Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 10 July 1997

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

Opinion of the Advocate-General

1 The Sø- og Handelsret (Maritime and Commercial Court of Denmark) has referred to the Court, pursuant to Article 177 of the EC Treaty, a question relating to a number of different situations in order to give judgment in four cases before it concerning the employment rights of pregnant women.

Before replying to this question, I wish to set out the relevant domestic law and the facts of the four main actions, following the sequence of the order for reference.

National law

A. Law No 516 of 23 July 1987 on the legal relations between employers and non-manual workers

2 The applicants' employment relationship is governed by Law No 516 of 23 July 1987 on the legal relations between employers and non-manual workers (`the Law on non-manual workers'), which covers many commercial and clerical employees and regulates, among other matters of employment law, dismissal, compensation for dismissal, failure by employers and employees to fulfil their obligations, sick leave, protection for pregnancy and maternity leave.

The legal situation of female employees in the event of illness and incapacity for work by reason of pregnancy and confinement is also governed by Law No 639 of 17 July 1992 on equal pay for men and women, which incorporated Directive 75/117/EEC (1) into Danish law, by Law No 244 of 19 April 1989 on equal treatment for men and women, which refers to, among other things, employment and maternity leave and which adapted Danish law to Directive 76/207/EEC, (2) and by Law No 852 of 20 December 1989 on benefits in the event of illness or confinement (`the Law on benefits').

3 In the Law on non-manual workers, which is the one which, according to the order for reference, applied to the applicants, incapacity for work by reason of illness and its consequences are regulated by Paragraph 5, subparagraph 1 of which reads as follows: `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.'

The term `illness' 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. The employee is entitled to full pay during illness and the employer is entitled to receive the social security sickness benefit to which the employee would otherwise have been entitled.

4 Paragraph 7 of the Law on non-manual workers regulates the situation of female employees during pregnancy and maternity leave. The employee must inform the employer, at least three months before the anticipated date of birth, of the date when she proposes to begin her maternity leave.

The first sentence of Paragraph 7(2) provides that `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'. The second sentence adds that `a similar obligation exists where the employer considers it impossible to provide work for the employee, even though she is not unfit for work'.

B. Law on benefits

5 Employed persons are entitled to receive benefits in various situations:

- Paragraph 5: `sickness benefit' is payable in the event of total incapacity for work on grounds of illness;

- Paragraph 12(1): `maternity benefit' is payable to women from a date four weeks prior to the estimated date of confinement;

- Paragraph 12(2): `pre-maternity benefit' is payable before that date if

(1) a doctor takes the view that there is a pathological development in the pregnancy and that continued work would create a risk to the health of the woman or her unborn child, or

(2) the special nature of the work creates a risk to the unborn child, or the woman is prevented by law from continuing to work during her pregnancy and her employer has not offered her any other suitable duties.

If work is discontinued by reason of pregnancy, confinement or adoption, the benefits are paid by local authorities.

6 The national court points out that where incapacity for work arises from pregnancy or confinement, the entitlement to pay is not the same as where it arises from sickness. In practice, the incapacity of a pregnant woman for work may give rise to the following situations:

- if her incapacity is not caused by pregnancy and arises before the commencement of maternity leave, Paragraph 5 of the Law on non-manual workers will apply and the woman will be entitled to full pay;

- if incapacity is caused by pregnancy and arises more than three months before the confinement, the woman will be not entitled to any pay, but will have a right to benefits;

- if incapacity arises within the three months preceding the anticipated date of confinement, the employer must pay one half of the wages under the first sentence of Paragraph 7(2) of the Law on non-manual workers.

The national court adds that the employee must, on request by the employer, provide documentary proof of her incapacity for work, which must have been assessed by a doctor. Detailed information on the causes of incapacity need not be given, but she must state whether it is connected with her pregnancy.

Employed persons have rights deriving from the Law on benefits in addition to those arising from the Law on non-manual workers.

C. Circular No 191 of the Social Affairs Appeal Committee of 27 October 1994 on sickness and maternity benefits

7 Circular No 191 of 27 October 1994 on sickness and maternity benefits sets out, in points 171, 172 and 175 of Chapter 8, (3) a number of implementing rules regulating the grant of benefits prior to four weeks before the expected date of birth. The provisions relevant to the present case are as follows:

`171. A woman is entitled to pre-maternity benefit if a doctor takes the view that there is a pathological development in the pregnancy and that continued work could create a risk to the health of the woman or her unborn child. The examples given are: risk of miscarriage; multiple pregnancies if there is an increased risk of miscarriage or premature delivery; toxaemia in the course of the pregnancy, with increased blood pressure, albumin in the urine and/or oedema; special cases involving violent and/or frequent vomiting, affecting the woman's general condition and resulting in incapacity for work; vaginal bleeding; premature separation of the placenta; slackening of the pelvic ligaments and serious psychological distress, including cases of pregnancy stress syndrome, manifesting itself in such an extreme form that it may fall within the definition of "illness".'

The national court states that this provision corresponds to the third part of the question submitted to the Court of Justice.

`172. In cases where the woman is totally unfit for work, pre-maternity benefit will be payable if the pregnancy substantially aggravates an illness (such as back, heart, lung or kidney disorders) which is otherwise unconnected with the pregnancy, or if treatment of that illness is hampered by the pregnancy.'

This benefit is also payable in the case of absence from work owing to incapacity for work on grounds of miscarriage or abortion.

The national court points out that this provision corresponds to the first and second parts of the question submitted to the Court of Justice.

`175. In certain situations there is no right to benefit at all. This applies to routine minor complaints associated with the normal development of pregnancy, not resulting in incapacity for work, such as nausea, malaise, vomiting, slight anaemia or very slight increase in blood pressure, and to cases where absence from work is based on a doctor's certificate advising rest on grounds other than a pathological situation in the strict sense or particular risks to the unborn child.'

The national court points out that this provision corresponds to the fourth and fifth parts of the question submitted to the Court of Justice.

8 The national court observes that there is disagreement between unions and employers on how to interpret the provisions of the Law on non-manual workers concerning incapacity for work on grounds of illness and pregnancy. Employee representatives argue that, as a result of the Community rules on equal treatment for men and women, the Danish Law on non-manual workers should be construed as giving women the right to full pay also where incapacity is due to pregnancy. The employers, on the other hand, contend that it is not contrary to Community law to interpret the Danish Law as meaning that women are not entitled to full pay where incapacity is due to pregnancy, but they are entitled to benefits.

Facts of the cases pending before the Sø- og Handelsret

9 The question referred to the Court has arisen in the context of four cases. The applicants in each case are women whose employment relationship is governed by the Law on non-manual workers. They all suffered an abnormal pregnancy and were all certified to be completely or partly unfit for work by a doctor more than three months before the expected date of confinement. Three of them were excused from work and were not entitled to any pay from their employers (the first, second and fourth cases), while the other, whose partial unfitness for work would have permitted her to work shorter hours, was suspended from employment and pay because her employer considered that he was unable to continue to give her work. The diagnoses by the doctors indicated slackening of the pelvic ligaments (in the first case), threat of miscarriage with risk to the health of the pregnant women or the child (in the second and third cases) and hyperemesis gravidarum (in the fourth case).

10 The facts set out in the order for reference relating to the first case are as follows. The applicant, Berit Høj Pedersen, was engaged as a store assistant in December 1990 by the defendant, which forms part of a nationwide chain of supermarkets in Denmark. Her work consisted mainly in arranging goods, stocking shelves and general store work.

She became pregnant in May 1992. She was unfit for work from 26 June 1992 until she gave birth in February 1993, the diagnosis being `slackening of the pelvic ligaments'. The defendant took the view that her absences were due to pregnancy and not to illness in the strict sense, so her wages were stopped when she produced the first doctor's certificate.

Until three months before the expected date of confinement the applicant received only the pre-maternity benefits under Paragraph 12(2) of the Law on benefits. Thereafter, until one month before the expected date of confinement, she received in addition half-pay from her employer in accordance with Paragraph 7 of the Law on non-manual workers. During the month preceding the expected date of confinement she received full pay on the basis of the collective agreement which covered her.

11 In the second case described by the national court, the applicant, Bettina Andresen, was engaged on 1 August 1991 as a surgery assistant by a dentist, Mr Bagner. On 25 August 1993 the applicant, who was then pregnant, was found unfit for work because of a risk of miscarriage (abortus imminens), her expected date of confinement being 24 April 1994. Her medical certificates showed that continued employment would entail a risk to her own health and that of the unborn child. In September 1993 the defendant discontinued her pay and advised her to apply for pre-maternity benefit.

12 The applicant in the third case is Tina Pedersen, who was engaged as a trainee surgery assistant on 1 September 1984 by a dentist, Mr Rasmussen. On completion of the training period, she was employed on terms and conditions of employment covered by the Law on non-manual workers. As a result of pregnancy, her doctor found her partially unfit for work on 4 February 1994 because of the risk of miscarriage (abortus imminens), her expected date of confinement being 5 June 1994. Her doctor stated that continued employment would entail a risk to her own health and/or that of the unborn child.

The applicant telephoned the defendant to notify him of her situation and inform him that she wished to resume work with shorter hours. The defendant stated that he was not prepared to employ her on a part-time basis and that he would have to appoint a full-time replacement because, in his opinion, the applicant was unable to carry out her work normally. He subsequently informed the applicant that he had appointed a full-time replacement to her post during her absence and that he would not continue to pay her wages, and therefore advised her to claim pre-maternity benefit.

13 The applicant in the fourth case, Pia Sørensen, began to work for the defendant, Hvitfeldt Guld og Sølv ApS, as an apprentice on 1 August 1989. After completing her apprenticeship she was given a permanent position as a sales assistant on terms and conditions of employment covered by the Law on non-manual workers. In mid-January 1994, after suffering severe nausea, she realised that she was pregnant. A doctor's certificate of 25 January 1994 found her unfit for work for four weeks by reason of severe nausea and vomiting. This was followed by a rapid loss of weight, with the result that she had to be admitted to hospital. On 4 March 1994 a diagnosis of hyperemesis gravidarum was made, which entailed a risk to the health of the mother and the unborn child, and she was found unfit for work for four a half months on the ground of pregnancy. The defendant stopped her wages in February 1994.

The question referred

14 The Sø- og Handelsret found it necessary to stay these proceedings and to seek a ruling, pursuant to Article 177 of the EC Treaty, from the Court of Justice on the following question:

`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, (4) 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 a 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, takes the view 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 to 5 no State benefit is received, and the employer, moreover, is required under national legislation to provide full pay during illness?'

The Community legislation applicable

15 Article 119 of the Treaty provides as follows:

`Each Member State shall ... 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.

...'

16 Article 1 of Directive 75/117 is worded as follows:

`The principle of equal pay for men and women outlined in Article 119 of the Treaty ... 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.

...'

17 Article 2 of Directive 76/207 on the implementation in the Member States of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, provides 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.

...';

and Article 5 provides:

`1. 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.

...'

18 Directive 92/85 of 19 October 1992, the purpose of which is to introduce measures to improve the safety and health at work of pregnant women and women who have recently given birth or are breastfeeding, ought to have been incorporated into the domestic law of the Member States not more than two years after the Directive was adopted, that is to say, by 19 October 1994.

In my opinion, because of the time factor this Directive does not apply to the facts of the cases in the main proceedings as, according to the account given by the national court in the order for reference, the employment-law claims of the employees are limited to the period of pregnancy and they all gave birth before 19 October 1994. Furthermore, it is not stated whether the Danish legislation had yet been adopted by that date.

19 Written observations have been submitted within the time-limit laid down for that purpose by Article 20 of the EC Statute of the Court of Justice by the applicants and the defendants in the main proceedings, who have submitted observations together, and by the French Government, the Government of the United Kingdom and the Commission. Counsel for the applicants and the defendants appeared at the hearing, together with the representatives of the French Government and the Commission.

20 The applicants, who examine each of the six situations covered by the question referred, contend that:

- if a woman's unfitness for work, proved by a doctor's certificate, is due to the fact that her pregnancy seriously aggravates an illness unrelated to the pregnancy (the first situation) or to an illness caused by pregnancy (the second situation) - which are situations where the State guarantees benefits equal to what she would receive if she were on sick leave - it is contrary to Community law, in particular Article 119 of the Treaty, for domestic legislation to exempt her employer from paying her full wages in view of the fact that she would be entitled to full pay if her incapacity for work were not connected with pregnancy;

- if a woman's unfitness for work is due to the fact that there is a pathological development in her pregnancy, so that continued employment would create a risk to the health of the mother and/or the unborn child (the third situation) - also a situation where the State guarantees benefits equal to what she would receive if she were on sick leave - it is contrary to Community law for women to receive only that benefit when other workers receive full pay in the event of illness, given that pregnancy is a situation which affects only women;

- if absence is due to routine minor complaints which occur in any normal pregnancy and do not result in incapacity for work (the fourth situation) or if absence is by reason of a doctor's certificate recommending rest, although not based on the existence of an actual pathological condition or any particular risks to the unborn child (the fifth situation) - these being situations where women are not entitled to benefits - this should be treated as illness although there is no actual pathological condition, and a national provision under which employees in these situations receive neither pay nor benefits is contrary to Community law; and

- if a woman's absence from work arises from the fact that the employer considers, solely by reason of her pregnancy, that he cannot use her services even though she does not fulfil the conditions for being given leave of absence (the sixth situation) - a situation where the State guarantees benefits equal to what she would receive if she were given sick leave - it is contrary to Community law for a national provision to compel an employee who is fit for work to accept lower pay than she is entitled to receive, this being a situation which affects women only.

At the hearing, counsel for Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Ms Høj Pedersen, Ms Andresen and Ms Pedersen, the applicants in cases 1, 2 and 3 respectively, informed the Court that those cases had been referred to the National Council for Forensic Medicine, which acts as a supreme court specialising in medical questions affecting individuals, and that, after the present question had been referred to the Court of Justice, the National Council decided that the three applicants were absent from work for reasons connected with pregnancy, which could be deemed an illness.

21 The defendants argue that employees who are unfit for work by reason of pregnancy cannot be regarded as ill and consequently their entitlement to pay does not fall within the ambit of Article 119 of the Treaty. As only women can claim an allowance on the ground of absence due to pregnancy, there can be no comparison with the right of men to receive pay in an equivalent situation and therefore no question of discrimination in relation to pay.

The defendants add, in the alternative, that there are objective reasons justifying the refusal of full pay to the applicants, that is to say that Danish law reflects a fair, adequate sharing among female employees, employers and society of the risks and the financial burdens associated with pregnancy; the refusal of full pay for women in the event of pregnancy is not discrimination against them, but is due to the fact that pregnancy is, from the viewpoint of the labour market, an exceptional situation the burden of which should not fall entirely on the employer; and it must be borne in mind that pregnancy is a condition which normally arises intentionally, so that absence connected with that condition cannot be treated as due to an unforeseen illness.

22 The French Government considers whether payments received for incapacity for work caused by pregnancy constitute pay within the meaning of Article 119, paragraph 2, of the Treaty. The actual wording of this provision and the Court's case-law lead the French Government to reply in the affirmative. As the benefit received by a pregnant woman whose incapacity for work is caused by pregnancy is less than the pay she would receive if such incapacity were due to an illness unrelated to pregnancy, the French Government concludes that the difference in treatment arising from the Danish legislation is contrary to the principle of equal pay and there are no objective circumstances to justify such difference, which is disadvantageous to pregnant women.

23 The United Kingdom considers that a distinction should be drawn between two different situations: first, where the woman's period of absence occurs within the maternity leave period provided for by national legislation; and secondly, where it occurs outside such period of leave.

If the absence occurs during the period of maternity leave, which is when the disorders inherent in pregnancy and childbirth normally arise, neither Article 119 of the Treaty nor Directives 75/117 and 76/207 guarantee the woman's right to receive full pay from her employer or pay equal to sick pay or any other level of pay. The only requirement to be inferred from Article 119 and Directive 75/117 is that the pay or allowance available to a woman within the national maternity leave period should not be such that the right to maternity leave cannot be effectively exercised, but the level of maternity pay is a matter left entirely to the national legislature to fix.

However, a woman who is absent from work on account of a pregnancy-related illness outside the maternity leave period should be treated in the same manner as any other sick employee who is absent from work, whether male or female.

The United Kingdom concludes that national provisions which have the effect that a woman who is absent from work outside the maternity leave period because of pregnancy-related sickness receives lower pay than a man or woman absent from work owing to sickness or incapacity unrelated to pregnancy are not compatible with Article 119 or Directives 75/117 and 76/207.

24 The Commission proposes that a single reply be given to the first, second and third parts of the question for a number of reasons: the situations in question all entail incapacity for work attested by a doctor's certificate; such incapacity is due to a pregnancy-related illness or is aggravated by it; the State guarantees that women in any of those situations receive benefits equal to what they would receive in the event of absence for sickness; and the Law on employees exempts employers from giving full pay when incapacity is related to pregnancy.

The Commission observes, firstly, that the wages or salary paid by an employer to an employee under Paragraph 5 of the Law on non-manual workers during illness, or to a pregnant employee under Paragraph 7 of the same Law, fall within the definition of pay in Article 119 of the Treaty, as construed by the Court of Justice. Secondly, the situations to which the first, second and third parts of the question relate are comparable to those where a worker, irrespective of sex, has to discontinue work by reason of illness. As only women can become pregnant, Paragraph 7(2) of the Law on non-manual workers, which requires employers to allow only half pay for a specified period to women who are prevented from working by a pregnancy-related illness, gives rise to direct discrimination in so far as different rules are applied to comparable situations, and it is therefore incompatible with Article 119 of the Treaty, even though the State pays benefits, bearing in mind that Paragraph 5 of the same Law requires the employer to pay full wages or salary to employees who are absent by reason of illness.

With regard to the fourth and fifth parts of the question, the Commission notes that these are not cases of genuine incapacity for work or illness attested by a doctor's certificate, but situations which could be treated in the same way as a woman's absence from work during maternity leave. As a woman's situation in these cases is not comparable with that of a male worker who is ill, the fact that the woman is not entitled to pay is not a breach of Article 119 of the Treaty.

With regard to the sixth part of the question, the Commission observes, firstly, that Paragraph 7(2) of the Law on non-manual workers, which provides that an employer who considers it impossible to continue to employ a pregnant woman may require her to give up work although she has not been found unfit for work, the employer's only obligation being to pay one half of her wages for a limited period, gives rise to direct discrimination with regard to working conditions, contrary to Articles 2(1) and 5(1) of Directive 76/207 and, secondly, that Paragraph 7(2) of the Law on non-manual workers cannot be considered a provision intended to protect women on grounds of pregnancy or maternity within the meaning of Article 2(3) because the decision is taken by the employer unilaterally and in his own interest.

Finally, so far as Directive 92/85 is concerned, the Commission contends that the proceedings before the national court appear to be prior to the implementation of the directive in Danish law. In any case, according to the Commission, in so far as Paragraph 7(2) of the Law on non-manual workers gives the employer the right to decide whether to continue to employ a pregnant worker while she is in that condition, it is incompatible with the directive.

Analysis of the question submitted

25 Before examining the question referred to the Court, I must stress that the national court, which has stayed proceedings in the four cases, has submitted a question which covers six situations. On this point the following observations arise:

(1) Firstly, the fourth and fifth situations have no connection whatever with the four pending actions because none of the applicants was in those situations. Therefore I shall propose that the Court consider the admissibility of the question in relation to those two situations.

(2) Secondly, the sixth situation, which relates to the facts of the third case, calls for a reply in the light of the principle of equal treatment with regard to access to employment and working conditions, laid down by Directive 76/207, because, in my view, the refusal to pay wages is no more than a consequence of the refusal of employment.

(3) Thirdly, comparing the facts of the three other cases with the first, second and third situations, it will be seen that the applicants' diagnoses fit the second and third situations, but not the first. Nevertheless, I agree with the Commission that, as regards these three situations, a single reply can and must be given in the light of the principle of equal pay laid down in Article 119 of the Treaty and in greater detail Directive 75/117, when they are grouped together by reference to their common features, that is to say, the woman's absence is justified by unfitness for work proved by a doctor's certificate, such unfitness is caused by pregnancy, the employer is consequently entitled to stop her pay and, if unfitness for work is due to an illness unconnected with pregnancy, the employer would be obliged to give her full pay.

Therefore I shall consider in turn the admissibility of the fourth and fifth parts of the question, the reply to the first, second and third parts and, finally, the reply to the sixth part.

A. Admissibility of the fourth and fifth parts of the question referred

26 These two parts of the question relate respectively to a woman's absence from work owing to routine pregnancy-related minor complaints occurring in any normal pregnancy which do not result in incapacity for work, and absence by reason of a doctor's certificate recommending rest, but which is not based on an actual pathological condition or any special risks to the unborn child. In both situations the employer has no obligation to pay wages and the employees have no right to State benefits.

27 However, it is clear from the order for reference that none of the applicants in the four cases had a normal pregnancy and that they all had a doctor's certificate stating that they were totally or partially unfit for work. Therefore none of them was in either of the two situations described above.

These are hypothetical cases raised by the national court in order to cover all the possibilities offered by Circular No 191, but they have no connection with the four cases described in the order for reference. In fact, the national court itself states that point 175 of the Circular, which provides for precisely those two situations, corresponds to the fourth and fifth parts of the question.

28 There is a settled body of case-law concerning the respective roles of the national courts and the Court of Justice in the framework of the cooperation procedure provided for by Article 177 of the Treaty. According to this case-law, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment, and the relevance of the questions which it submits to the Court of Justice, (5) whereas it is the latter's task to examine the conditions under which the national court has referred a question to it, so as to verify its own jurisdiction. The spirit of cooperation which must govern the procedure for preliminary rulings also means that the national court should have regard to the proper function of the Court of Justice in this field, which

is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. (6)

29 In view of that task, the Court has held that it could not give a ruling on a question referred by a national court where the interpretation or examination of the validity of a rule of Community law bore no relation to the actual nature or the subject-matter of the main action, (7) or where it was asked for a ruling on a hypothetical problem without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it. (8)

In this connection, the Court has added that it is essential for the national court to explain the reasons why it considers that a reply to its questions is necessary to enable it to give judgment, so that the Court can ascertain whether the interpretation of Community law which is sought is related to the actual nature and the subject-matter of the main proceedings. If it should appear that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment. (9)

30 In the light of this case-law, and as none of the applicants in the proceedings pending before the national court has been in the situations referred to by the fourth and fifth parts of the question - because none of them had a normal pregnancy, having been found totally or partially unfit for work by a doctor's certificate - I consider that a reply by the Court interpreting the Community law applying to those two situations would not assist the national court to give judgment in the actions before it. Therefore I propose that the Court rule that the fourth and fifth parts of the question are inadmissible.

B. The first, second and third parts of the question referred

31 The first, second and third parts refer to the first sentence of Paragraph 7(2) of the Danish Law on non-manual workers, under which unfitness for work attested by a doctor's certificate gives rise to less favourable treatment in relation to pay when such unfitness is pregnancy-related. This was the provision which enabled the employers of the applicants Ms Høj Pedersen (first case), Ms Andresen (second case) and Ms Sørensen (fourth case) - who, while pregnant, were diagnosed as suffering from slackening of the pelvic ligaments, a risk of miscarriage and hyperemesis gravidarum respectively and all of whom had to stop working - to discontinue their pay and advise them to claim pre-maternity benefits.

32 I infer from the wording of the question and from the reasoning of the order referring it that the national court wishes to know whether, by reference to these three situations, Article 119 of the Treaty and Directive 75/117 preclude a national provision to the effect that, when a pregnant woman's incapacity for work, attested by a doctor's certificate, is connected with pregnancy, her employer has an obligation to pay only one half of her wages for a maximum of five months between a date three months before and three months after her confinement whereas, if incapacity for work is not pregnancy-related, the employer must pay the full wages.

33 First of all, it is necessary to ascertain the Community legislation which must be interpreted. The order for reference refers to Article 119 of the Treaty and Directive 75/117. However, the Court has held that Directive 75/117, whose objective is to lay down the conditions necessary for the implementation of the principle that men and women should receive equal pay, in no way affects the content or scope of that principle as laid down in Article 119 of the Treaty. (10)

Therefore, whatever conclusion is reached with regard to the application to the present cases of the definition of `pay' in Article 119 will also be valid with regard to Directive 75/117.

34 There is no doubt that the principle of equal pay for men and women for the same work, laid down by Article 119 of the Treaty, forms part of the foundations of the Community. (11) This Article gives a wide definition of pay as meaning `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'. This definition has been expanded in the case-law of the Court, which, in 1971, stated that it includes any other consideration `whether immediate or future' (12) and, in 1990, added that benefits paid by an employer to a worker in connection with the employment relationship fall within the definition of pay, `whether they are paid under a contract of employment, by virtue of legislative provisions or on a voluntary basis'. (13)

Since then the Court has found that the following items fall within the definition of pay, although this list is given by way of example only and does not aim to be exhaustive: rail travel facilities granted by a railway undertaking to its employees on retirement and extended to members of their family; (14) benefits paid to a worker on compulsory redundancy and pensions paid under a contracted-out private occupational scheme; (15) compensation paid by an employer to staff council members in the form of paid leave or overtime by reason of attending training courses which provide knowledge necessary for the work of the staff council although, during those courses, they are not doing the work laid down by their contracts of employment; (16) the right to join a company pension scheme; (17) the continued payment of wages to an employee in the event of illness (18) and the benefit paid by an employer under legislation or collective agreements to a woman on maternity leave. (19)

35 The principle of non-discrimination between male and female workers laid down by Article 119 precludes regulations which permit men and women to be paid at different rates for the same work or for work of equal value. (20) The Court has held that the first paragraph of Article 119 of the Treaty applies directly to all forms of direct and overt discrimination which may be identified solely with the aid of the criteria of equal pay and equal work referred to by the article in question, without national or Community measures being required. (21)

36 Since the Court's judgment in the Rinner-Kühn case, (22) there has been no doubt that the continued payment of wages by an employer during sick leave falls within the definition of pay in Article 119 of the Treaty.

It is now necessary to determine whether the continued payment of wages by an employer to a pregnant woman whose unfitness for work is caused by pregnancy is also covered by that definition.

37 Under the Danish provision in question, the employer's obligation with regard to pay is limited, in the abovementioned case, to one half of the pay for a maximum of five months during the three months preceding and the three months following childbirth. Going back to the definition of pay in Article 119, it follows that this is part of the wage which the worker receives directly from her employer in respect of her employment by virtue of a legal provision. Therefore I think that the continued payment of wages in this case also falls within the definition of pay. The question which remains is whether a pregnant woman whose unfitness for work is caused by pregnancy is entitled to the same treatment, as regards pay, as a man who is unfit for work by reason of illness.

38 The Court has on several occasions given rulings on the application of the principle of equal treatment of male and female workers in relation to the employment rights of pregnant women. However, all the cases hitherto have involved access to employment or working conditions, as laid down by Directive 76/207. (23)

39 However, in the Gillespie judgment, (24) the Court gave a ruling on the principle of equal pay in relation to the benefit received by a woman during maternity leave. The Court stated that `women taking maternity leave provided for by national legislation ... are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work', and that, as Directive 92/85 did not apply ratione temporis to the facts of that case, `neither Article 119 of the EEC Treaty nor Article 1 of Directive 75/117 required that women should continue to receive full pay during maternity leave'. (25)

40 On the basis of that ruling it is clear that, during their maternity leave, the applicants could not rely on Article 119 of the Treaty or on Directive 75/117 to claim full pay because their specific situation during that period was not comparable with that of a man actually at work.

41 The problem which arises is whether a pregnant woman's unfitness for work which is caused by pregnancy must be treated as `pre-maternity' leave, in which case she would again be unable to rely on the abovementioned provisions in order to claim a right to full pay.

In my opinion, the reply must be in the negative, for several reasons. Firstly, the duration of maternity leave is predetermined and does not depend on the period which each woman needs to recover from the effects of childbirth, whereas the duration of unfitness for work of a pregnant woman caused by pregnancy depends entirely on the period necessary for recovery. Secondly, a woman does not have to be ill in order to receive maternity leave, but the existence of a serious health problem is an essential condition for a pregnant woman to obtain a doctor's certificate of unfitness for work. Finally, during maternity leave a woman not only does not have to work, but is also released from any other obligation arising from her contract of employment, whereas a pregnant woman who is found unfit for work, irrespective of the reason, has to assist her own recovery by submitting to the treatment prescribed by the doctor.

42 However, during pregnancy and before maternity leave begins, what is the difference between a woman's unfitness for work caused by pregnancy and the unfitness for work of a man who is ill?

Comparing the two situations, I must confess that, so far as their employment is concerned, I can see no difference between the unfitness for work of a pregnant woman which is caused by pregnancy and the unfitness for work of a man by reason of illness. Both are suffering from an ailment attested by a doctor's certificate. Both are temporarily incapable of working for that reason and, while they are unfit for work, there is a reasonable expectation that both the woman whose health is affected by pregnancy and the man who is ill will recover and resume work, because unfitness for work normally ends with the doctor passing the worker as fit following recovery.

43 In conclusion, from the viewpoint of her rights and obligations in relation to employment, a pregnant woman whose unfitness for work is due to pregnancy and is attested by a doctor's certificate is in a very different position from that of a woman on maternity leave; it is, in essence, the same as that of a man whose unfitness for work is due to illness.

44 However, the national provision in question provides for different treatment with regard to pay on the basis of the cause of the illness and, in practice, the pay entitlement of a pregnant woman who is unfit for work will be less than or the same as that of a man who is ill, depending on whether her ailment is pregnancy-related or not. As this is a criterion for differentiation which takes account of a circumstance affecting, by definition, women only, it is direct discrimination on grounds of sex contrary to Article 119 of the Treaty and therefore cannot be justified.

45 For the reasons I have just given, I propose that the reply to the first, second and third parts of the question be that the principle of equal pay laid down in Article 119 of the Treaty and, in greater detail, in Article 1 of Directive 75/117 precludes national legislation which provides that, where the unfitness for work of a pregnant woman, attested by a doctor's certificate, is pregnancy-related, her employer is only obliged to pay her one half of her salary for a maximum of five months within the three months before and the three months after her confinement whereas, if unfitness for work is not pregnancy-related, the employer must pay his employees the full wage.

C. The sixth part of the question referred

46 It seems to me that, in this part of the question, the national court wishes to ascertain whether the principle of equal treatment of men and women with regard to access to employment, vocational training and promotion laid down by Directive 76/207 precludes a national provision such as the second sentence of Paragraph 7(2) of

the Law on non-manual workers, which provides that in the event of an employee's pregnancy, her employer must pay her one half of her salary for a maximum of five months within the three months before and the three months after her confinement, if he considers that, although she is not unfit for work, he cannot continue to provide work for her.

The applicant in the third case, Ms Pedersen, began to work for a dentist, Mr Rasmussen, on 1 September 1984 and was found partially unfit for work on 4 February 1994 by a doctor's certificate, owing to the risk of a miscarriage (abortus imminens), the expected date of confinement being 5 June. On the basis of the abovementioned provision, her employment and salary were suspended when her employer refused her request to work shorter hours.

As stated in paragraph 25 above, although here again the employer refused to pay wages, I consider that this situation cannot be resolved by applying the principle of equal treatment, but that it must be examined in the light of Directive 76/207 because the refusal to pay wages is no more than a consequence of the refusal of employment.

47 In the order for reference the national court states, with regard to the Law on non-manual workers, that it is for the employer alone to decide whether he can continue to give work to a pregnant employee. It adds that the reasoning behind this provision is presumably that the employer may, in view of the nature of the post, impose requirements with regard to the employee's working capacity which may justify her ceasing work at a date prior to the three-month period before her confinement and the employer must be in a position to explain why it was necessary to dismiss her, but the precise requirements relating to that justification are not clear.

48 Article 2(3) of Directive 76/207 provides that the principle of equal treatment laid down by the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. Article 2(3) gives legal cover to protection measures adopted by the Member States, such as the right of women only to maternity leave.

On this point the Court has held 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, firstly, a woman's biological condition during pregnancy and thereafter and, secondly, the special relationship between a woman and her child over the period which follows pregnancy and childbirth. (26)

Therefore, in order to be covered by this exception, the measures must be intended directly to protect women in those situations.

49 However, the Danish provision in question, which leaves it to the employer's discretion whether he can continue to give employment to a pregnant employee merely because she is in that situation - as it is not necessary for her to be found unfit for work - cannot be covered by Article 2(3) of Directive 76/207 because, instead of protecting pregnant women, what it does is to make it possible to leave them temporarily unemployed merely by their employer's decision.

Consequently Article 2(3) must be examined in the light of the other provisions of the directive, which require strictly equal treatment of male and female workers, particularly Article 5(1), which states that application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women must be guaranteed the same conditions without discrimination on grounds of sex.

50 The Court has consistently held that `discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations'. (27) The Court has found that a refusal to employ a pregnant woman (28) and the dismissal of an employee by reason of her pregnancy (29) constitute direct discrimination on grounds of sex.

51 The Danish provision in question enables an employer temporarily to dispense with the services of a pregnant employee even if she is not unfit for work, if he considers that he cannot continue to provide her with work. However, this option is not available to the employer in relation to a male employee who has not been found unfit for work and, whereas both the female and the male employee may be able and willing to work, the employer can dispense only with the services of the former while she is pregnant.

Therefore a national provision to that effect, which lays down different treatment for male and female workers who are not absent from work on medical grounds and are therefore able to work, gives rise to direct discrimination on grounds of sex, contrary to Article 5(1) of Directive 76/207, by adopting as the criterion for application a situation which affects women only.

52 For the reasons I have just given, I believe that the reply to the sixth part of the question must be that the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, in Article 5(1) of Directive 76/207, precludes a national provision which, in the case of a pregnant employee who has not been found unfit for work, enables the employer to decide in his own discretion whether he can continue to provide her with work, his only obligation being to pay her one half of her wage, for a maximum of five months within the three months before and the three months after her confinement.

Conclusion

On the foregoing grounds I propose that the Court should:

(1) dismiss as inadmissible the fourth and fifth parts of the question referred by the Sø- og Handelsret;

(2) reply as follows to the first, second, third and sixth parts of the question:

(a) The principle of equal pay laid down in Article 119 of the Treaty and, in greater detail, in Article 1 of 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 precludes national legislation which provides that, where the unfitness for work of a pregnant woman, attested by a doctor's certificate, is pregnancy-related, her employer is only obliged to pay her one half of her salary for a maximum of five months within the three months before and the three months after her confinement whereas, if unfitness for work is not pregnancy-related, the employer must pay his employees the full wage.

(b) Article 5(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 precludes a national provision which, in the case of a pregnant employee who has not been found unfit for work, enables the employer to decide in his own discretion whether he can continue to provide her with work, his only obligation being to pay her one half of her wage, for a maximum of five months within the three months before and the three months after her confinement.

(1) - 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).

(2) - 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).

(3) - The national court states in the order for reference that these correspond substantially to points 90, 91 and 93 of Circular No 5 of 22 March 1990.

(4) - 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.

(5) - Case 83/78 Pigs Marketing Board [1978] ECR 2347, paragraph 25; Case C-186/90 Durighello [1991] ECR I-5773, paragraph 8; and Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraph 15.

(6) - Case 244/80 Foglia [1981] ECR 3045, paragraphs 18 and 20; Case 149/82 Robards [1983] ECR 171, paragraph 19; and Case C-343/90 Lourenço Dias, cited in footnote 5 above, paragraph 17.

(7) - Case 126/80 Salonia [1981] ECR 1563, paragraph 6; Case C-186/90 Durighello, cited in footnote 5 above, paragraph 9; Case C-129/94 Ruiz Bernáldez [1996] ECR I-1829, paragraph 7; and C-104/95 Kontogeorgas [1996] ECR I-6643, paragraph 11.

(8) - Case C-83/91 Meilicke [1992] ECR I-4871, paragraphs 32 and 33.

(9) - Case C-343/90 Lourenço Dias, cited in footnote 5 above, paragraphs 19 and 20.

(10) - Case 69/80 Worringham and Humphreys [1981] ECR 767, paragraph 21; Case 96/80 Jenkins [1981] ECR 911, paragraph 22; Case 192/85 Newstead [1987] ECR 4753, paragraph 20; and Case C-262/88 Barber [1990] ECR I-1889, paragraph 11.

(11) - Case 43/75 Defrenne v Sabena [1976] ECR 455, paragraph 12.

(12) - Case 80/70 Defrenne v Belgium [1971] ECR 445, paragraph 6.

(13) - Barber, cited in footnote 10 above, paragraph 20.

(14) - Case 12/81 Garland [1982] ECR 359, paragraph 9.

(15) - Barber, cited in footnote 10 above, paragraphs 20 and 30.

(16) - Case C-360/90 Bötel [1992] ECR I-3589, paragraphs 14 and 15, and Case C-457/93 Lewark [1996] ECR I-243, paragraph 23.

(17) - Case 170/84 Bilka [1986] ECR 1607, paragraph 22; Case C-57/93 Vroege [1994] ECR I-4541, paragraph 15; and Case C-128/93 Fisscher [1994] ECR I-4583, paragraph 12.

(18) - Case 171/88 Rinner-Kühn [1989] ECR 2743, paragraph 7.

(19) - Case C-342/93 Gillespie and Others [1996] ECR I-475, paragraph 14.

(20) - Ibidem, paragraph 15.

(21) - Defrenne v Sabena, cited in footnote 11 above, paragraph 18; Case 129/79 Macarthys [1980] ECR 1275, paragraph 10; and Worringham and Humphreys, paragraph 23, and Jenkins, paragraph 17, both cited in footnote 10 above.

(22) - Cited in footnote 18 above. The case concerned the German law on the continued payment of wages in the event of illness, under which the employer must continue to pay wages for a period of up to six weeks to any employee who, after the commencement of his employment and through no fault of his own, is incapable of working. An employer who has fewer than 20 employees may obtain reimbursement of part of the wages from the sickness insurance fund.

(23) - See Case C-177/88 Dekker [1990] ECR I-3941; Case C-421/92 Habermann-Beltermann [1994] ECR I-1657; Case C-32/93 Webb [1994] ECR I-3567; and Case C-400/95 Larsson [1997] ECR I-2757.

(24) - Cited in footnote 19 above.

(25) - Ibidem, paragraphs 17, 19 and 20.

(26) - Case 184/83 Hofmann [1984] ECR 3047, paragraph 25.

(27) - Case C-279/93 Schumacker [1995] ECR I-225, paragraph 30.

(28) - Dekker, cited in footnote 23 above.

(29) - Habermann-Beltermann and Webb, cited in footnote 23 above.