2(1) of Council Directive 76/207/EEC, if a woman, who, after she has started her parental leave (Erzieungsurlaub) wishes to shorten that leave with the consent of her employer, is under an obligation to inform the employer if she knows she is pregnant again before the agreement on her return to work is concluded, where she cannot fully carry out the proposed work because, from the very first day, a prohibition of employment applies in respect of particular tasks?

2. In the event that Question 1 is answered in the affirmative, in the case described, does it constitute unlawful discrimination on the grounds of sex, within the meaning of Directive 76/207, if the employer then has the right to rescind his consent to the shortening of parental leave because he was mistaken about the fact that the woman was pregnant?

The first question

26 By its first question, the national court asks whether Article 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.

Observations submitted to the Court

27 In Ms Busch's view, the obligation for a woman to declare her pregnancy before commencing new employment constitutes discrimination against her on grounds of sex. She argues that this is also the case where, in an existing employment relationship, the employee decides to return to work at the end of a shortened period of parental leave. The financial loss for the employer through granting the protection due to pregnant women and, where appropriate, grants of leave due to prohibitions of work, should not be taken into consideration.
28 Ms Busch adds that, as it was, she would have been able to carry out her duties until the start of her maternity leave, even taking into account the very minimal restrictions which would have been imposed on her, such as the prohibition on handling syringes and lifting heavy loads. The prohibited activities took up only a few minutes of each working day.
29 The clinic submits, as a preliminary point, that the present case does not involve either a refusal to hire or a termination of an employment contract of a pregnant worker, since the indefinite employment relationship between it and Ms Busch existed previously and continued to exist afterwards.
30 The clinic submits that Ms Busch would have been objectively unable to carry out a significant part of the tasks involved in her job if she had actually returned to work, because of the prohibitions imposed on account of her pregnancy. Moreover, the fact that she failed to inform the employer of that fact, knowing that she would not be able to perform her duties fully, constituted a breach of the duty of employee loyalty inherent in any contract of employment and continuing during parental leave.
31 In any event, the obligation to inform the employer in those circumstances, even if it did constitute discrimination on grounds of sex, was justified by the existence of a number of legislative provisions enacted to protect pregnant women and prohibiting certain activities during pregnancy.
32 The German Government submits that although, according to settled case-law, Directive 76/207 prohibits restrictions on access to employment and on dismissals due to a woman's being pregnant, to work prohibitions and to protective measures relating to pregnancy, that case-law is not applicable to the present case, which involves the conditions and ways of carrying out a pre-existing employment relationship. In that light, the circumstances of the main proceedings in this case differ from those where the Court has had to rule on issues involving the hiring or dismissal of a female employee (Case C-179/88 *Handels- og Kontorfunktionærernes Forbund* [1990] ECR I-3979; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657; Case C-32/93 *Webb* [1994] ECR I-3567; Case C-207/98 *Mahlburg* [2000] ECR I-549; and Case C-109/00 *Tele Danmark* [2001] ECR I-6993. Ms Busch enjoyed the security of an employment contract for an indefinite term, the existence of which was not disputed when the clinic contested the validity of its consent to an earlier end to the parental leave.
33 The German Government also submits that Ms Busch, whilst aware that she would be unable to carry out a large share of her duties because of the protective measures in place for pregnant women, was seeking to obtain the supplementary allowance paid by the employer to supplement the maternity allowance. Such conduct was not compatible with the duty of loyalty and mutual trust which should prevail in labour relations and could be likened to an abuse of process.
34 The Commission submits that the refusal by an employer, on account of pregnancy, to reinstate an employee before the end of parental leave constitutes direct sex discrimination, contrary to Article 3(1) of Directive 76/207. Since pregnancy is discriminatory and thus not a criterion which the employer may take into account, the employee was not obliged to inform her employer of her condition (see, to that effect, *Tele Danmark* , paragraph 34).
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 (see *Habermann-Beltermann* , paragraph 24). Nor can the financial loss suffered by the employer justify refusing employment on grounds of pregnancy (see Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 12; and *Mahlburg* , paragraph 29), even when the contract of employment is for a fixed term (see *Tele Danmark* , paragraph 30).
36 The Commission adds that, according to Ms Busch, an internal reorganisation of duties had enabled her to carry out most of her work duties during her first pregnancy, despite the prevailing work prohibitions, and that she could thus expect a similar reorganisation during the second pregnancy. The Commission doubts, in any event, that those prohibitions were such that she was unable to carry out any work.
37 The Commission also disagrees with the argument based on abuse of process. Regardless of the reasons why Ms Busch asked for her parental leave to be shortened, she was entitled to make such a request. That in itself was sufficient to establish that there was no abuse of process.

