Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 27 November 2007

Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG

Reference for a preliminary ruling: Oberster Gerichtshof - Austria

Social policy - Directive 92/85/EEC - Measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding - Meaning of 'pregnant worker' - Prohibition of dismissal of pregnant workers during the period from the beginning of their pregnancy to the end of the maternity leave - Woman dismissed where, at the date she was given notice of her dismissal, her ova had been fertilised in vitro, but not yet transferred to her uterus - Directive 76/207/EEC - Equal treatment for men and women - Woman undergoing in vitro fertilisation treatment - Prohibition of dismissal – Scope

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I – Introduction

1. For a long time, pregnancy had an aura of mystery; home pregnancy tests had not yet been invented and technological advances did not provide images of the foetus in the mother's womb. In the past, a pregnant woman could not be sure of her condition straight away and often remained in a state of uncertainty for weeks. Some observers, particularly the pioneers of medical science, attempted to describe the symptoms of gestation. Pliny the Elder affirms in book VII of his *Natural History* that, 'on the tenth day after conception, pains are felt in the head, vertigo, and dimness of the sight; these signs, together with loathing of food and rising of the stomach, indicate the formation of the future human being'; adding that 'if it is a male that is conceived, the colour of the pregnant woman is more healthy, and the birth less painful'. (2)

2. Most societies have tried to give special importance to the pregnant woman, both out of a desire to pay tribute to her and in order to protect her – and her child – against the bad omens and dangers associated with maternity. In his famous book *Les rites de passage* (Rites of Passage, published in 1909), the French ethnographer Arnold Van Gennep describes various rituals marking the changes experienced by human beings in primitive societies: pregnancy, birth, marriage and death. (3)

3. In *Mémoires de Deux Jeunes Mariées* (Letters of Two Brides), one of Balzac's heroines, who is pregnant for the first time, is surprised that she does not feel anything in particular at first and that she is more aware of her condition through the way others look at her rather than through the sensations of her own body, observing that 'motherhood is at first merely in the imagination' and, as she watches her symptoms, she goes on to develop an intense desire to know at what moment motherhood begins. (4) The great Aragonese master, Francisco Goya, painted the beautiful Countess of Chinchón in the full glory of her 21 years, not hiding the fact that she was expecting a child but indicating it discreetly by giving her a delicate headdress of ears of corn, a symbol of fertility. (5)

4. Ms Mayr probably wished to keep her desire to conceive to herself. It would be quite reasonable to suppose that she would have preferred to keep this private and intimate matter a secret for a few months. But this was not possible as the assisted reproduction process to which she was obliged to have recourse made it necessary for her to disclose her secret immediately. After undergoing a follicular puncture and when the ova had been fertilised in a laboratory but the embryos had not been implanted in her uterus, her employer gave her notice of the termination of her employment.

5. The Oberster Gerichtshof (Austrian Supreme Court) is seeking clarification from the Court of Justice as to the scope of the term 'pregnant worker' in Article 2(a) of Directive 92/85/EEC, (6) in particular to determine whether, at the time the employee concerned was dismissed, she could be regarded as pregnant and thus protected by that provision of Community law.

6. The reference therefore raises the question of when a pregnancy begins for the purposes of that directive. This is a very delicate question as it could lead indirectly into a medico-ethical debate on the origins of life, which would be both unnecessary and inappropriate in the present context.

II – The legal framework

A – Community legislation

1. Directive 92/85

7. The question referred for a preliminary ruling concerns Directive 92/85/EEC, specifically Article 2(a), by virtue of which a 'pregnant worker' is one who 'informs her employer of her condition, in accordance with national legislation and/or national practice.'

8. One of the safeguards given to workers falling within the scope of the directive is a prohibition of dismissal in order to guarantee 'the exercise of their health and safety protection rights'. Pursuant to Article 10, Member States must take the necessary measures to prohibit such dismissal from the beginning of the pregnancy to the end of the maternity leave, save in exceptional cases not connected with their condition which

are permitted under national legislation and/or practice, provided that the competent authority has given its consent (Article 10(1)), and if a worker is dismissed during this period, the employer must give grounds for the dismissal in writing (Article 10(2)).

2. Directive 76/207

9. Although the referring court does not expressly refer to it, Directive 76/207/EEC (7) is also relevant. Article 2(1) provides that, on the basis of the principle of equal treatment, there shall be 'no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status' and Article 2(3) clarifies that the provisions of the directive are without prejudice to 'the protection of women, particularly as regards pregnancy and maternity'.

10. Article 5 provides that the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women are to be guaranteed the same position without any discrimination relating to their sex.

11. Directive 76/207 was amended by Directive 2002/73/EC, (8) and later repealed and replaced by Directive 2006/54/EC. (9) Neither of these pieces of legislation, however, applies in this case as the time-limits for transposition of Directive 2002/73 and the adoption of Directive 2006/54 fall after the occurrence of the events in the main proceedings.

B – The Austrian legislation

12. Under Paragraph 10 of the Mutterschutzgesetz (Law on maternity protection ('MSchG')), workers cannot validly be dismissed during pregnancy or in the four months following child birth, provided that the employer has been informed of these circumstances prior to the termination of employment or within five days of its announcement or notification.

13. Furthermore, the Fortpflanzungsmedizingesetz (Law on reproductive medicine ('FMedG')) defines fertilised ova and cells grown from them as 'viable cells' (Paragraph 1(3)) and provides that they may be kept for a period of up to ten years (Paragraph 17(1)).

III – The facts, the main proceedings and the question referred for a preliminary ruling

14. Sabine Mayr worked as a waitress for Bäckerei und Konditorei Gerhard Flöckner OHG from 3 January 2005.

15. After hormone treatment lasting for about one and a half months, a follicular puncture was carried out on her on 8 March 2005 and she was certified sick by her general practitioner from 8 to 13 March 2005, which was the date planned for transferring two embryos to her uterus. (10)

16. In the meantime, on 10 March, her employer advised her by telephone that her employment would be terminated on 26 March 2005. By a letter of the same date Ms Mayr informed the company of the procedure planned for 13 March. According to the referring court, it is not disputed that on the date that she was notified of her dismissal the ova taken from her had already been united with her partner's sperm cells and that *in vitro* embryos therefore existed.

17. In these circumstances, Ms Mayr took legal action against her employer claiming her salary and pro rata annual remuneration, submitting that the dismissal of 10 March 2005 had no legal effect because as from 8 March when the *in vitro* fertilisation of her ova took place she was entitled to protection against dismissal under Paragraph 10(1) of the MSchG. The employer requested that the action be dismissed on the ground that at the time it gave notice of the dismissal no pregnancy yet existed.

18. The Landesgericht (Regional Court), Salzburg at first instance granted Sabine Mayr's application on the basis that, according to the case-law of the Oberster Gerichtshof, the protection enshrined in Paragraph 10 of the MSchG begins with the fertilisation of the ovum and therefore should be extended to the case of *in vitro* fertilisation, since the purpose of the MSchG is to safeguard the mother's economic existence.

19. Bäckerei und Konditorei Gerhard Flöckner OHG appealed against this judgment to the Oberlandesgericht (Higher Regional Court), Linz, which set aside the judgment at first instance on the basis that, irrespective of the point in pregnancy when hormonal changes start to take place, pregnancy cannot exist separately from the body in which it develops. Consequently, in the case of *in vitro* fertilisation, pregnancy – and therefore the protection against dismissal – will start with the transfer of the fertilised ovum to the uterus.

20. Ms Mayr was unsatisfied with the judgment on appeal and appealed to the Oberster Gerichtshof. The Austrian referring court, being of the view that the outcome of the case depends on the interpretation of provisions of Community law, has referred the following question to the Court for a preliminary ruling under Article 234 EC:

'Is a worker, who undergoes *in vitro* fertilisation, a 'pregnant worker' within the meaning of the first part of Article 2(a) of 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) if, at the time at which she was given notice of dismissal, the woman's ova had already been fertilised with the sperm cells of her partner and *in vitro* embryos thus existed, but they had not yet been implanted within her?'

IV – The proceedings before the Court of Justice

21. The reference for a preliminary ruling was lodged at the Registry of the Court on 14 December 2006.

22. The respondent in the main proceedings, the Commission and the Greek, Italian and Austrian Governments have all submitted written observations.

23. At the hearing, held on 16 October 2007, oral observations were presented by the representatives of the Austrian and Greek Governments and of the Commission.

V – Analysis of the question referred for a preliminary ruling

A – Applicability of Directive 92/85

1. The concept of 'pregnant worker'

24. The Oberster Gerichtshof's uncertainty centres on the scope of Directive 92/85 and, in particular, on the definition of a 'pregnant worker' for the purposes of the employment protection set out in the directive.

25. The Directive was adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) with the aim of protecting the safety and health at work of pregnant workers, workers who have recently given birth or who are breastfeeding. Thus Article 10 prohibits the dismissal of workers in these circumstances 'during the period from the beginning of their pregnancy to the end of the maternity leave'. (11) Consequently, from the beginning of the pregnancy, an employer is prevented from dismissing a 'pregnant worker', as defined in Article 2(a), which also provides that the employee must have informed her employer of her condition 'in accordance with national legislation and/or national practice'.

2. A precondition: inform the employer

26. Leaving to one side for the moment the crucial question of when pregnancy starts, it is necessary here to address the issue of notice to the employer, given that the respondent in the main proceedings argues in its observations that, even if one were to accept that at the time Ms Mayr was given notice of dismissal she was pregnant in the medical sense of the term, she could not avail herself of the protection offered by the directive because she had not disclosed this fact to her employer.

27. However, Article 2 assigns the determination of the method and timing of that information to Member State legislation and it is for the national court to evaluate such matters. But, having regard to the Austrian legislation before the Court, it seems safe to say that the notification was effected within the time-limit, since Paragraph 10 of the MSchG permits this up to five days after the announcement of the worker's dismissal and Ms Mayr sent a letter containing the details of her pregnancy on the same day that the telephone conversation with her employer took place.

3. The beginning of pregnancy as a physical condition of the woman capable of being protected

28. Having clarified this point, we come to the heart of the issue, which revolves around ascertaining when a woman is pregnant and as such is protected by Directive 92/85, which contains no provisions relating to this point (the Article 2(a) reference to 'national legislation and/or national practice' applies only to informing the employer, as the Commission quite correctly points out in its written observations). The silence of the directive on this issue means that we must turn to medical science for an answer.

29. Before going any further, I should emphasise one important point, which is that controversy about when pregnancy begins has often taken place against the background of the abortion debate. Depending on which moment is taken as the beginning of pregnancy, particular measures are classified as either preventive methods of birth control (contraceptives, for example) or methods of terminating a pregnancy. The ethical implications of this debate mean that it is advisable to separate it from the strictly legal question which has been brought before the Court in order to establish when a woman has the protection of Directive 92/85, and not when the biological process leading to the birth of a new human being begins.

30. Gynaecologists and obstetricians commonly use a range of different timeframes to calculate the gestation period: the date of the woman's last menstruation, the date of ovulation, the date of fertilisation, the date of implantation or the date when the pregnancy can be detected using chemical tests. Notwithstanding all these methods, the beginning of pregnancy is traditionally placed at 'conception'.

31. In 1875, based on his study of the reproduction of sea urchins, Oskar Hertwig discovered that fertilisation starts with the penetration of the sperm into the ovum. (12) From that point onwards conception was associated with the process described by this German zoologist; and in the middle of last century it became centred on the idea of implantation, first in connection with the nidation of the fertilised ovum in the uterus wall and later by reference to the blastocyst.

32. A brief summary may be useful here: (13) once the ovum has been fertilised by the sperm, the zygote descends towards the uterus whilst undergoing a series of cell divisions. About five days after fertilisation there already exists a set of inner cells, which develop into the embryo, and an outer ring which forms the placenta. On about the sixth day this blastocycst adheres to the lining of the uterus and this is known as nidation or implantation.

33. So, fertilisation and implantation are the two possible stages which investigators may use to determine the beginning of pregnancy. This choice is one which has its attendant prejudices and practical consequences, (14) and which takes on particular complexity when, as in the case of Ms Mayr, procreation is attempted using technical medical procedures. Without entering into a scientific evaluation of the two options, a variety of different considerations lead me to think that the legal protection of the pregnant woman arises on implantation of the blastocyst in the uterus. In this I am relying on four arguments which have varying degrees of importance: a) the specialist literature, which inclines to this point of view; b) the actual meaning of the word 'pregnant', which does not contradict that scientific approach; c) the principal aim of the directive, which tends towards the protection of the pregnant worker's health and safety; and d) lastly, the fact that such protection cannot last indefinitely.

a) The FIGO definition of pregnancy

34. The most convincing argument here is that of certain international organisations and bodies of indisputable authority which support the moment of nidation. The Committee for the Study of Ethical Aspects of Human Reproduction of the International Federation of Gynecology and Obstetrics (FIGO), for example, in its Cairo declaration of March 1998, described pregnancy as that part of the process of human reproduction 'that commences with the implantation of the conceptus in a woman, and ends with either the birth of an infant or an abortion'. (15)

35. Under this interpretation, at the time when she was notified of the dismissal, Ms Mayr was not a pregnant worker for the purposes of Directive 92/85, since, although at that moment her ova had already been fertilised in the laboratory, they had not yet been transferred to her organism and nidation had not taken place. (16)

36. Continuing with the factual narrative, after hormone treatment lasting for about one and a half months, a follicular puncture was carried out on Ms Mayr on 8 March 2005 and she was certified sick by her general practitioner for five days. On 10 March, when the ova collected had already been cultured and, according to the information available, had been fertilised, she was dismissed. The resulting embryos were transferred three days later, on 13 March.

37. Therefore, if the FIGO definition referred to above considers the pregnancy to commence only after the implantation of the 'conceptus' in a woman, Ms Mayr was not pregnant when the employer gave her notice of dismissal.

b) The usual meaning of the term pregnancy

38. That conclusion is consistent with the usual meaning of the word 'pregnancy' in medical science, where it is used to designate the process which takes place between conception and birth. This meaning also appears in that haven against the harshness of reality called the dictionary. (17) Pregnancy is identified with the development of a new human being in the woman's womb, a process which had not occurred at the time Ms Mayr was dismissed. The fact that she later becomes pregnant does not change this and nor does the fact that at the time she lost her job the ova had been fertilised in the laboratory because, as the respondent suggests, (18) the question is not whether the zygote had become *nasciturus* (a foetus) in the legal sense, but whether there was a pregnancy.

39. I also disagree with the Greek Government's submission in paragraph 17 of its written observations that the fact that in the case of *in vitro* fertilisation the woman can change her mind right up to the moment when the fertilised ovum is transferred does not make her situation any different from that of a natural pregnancy, which can also be terminated voluntarily. Without making moral judgements about either situation, an element can be identified which distinguishes the two cases in law, namely that with *in vitro* fertilisation there is no new life within the mother until implantation takes place.

40. Furthermore, the Austrian Government relies on the protective purpose of Directive 92/85 to support the argument that while with a natural conception pregnancy originates when the ovum and the sperm unite within the woman's body, in an *in vitro* fertilisation it would begin with the transfer of the ova fertilised in the laboratory to the uterus. Hence there would be no need to wait for 'nidation' (which would take a further five or six days). However, such digressions are unnecessary because the knowledge that the embryos were not yet within Ms Mayr's uterus is sufficient for us to rule out her being pregnant at the time she was given notice of dismissal.

c) The *ratio legis* of the directive

41. The conclusion that Ms Mayr was not pregnant is consistent with the *ratio legis* of Directive 92/85, as the directive is quite clear that the purpose of the protection which it offers is to encourage improvements in the safety and health at work of pregnant workers, meaning their physiological condition. The 15th recital in the preamble to the directive explains that the prohibition on dismissing workers aims to avoid the harmful effects that this may have on their physical and mental state.

42. This is also the interpretation given by Community case-law in *Brown*, (19) and *Tele Danmark*, (20) where the Court stated that Article 10 seeks to avoid the situation where a threat of dismissal prompts the woman voluntarily to terminate her pregnancy. (21) The legislation which is the subject of the referring court's question aims to protect the biological condition of the pregnant woman. Protection of the woman's equally desirable right to procreate (in abstract), to become pregnant and to give birth without her work becoming an insurmountable obstacle seems also to be guaranteed by Community law, but not by Directive 92/85.

d) Potential postponement of the embryo transfer.

43. There is a further argument which makes me tend towards withholding the benefits of the measures contained in Directive 92/85 from a worker who, like Ms Mayr, at the time she was dismissed, had undergone an ova extraction procedure but had not yet had the embryos resulting from the *in vitro* fertilisation transferred to her uterus, meaning that the successful outcome of the procedure and implantation had not yet been confirmed. Several days usually elapse between the two events; furthermore, the ova fertilised in the laboratory are not always transferred immediately to the reproductive organs of the woman as they can be frozen for a period for possible future use.

44. In this regard, the Member States have a wide variety of different legislative provisions, ranging from the prohibition on storing fertilised ova contained in the relevant Italian legislation (22) to the recent Spanish Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida (Law 14/2006, of 26 May, on assisted human reproduction techniques) (23) which permits cryopreservation of ova, ovarian tissue and surplus pre-embryos until such time as the doctors involved judge that the receiving woman no longer meets the relevant clinical requirements for assisted reproduction. (24) The legislation of other Member States permits the storing of viable pre-embryos for a certain maximum period, which in Austria is set at 10 years (Paragraph 17(1) of the FMedG).

45. Against this background, if the Court of Justice were to decide (as the Greek Government, for example, argues) that the protection afforded to the pregnant woman by Directive 92/85 begins at the time of the fertilisation of the ovum and not at the time of implantation, the Article 10 prohibition on dismissal would go on for an indeterminate and excessive length of time, which would be contrary to the objective of the provision, which is to protect the woman who is already pregnant because of the vulnerability of her situation rather than to protect the woman who wishes to become pregnant, by whatever means, in the future.

46. Although this possibility seems to be prohibited by law in nearly every Member State, technically it is feasible to implant the fertilised ova of one woman in the uterus of another (and this is what happens in the case

of so-called surrogate mothers) so that, ultimately, a worker who is not and will not be pregnant could invoke the protection of the directive.

47. The argument (raised by the Italian Government) that the chances of success of a transfer of ova fertilised *in vitro* are low seems to me to be less convincing because it can always be countered that 'normal' pregnancies sometimes also end in miscarriage and this would also extinguish the protection.

4. Conclusion

48. For these reasons, I suggest that the Court replies to the question referred to it by the Oberster Gerichtshof by stating that an employee who undergoes an *in vitro* fertilisation procedure is not a 'pregnant worker' for the purposes of the first part of Article 2(a) of Directive 92/85/EEC, if, at the time when she was given notice of termination of employment, her ova had been fertilised in a laboratory but had not yet been transferred to her body.

49. Aside from this, although Directive 92/85 sets a minimum standard and therefore there is nothing to prevent the Member States from introducing wider protection, the Austrian legislation has not done so, although this should not be considered grounds for reproach.

B – Protection under Directive 76/207

50. The foregoing proposal, limited as it is in terms of subject-matter to the question put by the Austrian court, does not rule out, however, a more in-depth analysis of the case in the main proceedings to ascertain whether the dismissal of an employee in this way constitutes discrimination contrary to the principle of equal treatment of men and women.

51. This closer scrutiny is justified because maternity is covered both by the directive invoked by the referring court and by other Community legislation, in particular Directive 76/207, which established this sexual equality as regards access to employment, vocational training and promotion, and working conditions.

52. By contrast with Directive 92/85, which is a subsequent directive and is designed to encourage better security and health at work for pregnant workers, workers who have recently given birth or who are breastfeeding, Directive 76/207 had the broader objective of seeking equality of men and women in the workplace. With this premiss, Article 10 of Directive 92/85 contains a prohibition of dismissal 'during the period from the beginning of their pregnancy to the end of the maternity leave', whilst Directive 76/207 does not directly address the situation of dismissal by reason of pregnancy, but limits itself to confirming the principle of equal treatment (Article 5(1)), which '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' (Article 2(1)). (25)

53. According to the body of case-law which has been built up involving the interpretation of this provision of Directive 76/207, even if pregnancy does not give rise to inequality based on sex, it only affects women and consequently employment-related decisions which are potentially detrimental to women and which are motivated by the pregnancy constitute discrimination prohibited under Directive 76/207.

54. Under the principle of equal treatment enshrined in Directive 76/207, merely belonging to the female sex does not justify the application of special and more favourable rules than those which would, in the same circumstances, apply to men.

55. However, the principle of equality prohibits applying different rules to similar situations only where there is no objective reason to do so. The legislation contains important exceptions, as demonstrated by Article 2 of Directive 76/207, which permits the Member States to exclude from its field of application activities for which, by reason of their nature or the manner in which they are carried out, the sex of the worker constitutes a determining factor (Article 2(2)), provided that its application is without prejudice to 'provisions concerning the protection of women, particularly as regards pregnancy and maternity' (Article 2(3)), or to 'measures to encourage equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities' in the area of employment. (26)

56. Accordingly, it was held in *Stoeckel,* (27) following the approach put forward by the Advocate General, (28) that a prohibition on night work directed exclusively to women was contrary to Directive 76/207, because it was not shown that such a work-pattern gives rise to different effects or disadvantages depending on the sex of the worker. The Court went on to present the factors which would justify an inequality of treatment in favour of the female workforce in these circumstances and pointed out that the disadvantages of night work, except in the case of pregnancy or maternity, do not expose women to any greater risk than men. (29)

57. Pregnancy does, therefore, entitle the woman to a certain preferential treatment in her employment. However, it does not excuse any breach of the principle of equal treatment but only those justified by an objective necessity, (30) as in the case, for example, of the prohibition on dismissing a worker while she is pregnant. The case-law of the Court of Justice is clear on this point.

58. In *Habermann-Beltermann*, (31) the termination of a contract of employment due to pregnancy because of the employee's temporary inability to perform her duties was not upheld. In *Webb* (32) the Court classified as discriminatory the dismissal of a pregnant worker who had been recruited for an unlimited term with a view, initially, to replacing another employee during the latter's maternity leave.

59. The case-law on dismissals due to repeated periods of absence attributable to birth or pregnancy, but taken after maternity leave has expired, has had a less smooth trajectory. In *Hertz*, (33) the Court accepted that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex within the meaning of Directive 76/207, (34) adding that outside the period of the pregnancy and maternity leave a woman can be dismissed, as can a man, on account of absence due to illness even though this may be attributable to the birth or pregnancy.

60. In the similar case of Ms Larsson, I suggested that the Court (35) confirm the case-law which draws a line at the point when the maternity leave comes to an end, from which point any illness, whether or not occasioned by pregnancy, will fall under the general rules applicable to all workers, while periods during which a woman is unable to work due to pregnancy, prior to giving birth, would not be equivalent, for the purposes of dismissal, to a man's absences on grounds of illness. In its judgment in *Larsson* (36) the Court did not adopt my

position on this point but took the view that Directive 76/207 does not preclude dismissals on the grounds of absences due to an illness attributable to pregnancy or confinement, irrespective of whether it continues after maternity leave. It also accepted that, when calculating the period providing grounds for dismissal under national law, absences between the beginning of the pregnancy and the beginning of the maternity leave can be taken into account.

61. This interpretation was, however, to be abandoned barely a year later in *Brown* when the Court, following my Opinion, which endorsed the line taken in the Opinion in *Larsson*, did not take into account, for computation of the period justifying dismissal under UK law, time taken off sick owing to an illness resulting from pregnancy or childbirth which arose during pregnancy and persisted during and after maternity leave.

62. *Høj Pedersen and Others* (37) confirmed this interpretation by ruling that Danish legislation which allowed an employer to require a pregnant woman to stop working without paying her salary in full on the basis that he cannot find work for her is contrary to Community law. *Tele Danmark* introduced a refinement, consistent with my Opinion delivered on 10 May 2001, in the case of the termination of fixed-term contracts, by stating that Directive 76/207 precludes the dismissal of a worker taken on for a fixed period who does not inform the employer of her pregnancy (even though she was aware of it when the contract was signed) and who, as a result of the pregnancy is unable to carry out her duties during a substantial part of that period.

63. Finally, attention should be drawn to two recent judgments, as yet unpublished in the European Court Reports, namely *Kiiski* (38) which held that a worker who has temporarily stopped working because she is enjoying another form of leave cannot be deprived of maternity leave; and *Paquay* (39) which specifies that Directive 92/85 prohibits both a decision to dismiss and the taking of preparatory steps, such as looking for a replacement.

64. All these judgments revolve around the central idea that pregnancy is a physical reality which only affects women, a fact which has, according to Lucinda M. Finley, represented the greatest obstacle to women's full participation in the world of work. (40) It follows that any work-related measure based on pregnancy which is potentially detrimental to women is contrary to Directive 76/207. (41)

65. To date the Court of Justice has considered such discrimination only in cases of dismissal of pregnant workers on the grounds of a matter directly related to the pregnancy where such workers are given notice during the pregnancy or during or at the end of maternity leave. Now, however, the Oberster Gerichtshof is offering the Court the opportunity of ruling for the first time on the compatibility with Community law of the termination of an employment contract on the grounds of a worker's possible future pregnancy, albeit that the termination was agreed prior to the controversial beginning of the pregnancy.

66. That said, a purposive interpretation of Directive 76/207 consistent with the case-law examined suggests that the situation described is also capable of protection under Community law.

67. The directive puts the right of a woman not to be discriminated against above the principle of equality. In particular, Article 2 refers to the protection of the female sex as regards pregnancy and maternity (Article 2(3)) and expressly prohibits discrimination relating to marital or family status (Article 2(1)). Unlike the case of Directive 92/85, there is nothing in Directive 76/207 which limits its provisions to a phase of a woman's life, so there is no reason to preclude its application before or after pregnancy or the postpartum period.

68. Furthermore, the development of the case-law as briefly described earlier demonstrates the desire of the Court to extend the protection given to a woman in connection with maternity. I would therefore invite the Court of Justice to continue down this line of protecting procreation (within the limits of the principle of equality) and advise the Austrian court that if, having studied the relevant factual background, it is of the opinion that the actions of the employer were motivated by Ms Mayr's particular situation, the dismissal would be discriminatory and contrary to Directive 76/207. (42)

69. For reasons of prudence and respect for the dictates of legal certainty, I must nevertheless point out the importance in this matter of carefully appraising the facts in order to define the temporal scope of the protection.

70. In my view, the determining factor in ascertaining discrimination lies in whether the decision to dismiss has been taken on the basis of the maternity, whether current or merely potential. It is not a question of giving indefinite and armour-plated protection against dismissal to all women of childbearing age or women who have a desire to have children, or even those who have started a long and painful course of assisted reproduction treatment, but of preventing employers acting in a manner contrary to either the principle of equality between men and women or the fundamental aim of protecting procreation which is of transcendental importance in any modern society.

VI – Conclusion

71. In the light of the foregoing, I propose that the Court give the following answer to the question of the Oberster Gerichtshof:

(1) An employee who undergoes an *in vitro* fertilisation procedure is not a 'pregnant worker' for the purposes of the first part of Article 2(a) of Directive 92/85/EEC, if, at the time at which she was given notice of termination of employment, her ova had been fertilised in a laboratory but had not yet been transferred to her body.

(2) Nevertheless, the dismissal of the worker would constitute discrimination contrary to Directive 76/207/EEC if it can be shown to have been by reason of her particular circumstances or future maternity.

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1 – Original language: Spanish.

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2 – Pliny the Elder, *The Natural History,* Bostock, J. and Riley, H.T. (eds), Taylor and Francis, London, 1855.

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3 – Van Gennep, A., *Les rites de passage,* eds A. and J. Picard, 1992.

4 – Balzac, H., *Mémoires de deux jeunes mariées,* XXVIII, Oeuvres complètes, Paris, 1867, p. 124.

5– The painting can be admired at the Museo del Prado in Madrid.

6– 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. 1-8).

7– 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. 40-42).

8 – Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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 2002 L 269, p. 15).

9 – Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23)

10– The reference for a preliminary ruling states that Ms Mayr had already undergone two previous attempts at in vitro fertilisation, although no date is mentioned.

11– 'save in exceptional cases not connected with their condition which are permitted under national legislation … and, where applicable, provided that the competent authority has given its consent' (Article 10(1)).

12 – Source: Encyclopaedia Universalis, under '*embryologie*'.

13 – Information taken from the Encyclopaedia Britannica, entry on 'pregnancy', p. 675.

14 – For the reasons already explained and despite the fact that the two events usually take place five or six days apart.

15 – This declaration was published in 'Recommendations on Ethical Issues in Obstetrics and Gynecology by the FIGO Committee for the Study of Ethical Aspects of Human Reproduction' (November 2006): http://www.figo.org/about_guidelines.asp.

16– The *in vitro* fertilisation undergone by Ms Mayr is one of the most commonly used techniques of assisted human reproduction and it comprises various stages: 1) stimulation of the ovary using hormones, by means of intramuscular or subcutaneous injections in order to obtain several ova in one cycle (this is necessary because not all the ova obtained will become embryos suitable for transfer); 2) extraction of ova by transvaginal puncture under ultrasound monitoring, which takes about 15 minutes and is carried out under sedation, with the patient being allowed to return home after 20 or 30 minutes; 3) *in vitro* culture of the embryo by placing the extracted ova in a dish with prepared semen; fertilisation is confirmed the following day and the embryos are then kept in a growth medium; 4) embryo transfer of the fertilised ova to the woman's reproductive system (the uterus or tubes); depending on the characteristics of the embryos the best time to carry out this procedure is between the second and sixth day after fertilisation of the ova; the number of embryos transferred also varies depending on a number of different factors but the average is two or three; 5) once the appropriate number of embryos has been transferred, the remaining viable embryos are frozen in order to store them. (Source: Instituto Valenciano de Infertilidad. http://www.ivi.es/tratamientos/fecundacion.htm.)

17 – Pascual, J.A., *La Historia como pretexto,* speech made on 10 March 2002 on the occasion of his admission as a member of the Real Academia Española, Madrid, 2002, p. 82. He goes on to say that the Diccionario de la Academia is available to anyone, virtually anywhere, even in Vetusta itself, with the author Leopoldo Alas (known as 'Clarín') in his magnificent novel *La Regenta* even placing a copy of the dictionary in the casino of that [fictional representation of the] city [of Oviedo, which he portrays so negatively] (see Alas, L. *La Regenta* (vol.1), 5th edition, Sobejano, G (ed.), Castalia, Madrid, 1990, p. 254). In fact the Diccionario de la Real Academia de la Lengua Española defines pregnancy as 'el estado en que se halla la hembra gestante' (the condition of a gestating female) and the Dictionnaire de l'Académie Française as 'l'état d'une femme enceinte; durée de cet état' (the condition of an expectant woman; the duration of this condition).

18 – Paragraph 5 of its written observations.

19 – Case C-394/96 *Brown* [1998] ECR I-4185.

20 – Case C-109/00 *Tele Danmark* [2001] ECR I-6993.

21 – A similar approach can be found in the Opinions which I delivered in those cases on 5 February 1998 and 10 May 2001.

22 – Article 14 of Law Nº 40 of 19 February 2004, as indicated by the Italian Government in paragraph 19 of its observations. This is a prohibition of a general nature to which exceptions are only permitted in cases of force majeure.

23 – B.O.E., 27 May 2006.

24 – A similar line is taken by the French legislation, with Article L. 2141-4 of the public health code (introduced by the Law of 6 August 2004), stating that in order to store embryos the couple involved (or the survivor in the event of the death of one of them) must make an annual declaration to the effect that they maintain their 'plan to become parents', such that, if they do not make such a declaration the ova are destroyed after five years.

25 – Gorelli Hernández, J., 'Situación de embarazo y principio de igualdad de trato. La regulación comunitaria y su jurisprudencia', *Revista Española de Derecho del Trabajo* nº 97, 1999, p. 729, maintains that Article 10 of Directive 92/85 does not merely make discriminatory dismissals illegal but prohibits any dismissal during pregnancy and maternity. However, even given its general and unconditional nature, the Article 10 prohibition still maintains a certain connection with the prohibition of discrimination on grounds of sex in that it tolerates dismissal 'in exceptional cases not connected with their condition'.

26 – Rodríguez Piñero, M., 'Discriminación, igualdad de trato y acción positiva'*, La igualdad de trato en el Derecho comunitario laboral,* Aranzadi, Pamplona, 1997, p. 105, believes that this is an attempt to extend the scope of the principle of equal treatment of the sexes.

27 – Case C-345/89 *Stoeckel* [1991] ECR I-4047. See also Case C-13/93 *Minne* [1994] ECR I-371.

28 – Opinion of Advocate General Tesauro delivered on 24 January 1991.

29 – In this way the Court is attempting to avoid measures which give the appearance of being protective but which mask sexist ideas which are detrimental to women and hinder their access to the labour market and the performance of their everyday activities. In this regard the Spanish Tribunal Constitucional (Constitutional Court) has held in judgment 229/1992 that the prohibition on women working in the mining sector is unconstitutional because it corresponds more to a stereotype (i.e. the supposed weakness of the female sex) than to real natural or biological characteristics and introduces an element of discrimination against women.

30 – Article 7 of Directive 92/85 makes the exemption of women from night work subject to the submission of a medical certificate stating that this is necessary for the safety or health of the worker concerned.

31 – Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657.

32 – Case C-32/93 *Webb* [1994] ECR I-3567.

33 – Case C-179/88 *Hertz* [1990] ECR I-3979.

34– As it did in *Dekker*, a judgment handed down on the same date, in the case of a refusal to appoint a pregnant woman (Case C-177/88 *Dekker* [1990] ECR I-3941).

35 – Opinion delivered on 18 February 1997.

36 – Case C-400/95 *Larsson* [1997] ECR I-2757.

37 – Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327.

38 – Case C-116/06.

39 – Case C-460/06.

40 – Finley, L.M., 'Transcending equality theory: a way out of the maternity and the workplace debate', *Columbia Law Review*, vol. 86, 1118, p. 1119.

41 – The critical issue is therefore the grounds for the measure. In Bamforth, N., 'The treatment of pregnancy under European Community sex discrimination law', *European Public Law* No 1, 1995, p. 61, the author discusses the *Dekker* and *Hertz* cases, pointing out that the Court required the employer's reason (i.e. the grounds) for dismissing the pregnant worker to be examined because this has a bearing on the assessment of whether the act should be considered directly discriminatory under the terms of the directive. It is worth emphasising the importance of ascertaining the grounds of the dismissal since a proper evaluation not only allows us to discern the extent of the protection at issue in this case but also avoids undue reliance on the sexual equality debate and the language used in it, which, in the view of Lucinda M. Finley, was borrowed from the racial discrimination debate, although it has shown itself to be inadequate for the majority of problems faced by women today, who have made significant advances in areas and privileges which were previously the reserve of men (op. cit., p 1164).

42 – The respondent denies having dismissed Ms Mayr on grounds of her future pregnancy since it had not been informed of this fact. Although it falls to the national court to evaluate this claim, Ms Mayr had taken sick leave when the follicular puncture was carried out (two days before the dismissal) and therefore her employer could perhaps have known about her situation. In any event, pursuant to Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6), it would be for Bäckerei und Konditorei Gerhard Flöckner OHG to prove that its decision did not involve any breach of the principle of equal treatment.