Judgment of the Court (Sixth Chamber) of 19 November 1998

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service

Reference for a preliminary ruling: Sø- og Handelsretten - Denmark

Equal treatment for men and women - Remuneration - Working conditions for a pregnant woman

Case C-66/96

European Court reports 1998 Page I-07327

In Case C-66/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Sø- og Handelsret, Denmark, for a preliminary ruling in the proceedings pending before that court between

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Berit Høj Pedersen,

and

Fællesforeningen for Danmarks Brugsforeninger, acting on behalf of Kvickly Skive,

between

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Bettina Andresen,

and

Dansk Tandlægeforening, acting on behalf of Jørgen Bagner,

between

Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Tina Pedersen,

and

Dansk Tandlægeforening, acting on behalf of Jørgen Rasmussen,

and between

Kristelig Funktionær-Organisation, acting on behalf of Pia Sørensen,

and

Dansk Handel & Service, acting on behalf of Hvitfeldt Guld og Sølv ApS,

on the interpretation of Article 119 of the EC Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), 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) and 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1),

THE COURT

(Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, G.F. Mancini, J.L. Murray (Rapporteur) and R. Schintgen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Ms Høj Pedersen, Ms Andresen and Ms Pedersen, by Lars Svenning Andersen, of the Århus Bar,

- Kristelig Funktionær-Organisation, acting on behalf of Ms Sørensen, by Søren Juul, of the Copenhagen Bar,

- Fællesforeningen for Danmarks Brugsforeninger, acting on behalf of Kvickly Skive, by Mariann Norrbom, of the Copenhagen Bar,

- Dansk Tandlægeforening, acting on behalf of Mr Bagner and Mr Rasmussen, by Henrik Wedell-Wedellsborg, of the Copenhagen Bar,

- Dansk Handel & Service, acting on behalf of Hvitfeldt Guld og Sølv ApS, by Peter Herskind, of the Copenhagen Bar,

- the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same directorate, acting as Agents,

- the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Dinah Rose, Barrister, and

- the Commission of the European Communities, by Hans Peter Hartvig, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Ms Høj Pedersen, Ms Andresen and Ms Pedersen, represented by Lars Svenning Andersen; of Kristelig Funktionær-Organisation, acting on behalf of Ms Sørensen, represented by Søren Juul; of Fællesforeningen for Danmarks Brugsforeninger, acting on behalf of Kvickly Skive, represented by Mariann Norrbom; of Dansk Tandlægeforening, acting on behalf of Mr Bagner and Mr Rasmussen, represented by Christian Schow Madsen, of the Copenhagen Bar; of Dansk Handel & Service, acting on behalf of Hvitfeldt Guld og Sølv ApS, represented by Peter Vibe Jespersen, of the Copenhagen Bar; of the French Government, represented by Anne de Bourgoing; and of the Commission, represented by Hans Peter Hartvig and Marie Wolfcarius, at the hearing on 12 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 10 July 1997,

gives the following

Judgment

Grounds

1 By order of 20 February 1996, received at the Court on 11 March 1996, the Sø- og Handelsret (Maritime and Commercial Court, Denmark) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 119 of that treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), 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), and 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

2 That question was raised in proceedings brought by Ms Høj Pedersen, Ms Andresen, Ms Pedersen and Ms Sørensen against their respective employers, Kvickly Skive, Mr Bagner, Mr Rasmussen and Hvitfeldt Guld og Sølv ApS, concerning the maintenance of their wages during absences from work connected with their pregnancy.

The Community legislation

3 Article 119 of the Treaty provides:

`Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.'

4 Directive 75/117, which, according to its fourth recital, is aimed at facilitating the practical application of that provision, states in Article 1:

`The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.'

5 Article 2(1) of Directive 76/207 provides:

`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.'

6 However, according to Article 2(3) thereof, Directive 76/207

`shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

7 Article 5(1) of that same directive then specifies:

`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.'

8 Article 4 of Directive 92/85 provides:

`Assessment and information

1. 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 referred to in Article 7 of Directive 89/391/EEC, 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.

2. Without prejudice to Article 10 of Directive 89/391/EEC, workers within the meaning of Article 2 and workers likely to be in one of the situations referred to in Article 2 in the undertaking and/or establishment concerned and/or their representatives shall be informed of the results of the assessment referred to in paragraph 1 and of all measures to be taken concerning health and safety at work.'

9 Article 5 then states:

`Action further to the results of the assessment

1. Without prejudice to Article 6 of Directive 89/391/EEC, 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.'

10 Article 11 of the same directive provides:

`Employment rights

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.'

The national legislation

11 Paragraph 5(1) of Lov No 516 of 23 July 1987 om retsforholdet mellem arbejdsgivere og funktionærer (Law on the legal relations between employers and non-manual workers, hereinafter `the Law on non-manual workers') provides:

`If an employee is unable to carry out his or her work by reason of illness, the resultant absence from work shall be regarded as due to a legitimate impediment unless, in the course of the employment relationship, he or she

contracted that illness intentionally or through gross negligence, or, on entering the post, fraudulently failed to disclose that he or she was suffering from the illness in question.'

12 It appears from the order for reference that the `illness' to which that provision refers covers any physical or mental disorder or infirmity which, in the opinion of a doctor, renders the employee unable to carry out his or her work.

13 According to Paragraph 5 of Lov No 852 of 20 December 1989 om dagpenge ved sygdom eller fødsel (Law on benefits in the event of illness or confinement, hereinafter `the Law on benefits'), in the event of total incapacity for work on grounds of illness the employee continues to receive full benefits. The employer can then be reimbursed for the amount of benefit to which the employee would have been entitled.

14 On the subject of pregnancy and maternity, Paragraph 7 of the Law on non-manual workers provides:

`1. In order for the employer to organise work arrangements, an employee shall, no later than three months before the expected date of confinement, inform her employer of when she expects to begin her maternity leave.

2. Where an employee is pregnant, her employer is required to pay half her salary for a maximum of five months over the period from the date on which the incapacity for work arises, such period beginning not earlier than three months before the confinement and ending not later than three months after the confinement. A similar obligation exists where the employer considers it impossible to provide work for the employee, even though she is not unfit for work. If the employment is terminated, the employer shall provide full pay until expiry of the period of notice to which the employee is entitled.'

15 It appears from the order for reference that incapacity for work on grounds of pregnancy and confinement does not in principle give rise to the same rights as does incapacity for work on grounds of illness.

16 Thus, as is clear from the above provision, for a maximum of five months over a period beginning not earlier than three months before the confinement and ending not later than three months after the confinement, the employee is entitled only to receive half pay from her employer.

17 By contrast, during pregnancy but before the beginning of maternity leave, an employee having contracted an illness is entitled to full pay, under Paragraph 5 of the Law on non-manual workers, only if that illness is unconnected with her pregnancy.

18 In the event of incapacity for work or legitimate impediment for a particular reason connected with the pregnancy arising before the three-month period preceding the confinement, the employee will have no right in principle to her wages, but she will receive benefits in accordance with the Law on benefits and with Vejledning (Administrative Instruction) No 191 of 27 October 1994.

19 The employee must, at the request of the employer, provide documentary proof of her incapacity for work, which must have been assessed by a doctor. The employee is not required to specify the ground of the incapacity for work, but she must specify whether it is connected with the pregnancy.

20 Finally, in accordance with the second sentence of Paragraph 7(2) of the Law on non-manual workers, an employer may decline to provide employment for a pregnant employee, even though she is not unfit for work, if he considers that he cannot provide her with work. The employer is then required to pay her half her salary.

21 According to the national court, the reasoning behind that provision is that, in view of the nature of a particular job, an employer may impose requirements with regard to the employee's working capacity which justify her ceasing work at a date prior to the three-month period preceding the confinement. The employer must be able to explain why the employee was sent home.

The main proceedings

22 Ms Høj Pedersen, Ms Andresen, Ms Pedersen and Ms Sørensen are all covered by the Danish Law on non-manual workers. In all their cases, pregnancy followed an abnormal course prior to the three months preceding the expected date of confinement.

23 Ms Høj Pedersen and Ms Andresen were declared totally unfit for work and ceased to be paid by their employers, who advised them to claim benefits.

24 Ms Pedersen was declared to be only partially unfit for work. She consequently suggested to her employer, Mr Rasmussen, that she resume her work on a part-time basis, but he refused. She was then informed that a full-time replacement had been engaged and that her wages would no longer be paid. She was consequently also advised to apply for early maternity benefits.

25 It became apparent at the hearing that some doubt remained as to the nature of Ms Sørensen's incapacity.

26 The applicants in the main proceedings brought proceedings before the Sø- og Handelsret and, on the basis of the Community law rules on equal treatment for men and women, challenged the interpretation of Paragraph 5 of the Law on non-manual workers as meaning that women who are unfit for work for a reason connected with the pregnancy before the three-month period preceding their confinement are not entitled to full pay.

27 Taking the view that the outcome of the proceedings before it depended on the interpretation of Community law, the national court decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

`Is it contrary to Community law, including Article 119 of the EC Treaty and Directives 75/117/EEC, 76/207/EEC and 92/85/EEC, for national legislation to exempt employers from paying salaries to pregnant employees in cases where:

1. the absence is attributable to the fact that the pregnancy substantially aggravates an illness that is otherwise unconnected with the pregnancy;

2. the absence is attributable to an illness caused by the pregnancy;

3. the absence is attributable to the fact that there is a pathological development in the pregnancy and that continued work would create a risk for the health of the woman or her unborn child;

4. the absence is attributable to routine pregnancy-related minor complaints that occur in any normal pregnancy and, moreover, do not result in incapacity for work;

5. the absence results from medical recommendation intended to protect the unborn child but which is not based on an actual pathological condition or on any special risks for the unborn child;

6. the absence is attributable to the fact that the employer, on the basis of the pregnancy alone, considers that he cannot provide work for the pregnant employee, despite the fact that the employee is not unfit for work,

and in situations 1 to 3 and 6 the State guarantees that the pregnant employee will receive the same rate of benefit as she would receive if on sick leave, whereas in situations 4 and 5 no State benefit is received, and the employer, moreover, is required under national legislation to provide full pay during illness?'

The first, second and third situations

28 In its question, the national court asks, first, whether it is contrary to Article 119 of the Treaty and to Directives 75/117 and 92/85 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.

29 The first point to be borne in mind here is that Directive 75/117 is designed essentially to facilitate the practical application of the principle of equal pay laid down in Article 119 of the Treaty and thus that it in no way alters the content or scope of the principle as defined in that article (Case 192/85 Newstead v Department of Transport [1987] ECR 4753, paragraph 20).

30 Directive 92/85, it should be noted, was adopted on 19 October 1992 and, in accordance with Article 14 thereof, was to be implemented by the Member States within two years of that date. However, the fact that the events which gave rise to the main proceedings took place, essentially, before the expiry of the time-limit for its implementation but after its adoption does not preclude the national court from seeking a ruling from the Court of Justice on its interpretation (see, to this effect, Cases C-129/96 Inter-Environnement Wallonie v Région Wallonne [1997] ECR I-7411 and 80/86 Kolpinghuis Nijmegen [1987] ECR 3969).

31 As the Court has consistently held, Article 177 of the Treaty is based on a distinct separation between the functions of national courts and tribunals and those of the Court of Justice, and does not give the Court jurisdiction to ascertain the facts of a case or to criticise the reasons for a reference. When a national court or tribunal seeks a ruling on the interpretation of a provision of Community law, it is to be supposed that it considers that interpretation necessary to enable it to give judgment in the action (Case 5/77 Tedeschi v Denkavit [1977] ECR 1555, paragraphs 17 and 18).

32 A further relevant consideration is that, as the Court held in Case 171/88 Rinner-Kühn v FWW Spezial-Gebäudereinigung [1989] ECR 2743, the pay to be provided by an employer during a worker's period of sick leave constitutes pay within the meaning of Article 119 of the Treaty, which comprises any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see Case C-262/88 Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-1889, paragraph 12, and Case C-457/93 Kuratorium für Dialyse und Nierentransplantation v Lewark [1996] ECR I-243, paragraph 21).

33 It must next be noted that although pregnancy is not in any way comparable to a pathological condition (Case C-32/93 Webb v EMO Air Cargo [1994] ECR I-3567, paragraph 25), the fact remains that it is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to take absolute rest for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and are thus a specific feature of that condition (Case C-394/96 Brown v Rentokil [1998] ECR I-4185, paragraph 22).

34 In this case, it is clear from the case-file that all workers are in principle entitled, under the legislation at issue in the main proceedings, to continue to be paid in full in the event of incapacity for work.

35 Thus, the fact that a woman is deprived, before the beginning of her maternity leave, of her full pay when her incapacity for work is the result of a pathological condition connected with the pregnancy must be regarded as treatment based essentially on the pregnancy and thus as discriminatory.

36 It would be otherwise only where the sums received by employees by way of benefits were equal to the amount of their pay. If such were the case, it would still be for the national court to ascertain whether the

circumstance that the benefits are paid by a local authority is such as to bring about discrimination in breach of Article 119 of the Treaty.

37 It follows that the application of legislative provisions such as those at issue in the main proceedings involves discrimination against women, in breach of Article 119 of the Treaty and of Directive 75/117.

38 The defendants in the main proceedings contend that Article 11 of Directive 92/85 authorises national legislation establishing a ceiling for the allowances which women may claim in the event of pregnancy. They state moreover that any discrimination which might exist would be justified by the fact that the Danish legislation reflects a sharing of the risks and economic costs connected with pregnancy between the pregnant worker, the employer and society as a whole, which represents inter alia a balance between the concern to facilitate the access of women to the workplace and the need to ensure their protection in the event of pregnancy.

39 It must be noted here that Article 11(3) of Directive 92/85 only allows a ceiling to be laid down under national legislation for pay or benefits received by workers in the context of maternity leave, as it is defined in Article 8 of the same directive.

40 The discrimination found in paragraph 35 above cannot be justified by the aim of sharing the risks and economic costs connected with pregnancy between the pregnant worker, the employer and society as a whole. That goal cannot be regarded as an objective factor unrelated to any discrimination based on sex within the meaning of the case-law of the Court (see Lewark, cited above, paragraph 31).

41 It follows from the foregoing that it is contrary to Article 119 of the Treaty 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 fourth and fifth situations

42 The national court then further wishes to know whether it is contrary to Article 119 of the Treaty and Directive 75/117 for national legislation to provide that a pregnant woman is not entitled to receive her pay from her employer where, before the beginning of her maternity leave, she is absent from work by reason either of routine pregnancy-related minor complaints, when there is in fact no incapacity for work, or of 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, while any worker who is unfit for work on the grounds of illness is in principle entitled thereto.

43 First, it must be noted here that, at the hearing, it became clear that the question whether Mrs Sørensen is covered by the fourth or the fifth situation has not yet been finally decided by the national court.

44 Both of the situations described must therefore be considered.

45 It is true that, as the Court held in Case 244/78 Union Laitière Normande v French Dairy Farmers [1979] ECR 2663, at paragraph 5, the need to afford an interpretation of Community law which is helpful to the national court makes it essential to define the legal context in which the interpretation requested should be placed. From that point of view it may, depending on the circumstances, be an advantage for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so that it can be in a position to take cognisance of all the factual and legal elements which may be relevant to the interpretation of Community law which it is called upon to give (Joined Cases 36/80 and 71/80 Irish Creamery Milk Suppliers Association and Others v Ireland and Others [1981] ECR 735, paragraph 6).

46 However, those considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties, which will have to take responsibility for giving judgment in the case and which is therefore in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling from the Court of Justice (Irish Creamery Milk Suppliers Association and Others, paragraph 7).

47 The next point is that, as noted in paragraph 32 above, the pay received by a worker while on sick leave constitutes pay within the meaning of Article 119 of the Treaty.

48 It is, however, relevant that here, in contrast to the first three situations outlined by the national court, the pregnant woman is absent from her work before the beginning of her maternity leave not because of a pathological condition or of any special risks for the unborn child giving rise to an incapacity for work attested by a medical certificate but by reason either of routine pregnancy-related minor complaints or of mere medical recommendation, without there being any incapacity for work in either of those two situations.

49 Consequently, the fact that the employee forfeits some, or even all, of her salary by reason of such absences which are not based on an incapacity for work cannot be regarded as treatment based essentially on the pregnancy but rather as based on the choice made by the employee not to work.

50 It follows from the foregoing that it is not contrary to Article 119 of the Treaty or Directive 75/117 for national legislation to provide that a pregnant woman is not entitled to receive her pay from her employer where, before the beginning of her maternity leave, she is absent from work by reason either of routine pregnancy-related minor complaints, when there is in fact no incapacity for work, or of 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, while any worker who is unfit for work on the grounds of illness is in principle entitled thereto.

The sixth situation

51 Finally the national court wishes to know whether it is contrary to Directives 76/207 and 92/85 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.

52 It must first be noted that, in accordance with Article 5 of Directive 76/207, men and women must enjoy the same working conditions, including the conditions governing dismissal.

53 When legislation such as that at issue in the main proceedings affects only women employees, it constitutes discrimination, in breach of that provision.

54 It is true that, 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, of protecting a woman's biological condition during and after pregnancy (Webb, cited above, paragraph 20).

55 However, legislation such as that at issue in the main proceedings cannot fall within the scope of that provision.

56 It appears from the order for reference that the Danish legislation is aimed not so much at protecting the pregnant woman's biological condition as at preserving the interests of her employer. The national court states that such legislation is based on the idea that, given the nature of the employment, the employer may impose requirements with regard to the employee's working capacity which justify her ceasing work at a date prior to the three-month period preceding the confinement.

57 Turning to Directive 92/85, it must be noted that Articles 4 and 5 set up an assessment and information procedure in respect of activities liable to involve a risk to safety or health or an effect on workers who are pregnant or breastfeeding. That procedure can lead to the employer making a temporary adjustment in working conditions and/or working hours or, if such an adjustment is not feasible, a move to another job. It is only when such a move is also not feasible that the worker is granted leave in accordance with national legislation or national practice for the whole of the period necessary to protect her safety or health.

58 It is clear from the order for reference that legislation such as that at issue in the main proceedings does not satisfy the substantive and formal conditions laid down in Directive 92/85 for granting the worker leave from her duties since, first, the reason for giving leave to the employee is based on the interest of the employer and, secondly, that decision can be taken by the employer without first examining the possibility of adjusting the employee's working conditions and/or working hours or even the possibility of moving her to another job.

59 It follows from the foregoing that it is contrary to Directives 76/207 and 92/85 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.

Decision on costs

Costs

60 The costs incurred by the French and United Kingdom Governments 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 actions pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the question referred to it by the Sø- og Handelsret by order of 20 February 1996, hereby rules:

61 It is contrary to Article 119 of the EC Treaty and Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women 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.

62 It is not contrary to Article 119 of the Treaty or Directive 75/117 for national legislation to provide that a pregnant woman is not entitled to receive her pay from her employer where, before the beginning of her maternity leave, she is absent from work by reason either of routine pregnancy-related minor complaints, when there is in fact no incapacity for work, or of 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, while any worker who is unfit for work on the grounds of illness is in principle entitled thereto.

63 It is contrary to 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, and to 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) 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.