Findings of the Court

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 (see, concerning refusal to hire, *Dekker* and *Mahlburg* ; concerning dismissal, see *Webb* and *Tele Danmark* ; and, concerning refusal to renew a contract for a fixed term, see Case C-438/99 *Jiménez Melgar* [2000] ECR I-6915).
40 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.
41 It also follows from the case-law of the Court that discrimination on grounds of sex cannot be justified by the fact that she is temporarily prevented, by a legislative prohibition imposed because of pregnancy, from performing all of her duties (see *Habermann-Beltermann* , paragraphs 24 and 26; and *Mahlburg* , paragraph 27).
42 To be sure, Article 2(3) of Directive 76/207 reserves to Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity, by recognising the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth (see *Habermann-Beltermann* , paragraph 21). Articles 4(1) and 5

of Directive 92/85 also guarantee special protection for pregnant women and women who have recently given birth or are breastfeeding in respect of any activity liable to involve a specific risk to their safety or health or negative effects on the pregnancy or breastfeeding.

43 However, 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.

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 (*Dekker* , paragraph 12; *Mahlburg* , paragraph 29; and *Tele Danmark* , paragraph 28).

45 Article 5 of Directive 92/85 allows the employer, where there is a risk to the safety or health of a worker, or a negative effect on her pregnancy or breastfeeding, temporarily to adjust the working conditions or hours or, if that is not possible, move the worker to another job or, as a last resort, grant the worker leave.

46 The fact that, in asking to return to work, Ms Busch intended to receive a maternity allowance higher than the parental leave allowance, as well as the supplementary allowance paid by the employer, cannot legally justify sex discrimination over working conditions.

47 In the light of the foregoing, the answer to the first question must be that Article 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.

The second question

48 By its second question, the national court essentially asks whether Article 2(1) of Directive 76/207 is to be interpreted as precluding an employer from contesting under national law the consent it gave to the reinstatement of an employee before the end of her parental leave on the grounds that it was in error as to her being pregnant.

49 In the light of the answer to the first question, the second question must also be answered in the affirmative. Obviously, if an employer may not take an employee's pregnancy into consideration in the refusal to reinstate her before the end of her parental leave, nor can the employer plead that its consent to that reinstatement was vitiated because it was not aware that she was pregnant. Any national provision which might serve as a basis for such a claim must be set aside by the national court in order to ensure the full effect of Directive 76/207.

50 The answer to the second question must therefore be that Article 2(1) of Directive 76/207 is to be interpreted as precluding an employer from contesting under national law the consent it gave to the reinstatement of an employee to return before the end of her parental leave on the grounds that it was in error as to her being pregnant.

Costs

51 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Arbeitsgericht Lübeck by order of 6 August 2001, hereby rules:

1. Article 2(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions 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.

2. Article 2(1) of Directive 76/207 is to be interpreted as precluding an employer from contesting under national law the consent it gave to the reinstatement of an employee to return before the end of her parental leave on the grounds that it was in error as to her being pregnant.

Wathelet Timmermans Jann

von Bahr Rosas

Delivered in open court in Luxembourg on 27 February 2003.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber