OPINION OF ADVOCATE GENERAL LÉGER

delivered on 30 September 2003 [1]

1. This case provides an opportunity for the Court to clarify, or indeed reconsider, the case of *Gillespie*. [2] That case related to the principle of equal pay for men and women and, more particularly, women's pay during their maternity leave.

2. In this case the Court of Appeal of England and Wales, Civil Division, [3] is asking whether Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) must be interpreted as meaning that, where statutory maternity pay is calculated on the basis of the woman's average earnings during a specified period, such pay must include any pay rises awarded before or during the period of maternity leave but outside the reference period laid down by national law.

I — Legal background

A — *Community law*

3. Article 119 of the Treaty establishes the principle of equal pay for men and women. [4] It provides as follows:

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

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

1 — Original language: French.

2 — Case C-342/93 *Gillespie and Others* [1996] ECR I-475, ('the *Gillespie* judgment').

3 — Also referred to herein as 'the Court of Appeal'.

4 — Also referred to as the 'principle of equal pay'.

4. According to Article 1 of Directive 75/117/EEC,[5] the principle of equal pay is intended to eliminate, for the same work or for work to which equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

5. Directive 76/207/EEC[6] establishes the principle of equal treatment of men and women for the purposes of access to employment and working conditions.[7] That principle is intended to remove any discrimination on grounds of sex, either directly or indirectly, by reference in particular to marital or family status.[8]

6. Article 2(3) of Directive 76/207 provides that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

7. On 19 October 1992, the Council of the European Union adopted Directive 92/85/EEC 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).[9] That directive is based on Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and was to be transposed by 19 October 1994.[10]

8. Article 8 of Directive 92/85 relates to maternity leave. It provides as follows:

'(1) Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

(2) The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

5 — 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).

6 — Council Directive 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).

7 — Also referred to as the 'principle of equal treatment' or 'the principle of non-discrimination'.

8 — Article 2(1).

9 — OJ 1992 L 348, p. 1.

10 — Pursuant to Article 14(1).

9. Article 11 of Directive 92/85 concerns employment rights. It provides as follows:

'In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised in this Article, it shall be provided that:

...

(1) in the case referred to in Article 8 [maternity leave], the following must be ensured:

(a) the rights connected with the employment contract of workers within the meaning of Article 2, other than those referred to in point (b) below;

(b) maintenance of a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2;

(3) The allowance referred to in point 2(b) shall be deemed adequate if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation.'

B — *National law*

10. The national provisions on statutory maternity pay are found in Part XII of the Social Security Contributions and Benefits Act 1992 ('the Act').

11. Under section 164 of the Act, an employee is entitled to statutory maternity pay if she has been employed for a continuous period of at least 26 weeks with the same employer by the 15th week before the expected week of confinement, her normal weekly earnings are over a certain level, she has given the employer the appropriate notice and the baby is due within 11 weeks.

12. Under section 165(1) of the Act, statutory maternity pay is payable for a maximum of 18 weeks.

13. Section 166(1) of the Act provides that there are two rates of pay, the higher rate and the lower rate.

14. Section 166(2) of the Act prescribes that the higher rate is a rate equivalent to 90% of the woman's normal weekly earnings for a period of eight weeks immediately preceding the 14th week before the expected week of confinement or the lower rate, whichever is the higher. The lower rate is a flat-rate weekly payment.

15. Under section 166(1) and (4) of the Act, where an employee is entitled to higher rate statutory maternity pay, she is entitled to the higher rate for six weeks and to the lower rate for 12 weeks.

16. Section 171(4) of the Act provides that a woman's normal weekly earnings are to be taken to be the average weekly earnings which in the relevant period have been paid to her.

17. The Statutory Maternity Pay (General) Regulations 1986, as amended with effect from 12 June 1996 by Statutory Instrument No 1335 of 1996 ('the Regulations'), lay down certain conditions for applying the Act with regard to statutory maternity pay.

18. Regulation 21(2) of the Regulations defines the 'appropriate date' as the first date of the 14th week before the expected week of confinement, or the first day in the week in which the woman is confined, whichever is earlier.

19. Regulation 21(3) of the Regulations provides that the relevant period for the purposes of Section 171(4) of the Act is the period between:

'(a) the last normal pay day before the appropriate date; and

(b) the last normal pay day to fall at least 8 weeks earlier than the normal pay day mentioned in subparagraph (a), including the normal pay day mentioned in subparagraph (a) but excluding that first mentioned in subparagraph (b).'

20. Regulation 21(7) of the Regulations was inserted by Statutory Instrument No 1335 of 1996 to take account of the *Gillespie* judgment. It provides as follows:

'In any case where a woman receives a backdated pay increase which includes a sum in respect of a relevant period, normal weekly earnings shall be calculated as if such sum was paid in that relevant period even though received after that period.'

II — The main proceedings

21. Mrs Michelle K. Alabaster was an employee of Woolwich plc ('the Woolwich') in the United Kingdom from 7 December 1987 to 23 August 1996.

22. In May 1995 she became pregnant.

23. She commenced maternity leave on 8 January 1996. Her expected week of confinement was 11 February 1996 although she gave birth on 2 February 1996.

24. Mrs Alabaster received statutory maternity pay from the week of 8 January 1996. She was paid statutory maternity pay at the higher rate not just for the statutory six-week period but for an additional four weeks under her contract of employment. She then received statutory maternity pay at the lower rate for eight weeks.

25. On 12 December 1995 Mrs Alabaster received a salary increase with effect from 1 December. However, this salary increase was not reflected in her statutory maternity pay calculation because it came after the relevant period for calculating normal earnings.

26. Pursuant to Regulation 21(3) of the Regulations, the relevant period in Mrs Alabaster's case began on 1 September 1995 and ended on 31 October 1995.

27. Regulation 21(7) of the Regulations was not applicable in Mrs Alabaster's case since it only entered into force on 12 June 1996. In any event, the provision would not have applied because her pay increase was

not backdated in respect of the relevant period.

28. On 21 January 1997 Mrs Alabaster brought a complaint against the Woolwich in the Employment Tribunal in the United Kingdom. She contended that the failure to reflect the salary increase in her statutory maternity pay calculation constituted discrimination against her on grounds of sex contrary to Article 119 of the Treaty.

29. The Secretary of State for Social Security was joined in the proceedings by an order of the Employment Tribunal dated 30 May 1997.

30. By a decision of 10 March 1999 the Employment Tribunal held, applying the *Gillespie* judgment, that the failure to take account of Mrs Alabaster's pay increase in determining her statutory maternity pay amounted to a breach of Article 119 of the Treaty.

31. The Woolwich and the Secretary of State for Social Security appealed on this issue to the Employment Appeal Tribunal, which dismissed the appeal by a decision of 7 April 2000, also applying *Gillespie*.

III — The questions referred for a preliminary ruling

32. The respondents in the main proceedings appealed to the Court of Appeal, which decided to stay proceedings and to refer the following three questions to the Court of Justice for a preliminary ruling:

'In a situation where:

(a) the earnings-related element of a woman's statutory maternity pay ("SMP") is calculated by reference to her normal weekly earnings for an eight week period ending on the 15th week before the expected week of confinement ("the relevant period"), and

(b) the employer grants a pay rise, which is not back-dated to the relevant period, at any time after the end of the relevant period used for calculating that woman's earnings-related element of SMP and before the end of her maternity leave:

(1) Is Article 141 of the EC Treaty and the judgment in *Gillespie* [1996] ECR I-475 to be interpreted as meaning that

the woman is entitled to have that pay rise taken into consideration in calculating or re-calculating the earnings-related element of her SMP?

(2) Is the answer to Question 1 affected by whether the effective date of the pay rise commences: (i) prior to the beginning of the woman's maternity leave, (ii) prior to the ending of the period of the earnings-related period of her SMP, or (iii) on some other date and, if so, on what date?

(3) If the answer to Question 1 is in the affirmative,

(i) how should the calculation or re-calculation of the normal weekly earnings in the relevant period take into account the pay rise?

(ii) Should the relevant period be changed?

(iii) What allowance, if any, should be made for other factors occurring within the period to which the pay rise relates such as the numbers of hours worked, and the reason for the pay increase?

(iv) Does it follow that if there is a reduction in pay after the end of the relevant period but before the end of the woman's period of maternity leave, her SMP should be calculated or re-calculated to take account of the reduction of pay, and if so, how is this to be done?'

IV — First question

33. The first question relates to the interpretation of Article 119 of the Treaty and the *Gillespie* judgment.

34. The Court of Appeal is asking whether, in the light of that law, a statutory maternity benefit calculated on the basis of the woman's average earnings during a specified period should include pay rises

awarded before or during her maternity leave, but outside the relevant period prescribed by national law.

35. The answer to that question depends on the scope to be given to the *Gillespie* judgment. I shall therefore begin by considering the scope of that judgment (section A below). But I shall also set out the difficulties which the *Gillespie* judgment raises (in section B) and look at how the Court's case-law on the subject has evolved in this area (section C). Those two matters will lead to a consideration of whether a woman's right to have a pay rise taken account of in her maternity pay ought not to be based on Directive 92/85 rather than on the principle of equal treatment (section D).

A — *The scope of the Gillespie judgment*

36. The facts giving rise to the dispute in *Gillespie* were analogous to those in this case.

37. Ms Gillespie and 16 other workers took maternity leave during 1988. In November 1988 they had obtained backdated pay increases which took effect on 1 April 1988. However those pay increases had not been included in their maternity benefit as a result of the calculation method provided for by the relevant national rules.

38. The Court of Appeal in Northern Ireland, which was seised of the dispute, referred four questions to the Court for a preliminary ruling. It asked, in essence, whether the principle of equal pay required that the plaintiffs continue to receive full pay while on maternity leave or, if applicable, that they receive a pay rise awarded before or during their maternity leave.

39. The Court replied to those questions as follows:

'12 The definition in the second paragraph of Article 119 provides that the concept of pay used in the abovementioned provisions includes all consideration which workers receive directly or indirectly from their employers in respect of their employment. The legal nature of such consideration is not important for the purposes of the application of Article 119 provided that it is granted in respect of employment....

13 Consideration classified as pay includes, *inter alia*, consideration paid by the employer by virtue of legislative provisions and under a contract of employment whose purpose is to ensure that workers receive income even where, in certain cases specified by the legislature, they are not performing any work provided for in their contracts of employment....

14 It follows that, since the benefit paid by an employer under legislation or collective agreements to a woman on maternity leave is based on the employment relationship, it constitutes pay within the meaning of Article 119 of the Treaty and Directive 75/117.

15 Article 119 of the Treaty and Article 1 of Directive 75/117 therefore preclude regulations which permit men and women to be paid at different rates for the same work or for work of equal value.

16 It is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30).

17 The present case is concerned with women taking maternity leave provided for by national legislation. They 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.

18 As to whether Community law requires women on maternity leave to continue to receive full pay or lays down specific criteria determining the amount of benefit payable during maternity leave, Council Directive 92/85... provides for various measures to protect *inter alia* the safety and health of female workers, especially before and after giving birth. Those measures include... rights connected with contracts of employment,..., and maintenance of a payment..., and/or entitlement to an adequate allowance...

19 However, that directive does not apply *ratione temporis* to the facts of the present case. It was therefore for the national legislature to set the amount of the benefit to be paid during maternity leave...

20 That being so, it follows that at the material time 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. Nor did those provisions lay down any specific criteria for determining the amount of benefit to be paid to them during that period...

...'

21 As to the question whether a woman on maternity leave should receive a pay rise awarded before or during that period, the answer must be yes.

22 The benefit paid during maternity leave is equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.

40. The Court therefore held that the principle of equal pay laid down in Article 119 of the Treaty did not require that women should continue to receive full pay during maternity leave nor did it lay down specific criteria for determining the amount of maternity benefit payable to them. On other hand, it found that the principle of non-discrimination does require that the maternity benefit must include pay rises awarded between the beginning of the relevant period and the end of maternity leave.

41. The parties in this case hold differing views on the scope of the *Gillespie* judgment.

42. The United Kingdom says the judgment must be limited to the circumstances of that case, in other words to situations where a pay increase is backdated to the relevant period.

43. The United Kingdom submits that although the pay increases in *Gillespie* were decided on before or during the plaintiffs' maternity leave, they were backdated to the relevant period. In its judgment therefore the Court simply found that a pay increase of that kind must be reflected in the amount of maternity benefit. The Court did not, however, establish a principle that any pay rise awarded before or during the period of maternity leave but outside the relevant period must be reflected in the maternity benefit. In the United Kingdom's view, such an interpretation of *Gillespie* would create considerable legal uncertainty as well as a whole host of practical difficulties.

44. Mrs Alabaster challenges that reading of *Gillespie*. She submits that there is nothing in the judgment to support the claim that the pay rises were backdated to the relevant period. In any event she considers that the wording of the *Gillespie* judgment is clear: the principle of non-discrimination requires that any pay rise awarded before or during maternity leave must be taken into account, even if it was awarded outside the relevant period. Mrs Alabaster adds that the practical difficulties raised by the United Kingdom cannot call that conclusion in question.

45. The Commission agrees with Mrs Alabaster's analysis. It contends that if a Member State opts for a system of maternity pay based on a woman's earnings, that system must comply with Article 119 of the Treaty. This means, following *Gillespie*, that maternity pay must reflect any pay rises awarded before or during the woman's maternity leave.

46. I believe that the scope of the *Gillespie* judgment is clear. In my view the Court established a principle under which maternity pay calculated on the basis of a woman's earnings during a specified period must reflect any pay rise awarded between the beginning of the relevant period and the end of maternity leave.

47. As Mrs Alabaster said, there is nothing to support the contention that the pay rises in issue in *Gillespie* were backdated to the relevant period.

48. The *Gillespie* judgment merely states that 'during 1988 the plaintiffs took maternity leave';[11] that 'in November 1988, negotiations... resulted in pay increases being backdated to 1 April 1988';[12] and that 'the plaintiffs in the main proceedings were unable to receive that increase'.[13]

49. Indeed, certain aspects of the *Gillespie* judgment even suggest that the contested pay rises were backdated to a point in time outside the relevant period.

50. In paragraph 6 of the judgment the Court stated the reasons why the plaintiffs' pay rises had not been reflected in their maternity benefit to be as follows:

'According to the decision of the Industrial Tribunal, referred to in the order for reference, the cash benefit payable during maternity leave is determined on the basis of average weekly pay calculated... from the last two pay cheques received by the women concerned for the two months preceding the reference week ("reference pay"). The reference week is defined as the 15th week before the beginning of the expected week of confinement. *No provision was made for an increase in reference pay in the event of a subsequent pay rise.*'[14]

51. That last sentence therefore appears to suggest that the reason why the plaintiffs did not receive their pay rise was that it was awarded outside the reference period laid down by the relevant national rules.

52. I therefore do not think it has been established that the plaintiffs' pay rises in *Gillespie* were backdated to the relevant period.

53. In any event, the wording of the *Gillespie* judgment does not to my mind support the view that the Court's findings are confined to situations where that is the case.

11 — Paragraph 3.

12 — Paragraph 5.

13 — Idem. Nor, it may be added, does my Opinion in *Gillespie* contain any indication as to the dates of the relevant periods pertaining to the plaintiffs in the main proceedings.

14 — Emphasis added.

54. Paragraphs 21 and 22 of the judgment are expressed in terms that are clear and general. Paragraph 21 states: 'As to the question whether a woman on maternity leave should receive a pay rise awarded before or during that period, the answer must be yes'. Similarly, paragraph 22 states that '... a woman... must... benefit from any pay rise ... which is awarded between the beginning of the period covered by reference pay and the end of maternity leave...'. Finally the operative part of the *Gillespie* judgment states in clear and general terms as follows:

'To the extent that it is calculated on the basis of the pay received by a woman before ... maternity leave, the amount of benefit must include pay rises awarded between the beginning of the period covered by the reference pay and the end of maternity leave, as from the date on which they take effect.'

55. It follows that there is nothing to suggest that the principle established in *Gillespie* is confined to situations where the pay rise is backdated to the relevant period only.

56. On the basis of those considerations, the answer to the first question referred for a preliminary ruling must be yes. The Court may therefore decide that, under the *Gillespie* judgment, statutory maternity benefit calculated on the basis of a woman's average earnings during a specified period must include pay rises which are awarded before or during her maternity leave, but outside the relevant period laid down by national law.

57. However, like the United Kingdom, I think that *Gillespie* raises a number of difficulties. In view of those difficulties, and the way in which the case-law has developed, I propose to invite the Court not to uphold the judgment in *Gillespie*. As we shall see, as Community law currently stands, it is on Directive 92/85, rather than on the principle of equal pay, that a woman's right to have her pay rise taken into account ought to be founded.

B — *The difficulties raised by the Gillespie judgment*

58. It is well settled that the principle of non-discrimination requires that a woman should not be the subject of unfavourable treatment by reason of her pregnancy or because she is on maternity leave. [15] This

15 — See, inter alia, Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 26.

means that a woman who continues to be bound to her employer during her maternity leave must be able to continue to benefit from all working conditions which apply to both men and women. [16]

59. In *Gillespie*, [17] the Court inferred from that principle that a woman who is on maternity leave must, like any other worker who is actually working, benefit at once from any pay rise, even if it is awarded outside the relevant period or during her maternity leave. This requirement means that the pay rise must be reflected in the amount of salary or benefit paid to the woman during her maternity leave.

60. However, the particular feature of the *Gillespie* judgment is the fact that, in so doing, the Court applied the principle of non-discrimination to a woman on maternity leave and, more particularly, to the pay she receives during that time.

61. It seems to me that this particular application of the principle of equal treatment raises two sets of difficulties.

62. First, there is to my mind something of a contradiction between the principle established in *Gillespie* [18] and paragraphs 16 to 20 of the judgment.

63. The Court held in paragraphs 16 to 20 of the *Gillespie* judgment that Article 119 of the Treaty does not apply to women on maternity leave. The reason for that exclusion is that the prohibition laid down by Article 119 of the Treaty only applies in cases involving discrimination between men and women, whereas the Court takes the view that a woman on maternity leave is in a special situation requiring that she be afforded special protection, but which is not comparable with any other situation. The Court thus concluded that Article 119 of the Treaty does not require that women continue to receive full pay while on maternity leave, nor does it lay down any criterion for determining the amount of maternity benefit.

64. Yet at the same time the Court held in paragraphs 21 and 22 that the principle of non-discrimination requires that maternity benefit calculated on the basis of the pay received by the woman must take account of any pay rise awarded before or during

16 — Ibid. (paragraph 29).

17 — Paragraphs 21 and 22.

18 — It is perhaps useful to point out that by 'the principle established in *Gillespie*' I mean the Court's finding that the principle of non-discrimination requires that statutory maternity pay based on the woman's earnings during a specified period must include pay rises awarded before or during her maternity leave (see paragraph 22 of the *Gillespie* judgment).

her maternity leave. The reason for that requirement is that to do otherwise would be to discriminate against the woman because she is pregnant or on maternity leave.

65. It has to be said that those two principles would seem to be somewhat contradictory. It is difficult to see how the principle of non-discrimination, which does not apply during maternity leave and therefore does not posit any criterion for calculating maternity benefit, can at the same time impose an obligation to take account of certain pay rises when calculating maternity benefit. In other words, it is difficult to comprehend how the principle of non-discrimination, which is not applicable during maternity leave, can affect the amount of benefit paid to a woman when she is on maternity leave.

66. Ultimately, the *Gillespie* judgment seems to fall part way between two approaches, which should have been taken to their logical conclusion. The first is to exclude application of the principle of non-discrimination during maternity leave. However in that case the principle cannot entail an obligation to take account of a pay rise when calculating maternity benefit. The second is to apply the principle of non-discrimination to a woman on maternity leave. However in that case Article 119 of the Treaty requires that the woman receive her full salary during the whole period of her maternity leave.

67. Secondly, I believe that the principle laid down in *Gillespie* could have a detrimental effect on women.

68. As the Court of Appeal [19] and the United Kingdom [20] pointed out, to apply the principle of non-discrimination to a woman on maternity leave could affect the protection which she enjoys during that period.

69. Under *Gillespie*, a worker on maternity leave must not be treated any differently from a worker who is actually working. [21] As we have seen, the effect of this is that if the woman is awarded a pay increase before or during her maternity leave, that increase must be reflected in the amount of her maternity benefit immediately.

70. But if the principle of non-discrimination is to be applied correctly, account must also be taken of any *adverse* matters arising before or during maternity leave. Therefore, if the woman were to suffer a reduction in or loss of earnings before or during her

19 — See order of the national court of 26 February 2002 (paragraphs 16 and 17) and Question 3(iii) and (iv) referred for a preliminary ruling.

20 — See, *inter alia*, the written observations of the United Kingdom (paragraphs 26 and 27).

21 — See the *Gillespie* judgment, paragraph 22.

maternity leave, the principle of non-discrimination would demand that such reduction or loss too be reflected in the amount of her maternity benefit. To do otherwise would be to apply the principle of non-discrimination inconsistently, which would be incompatible with the requirements of the principle of legal certainty.

71. It follows that application of the principle established in *Gillespie* could have the effect of reducing the amount of benefit paid to women during their maternity leave.

72. That would be all the more regrettable given that the purpose of the relevant period in the United Kingdom appears to be to protect women against any adverse events that occur before or during their maternity leave. The United Kingdom explained that this period was chosen so that the woman's average earnings would be calculated during a period in her pregnancy (between the fourth and sixth months) in which as a rule she is subject to few pregnancy-related health problems.

73. However, as the United Kingdom emphasised, by requiring that all matters that arise prior to maternity leave be taken into account, the *Gillespie* judgment in effect moves the relevant period to the end of the pregnancy, which is the time when women are statistically less able to work normally.

74. Consequently, it is not impossible that the effect of the *Gillespie* judgment might be to reduce the amount of benefit paid to women during maternity leave. [22]

22 — The United Kingdom noted a further negative consequence of the *Gillespie* judgment. It pointed out that under Directive 92/85, the Member States are free, with regard to women's earnings during their maternity leave, to choose between paying a proportion of the woman's earnings and paying a flat-rate benefit (such as EUR 50 per week). It also explained that in the United Kingdom it is the employer who has the responsibility for calculating the amount of maternity benefit and that more than 70% of employers are small- or medium-sized enterprises, so that it is unlikely that they have the necessary resources to make frequent, complex calculations. In view of those factors, the United Kingdom indicated that the principle established in *Gillespie* created an 'administrative nightmare for employers' since it requires them to take account of all increases in pay awarded before or during maternity leave regardless of the amount. The United Kingdom therefore explained that the *Gillespie* judgment could cause certain Member States to abandon an earnings-related regime in favour of a flat-rate benefit one. I believe that the risk of provoking such change is real given the pressure which employers are one way or another able to exert on the competent authorities. Furthermore, a change of this order would be detrimental to women because the flat-rate regime is in most cases more unjust than the earnings-related one. However to my mind, it is not certain that Member States are entitled to make such a change. Article 1(3) of Directive 92/85 states expressly: 'This Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding compared with the situation which exists in each Member State on the date on which this Directive is adopted'. The provision could therefore preclude the Member States invoking the freedom accorded by Directive 92/85 to justify a change of regime entailing a reduction in the protection which women enjoy during their maternity leave in the Member State concerned.

C — *Evolution of the Court's case-law*

75. Furthermore the principle established in *Gillespie* appears no longer to be in step with the case-law as it now stands on the protection of rights associated with pregnancy and maternity.

76. Under the current case-law, the Court applies the principles of equal pay and equal treatment outside the period of maternity leave only.

77. Thus the Court has held that the principle of non-discrimination precludes refusing to enter into a contract of employment with a female worker on account of her pregnancy; [23] dismissal of a female worker for the same reason; [24] dismissal of a female worker for absences due to incapacity for work caused by illness resulting from her pregnancy; [25] an employer's refusal to allow a woman to return to work on the ground that she failed to inform her employer that she was pregnant before signing the contract of employment; [26] and a rule that deprives a woman of the right to an assessment of her performance because she was absent from the undertaking on account of maternity leave. [27]

78. Similarly, the Court has found that the principle of equal pay precludes an employer, when granting a Christmas bonus, from taking a woman's absence on maternity leave into account so as to reduce the amount thereof. [28] The Court also takes the view that the principle of equal pay demands that a woman continue to receive full pay where she is unfit for work before her maternity leave by reason of her pregnancy, if men who are unfit for work have that right. [29]

79. It is clear that these various different events — recruitment, dismissal, return to work, assessment, bonus payments, sick leave — occur outside the period covered by maternity leave.

23 — Cases C-177/88 *Dekker* [1990] ECR I-3941, paragraph 14, and C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 30.

24 — Cases C-179/88 *Handels- og Kontorfunktionærernes Forbund, ('Hertz')* [1990] ECR I-3979, paragraph 13, C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 26, C-32/93 Webb [1994] ECR I-3567, paragraph 29, and C-109/00 *Tele Danmark* [2001] ECR I-6993, paragraph 34.

25 — Case C-394/96 *Brown* [1998] ECR I-4185, paragraph 28. By that judgment the Court reversed its earlier case-law in *Hertz* (paragraph 19) and Case C-400/95 *Larsson* [1997] ECR I-2757, paragraph 26.

26 — Case C-320/01 *Busch* [2003] ECR I-2041, paragraph 47.

27 — *Thibault*, paragraph 33.

28 — Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 51.

29 — Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 41.

80. However where the woman is on maternity leave the Court no longer applies either the principle of equal pay or the principle of equal treatment. It seems on the contrary that it considers the position in the light of the provisions of Directive 92/85 alone.

81. Thus the case of *Boyle and Others* [30] related to a clause in an employment contract which made the payment during the period of maternity leave of pay higher than the statutory payment conditional on the worker's undertaking to return to work after the birth of her child for at least one month, failing which she was required to repay the difference between the amount of the pay she received and the amount of the statutory payments. The Court took the view that Article 119 of the Treaty did not preclude the application of such a clause on the ground that:

'...pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave'. [31]

82. The Court therefore considered the clause in issue purely in the light of the provisions of Directive 92/85. [32]

83. Similarly, the case of *Høj Pedersen and Others* concerned a national rule which provided that a pregnant woman who was unfit for work by reason of a pathological condition connected with her pregnancy was not entitled to receive full pay from her employer during the time that she was unfit. It was however established that a man who was unfit for work was entitled to receive full pay. The defendants in the main proceedings contended by way of justification for that difference that Article 11 of Directive 92/85 authorises the Member States to establish a ceiling for the allowances which women may claim in the event of pregnancy. [33]

84. The Court rejected that argument on the ground that Article 11 of Directive 92/85 only applies to pay or benefits received by workers in the context of maternity leave. [34] Since the dispute in that case concerned incapacity for work *before* maternity leave, the Court held that Article 119 of the Treaty required that a woman

30 — Case C-411/96 *Boyle* [1998] ECR I-6401.
31 — Ibid., paragraph 40.
32 — Ibid., paragraphs 29 to 36.
33 — Paragraph 38.
34 — Paragraph 39.

too continue to receive full pay if she is unfit for work. [35]

85. Finally, in the *Lewen* case [36] the Court held that a Christmas bonus paid voluntarily by the employer as an incentive for future work cannot constitute pay within the meaning of Article 11(2)(b) of Directive 92/85 in so far as it is not intended to ensure that, during her maternity leave, the worker receives an adequate level of income.

86. It follows from those judgments that, since the entry into force of Directive 92/85, the Court has drawn a distinction between two separate periods. The first covers pregnancy up to the beginning of maternity leave, and the second covers the period of maternity leave. The Court applies Article 119 of the Treaty and the principle of equal treatment during the first period only. When the woman is on maternity leave, however, her position is considered in the light of the provisions of Directive 92/85 alone. That means that if the woman suffers unfavourable treatment during her maternity leave, such treatment is only prohibited if it is contrary to the provisions of Directive 92/85. [37]

87. On that basis, it seems to me that the principle established in *Gillespie* no longer accords with current case-law. As I have said, in that case the Court applied the principle of non-discrimination to the second period referred to above and, more particularly, to the woman's pay during maternity leave.

88. Having regard to the difficulties set out above and the way in which the case-law has evolved, I would suggest that the Court ought not to uphold the principle established in *Gillespie*. A woman's entitlement to benefit from a pay rise ought to my mind now to be founded on Directive 92/85.

D — *The basis of the woman's right*

89. As we have seen, Directive 92/85 was adopted on the basis of Article 118 A of the

35 — Paragraphs 35 and 37.

36 — Paragraphs 22 to 24.

37 — See also to that effect Ghailani, D., 'La protection des droits liés a la grossesse et à la maternitée dans l'ordre juridique communautaire', *Revue belge de securité sociale*, 2002, p. 367 et seq. (pp. 383 and 386) and Berthou, K., and Masselot, A., 'Égalité de traitement et maternité. Jurisprudence récente de la CJCE', *Droit social*, 1999, p. 942 to 947 (p. 946).

Treaty to confer special protection on workers during pregnancy and maternity leave. The Community legislature took the view that pregnant workers, workers who have recently given birth and workers who are breastfeeding are in many respects a specific risk group and that measures ought to be taken to ensure their safety and health. [38] It thus adopted a range of protective measures, such as the prohibition on dismissing women during pregnancy and maternity leave, and time off for antenatal appointments.

90. As part of those measures, Directive 92/85 provides that women must be entitled to a continuous period of maternity leave of at least 14 weeks, including compulsory maternity leave of at least 2 weeks. In addition Article 11(2) of Directive 92/85 provides that during maternity leave the following must be ensured:

'(a) the rights connected with the employment contract of workers... other than those referred to in point (b) below;

(b) maintenance of a payment..., and/or entitlement to an adequate allowance...'.

91. It seems to me that subparagraph (a) could be interpreted as covering pay rises awarded before or during maternity leave. A worker's entitlement to benefit immediately from a pay rise awarded to her may be regarded as a 'right connected with [her] employment contract'. [39]

92. That interpretation would enable the difficulties identified above to be avoided.

93. First, it would be consistent with the principle that women on maternity leave are in a special position which requires them to be afforded special protection but which is not comparable with any other situation. [40] The proposed interpretation would involve applying to a woman on

38 — Directive 92/85 (eighth recital).

39 — However it seems harder to found the woman's rights on Article 11(2)(b) of Directive 92/85. The purpose of those provisions is to ensure an 'adequate' level of income for women on maternity leave (see on this point *Boyle* paragraphs 33 and 34 and *Lewen* paragraphs 22 and 23). Therefore if the authorities or persons concerned are paying adequate remuneration and/or benefits, they are implementing Article 11(2)(b) of Directive 92/85 correctly. That provision does not require that in addition they reflect any pay rises awarded to the woman in her maternity pay.

40 — See points 62 to 66 of this Opinion.

maternity leave the measures adopted specifically to ensure that she is protected. It would further guarantee that any pay rises are included in her maternity pay without having to compare her situation with that of a woman who is actually working. [41]

94. Furthermore it seems to me that the application of Directive 92/85 would enable certain adverse events that occur during maternity leave to be excluded. [42]

95. It will be recalled that the purpose of Directive 92/85 is to ensure that women are afforded special protection during their maternity leave. In addition, Article 1(3) of the Directive contains the idea that application of the Directive may not have the effect of reducing the level of protection afforded to pregnant workers, workers who have recently given birth or who are breastfeeding. It could be argued on the basis of those two elements that a woman could not, while she is on maternity leave, suffer any reduction in or loss of earnings.

96. That view is supported by the wording of Article 11(2)(a) of Directive 92/85. Whilst immediate entitlement to the benefit of a pay rise awarded while a woman is on maternity leave can amount to a 'right' connected with her contract of employment, it is difficult to argue that an obligation to reflect any reduction in or loss of earnings in the amount of maternity benefit constitutes such a 'right'. In other words the concept of 'rights connected with the employment contract' would require that account be taken of pay rises awarded before or during maternity leave, but not of reductions in or losses of earnings suffered during maternity leave. Such reductions or losses could occur only after the end of the woman's maternity leave. Finally the interpretation I have proposed is consistent with the current case-law on the protection of rights arising in connection with pregnancy and maternity. [43] It entails applying only the provisions of Directive 92/85 to women on maternity leave and in particular to their pay while on maternity leave.

41 — See *Gillespie*, paragraph 22.

42 — See points 67 to 74 of this Opinion.

43 — See points 75 to 87 of this Opinion.

97. Consequently I am of the view that the law on female workers may henceforth be founded on the provisions of Article 11(2)(a) of Directive 92/85.

98. I therefore propose that the Court reply to the first question referred for a preliminary ruling that Article 119 of the Treaty and the principle of non-discrimination do not require that statutory maternity pay calculated on the basis of a woman's average earnings during a specified period take account of pay rises awarded before or during maternity leave, but outside the reference period. Rather, the obligation to reflect such pay rises in the amount of maternity pay arises under Article 11(2)(a) of Directive 92/85.

V — Second question

99. By its second question the Court of Appeal is asking whether the fact that a pay rise takes effect before the beginning of maternity leave, before the end of the period of payment of the earnings-related element of maternity pay or, if appropriate, on some other date, has any effect on the reply to the first question.

100. The considerations set out in the analysis of the first question enable a reply to be given the national court. It is clear that, regardless of the legal basis used, the amount of the earnings-related element of the woman's statutory maternity pay must take account of any pay rise awarded between the start of the relevant period and the end of maternity leave.

VI — Third question

101. The last question to be referred for a preliminary ruling divides into four parts which I shall consider in turn.

102. The first two parts relate to the detailed rules for applying the principle established in *Gillespie*. The national court is asking how a pay rise is to be taken into account in calculating the woman's normal earnings during the relevant period. It also wishes to know whether the relevant period prescribed by national law ought to be changed.

103. Those questions are clearly of fundamental significance to employers in the United Kingdom. Following the judgment in this case they will have to calculate or review maternity pay in relation to all women awarded a pay rise before or during their maternity leave. Having regard to the large number of possible scenarios and difficulties, the national court and the defendant in the main proceedings [44] seek detailed guidance on how to do this.

104. However it seems to me that those questions can only be dealt with applying the principle of procedural autonomy. [45] In the absence of any Community legislation in this area, it is for the legal system of each Member State to lay down the detailed rules for applying the judgment delivered in this case, including any immediate implementing measures.

105. The second two parts of the question relate to the possible consequences of *Gillespie* in the event that the judgment requires that maternity pay take account of pay rises awarded before or during maternity leave but outside the relevant period. The Court of Appeal is asking whether Article 119 of the Treaty requires that, if it does, other factors occurring before or during maternity leave must be taken into account, in particular any loss of or reduction in earnings.

106. As we have seen, this question, though merely theoretical in the present case, is most apposite. Logical application of the principle established in *Gillespie* demands that statutory maternity pay include not only pay rises awarded before or during maternity leave but also reductions in and losses of earnings suffered during that period. [46] We have, however, seen how some of those adverse consequences may be obviated by using Directive 92/85. [47]

44 — See written observations submitted by the Woolwich, paragraph 8.

45 — On this principle see in particular my Opinion in the *Preston* case (Case C-78/98 [2000] ECR I-3201, paragraphs 38 et seq.).

46 — See points 67 to 74 of this Opinion.

47 — See points 94 to 96 of this Opinion.

VII — Conclusion

107. On the basis of the foregoing considerations I therefore propose that the Court reply to the questions referred to the Court for a preliminary ruling by the Court of Appeal of England and Wales, Civil Division, as follows:

(1) Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) on the principle of non-discrimination must be interpreted as meaning that, where statutory maternity benefit is calculated on the basis of a worker's average earnings during a specified period, that benefit need not include any pay rises awarded before or during the worker's period of maternity leave, but outside the relevant period laid down by national law.

(2) However, Article 11(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) requires that where statutory maternity benefit is calculated on the basis of the worker's average earnings during a specified period, that benefit must include any pay rises awarded before or during the worker's period of maternity leave.

(3) In the absence of any Community legislation in this sphere it is for each Member State to determine the detailed rules according to which the pay rises referred to in paragraph 2 are to be taken into account in the amount of the woman's statutory maternity pay.