OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 7 June 2001 [1]

Background

1. By order of 10 November 1999 the Juzgado de lo Social de Algeciras (Spain) referred to the Court for a preliminary ruling under Article 234 EC a series of questions on the interpretation of Article 10 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 breast feeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (hereinafter 'Directive 92/85'). [2]

Those questions arose within the context of proceedings instituted by a worker following the decision by her employer not to renew her earlier fixed-term employment contract on grounds which, according to the plaintiff, constitute discrimination on grounds of sex, in so far as they relate to her pregnancy.

Legal framework

Community legislation

2. Adopted pursuant to Article 118A (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), Directive 92/85 is one of the 'specific directives' implementing Council Directive 89/391/EEC (hereinafter: 'Directive 89/391'), [3] which has laid down 'general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance with national laws and/or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles' (Article 1(2)).

3. Pursuant to Article 15 of the latter Directive, '[p]articularly sensitive risk groups must be protected against the dangers which specifically affect them'. It is precisely in consideration of the fact that

1 — Original language: Italian.

2 — OJ 1992 L 348, p. 1.

3 — Council Directive 89/391/EEC of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

'pregnant workers, workers who have recently given birth or who are breast-feeding must be considered a specific risk group in many respects' (eighth 'recital in the preamble'), that the Council adopted Directive 92/85, aimed at encouraging improvements in the safety and health at work of workers in the periods prior and subsequent to giving birth.

4. Interest is focused here on Article 10 of that Directive because the questions of the national court are concerned with it. It states:

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

1. Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent.

2. If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing.

3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.'

5. For the purposes of the Directive (Article 2), the following definitions are given:

'(a) pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;

(b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;

(c) worker who is breast-feeding shall mean a worker who is breast-feeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice'.

6. Pursuant to Article 14(1), the date for transposing the Directive into the legal orders of the Member States was fixed at 19 October 1994.

7. Moreover, it should be noted that Council Directive 76/207/EEC (hereinafter: 'Directive 76/207') [4] also deals with this matter, containing, amongst other things, rules relating to dismissal. In accordance with Article 2(1) of that Directive, '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'.

8. Furthermore, especially with regard to effect of the principle examined here on conditions for dismissal, Article 3(1) of the same Directive states that: 'Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy'. For its part, Article 5(1) of the Directive specifies that: '[a]pplication 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'.

The national legislation

9. With regard to pertinent national legislation, it should firstly be noted that the principle of non-discrimination on the basis of sex is formally set out in Article 14 of the Spanish Constitution of 27 December 1978, which states:

'Spanish people are equal before the law; there may be no discrimination on grounds of birth, race, sex, religion, opinion, or any other condition or personal or social circumstance'.

10. More specifically, Article 55(5) of the Estatuto de los Trabajadores (Workers' Statute) [5] provides that: 'Any dismissal on one of the grounds of discrimination prohibited by the Constitution or by law or occurring in breach of the fundamental

4 — 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)

5 — Approved by Law No 8/80 of 10 March 1980 (BOE 14 March 1980) and amended by Legislative Royal Decree No 1/1995 of 24 March 1995 (BOE 29 March 1995).

rights and public freedoms of the worker shall be void'.

In such a case, pursuant to Article 55(6), the worker must immediately be reinstated and paid the wages due to him or her.

11. The Ley de Procedimiento Laboral (Law on Employment Procedure) [6] reproduces the provisions of Article 55(5) and (6) of the Estatuto de los Trabajadores in Article 108(2)(d), and Article 113(1).

12. Moreover, it must be pointed out that, at the time of the facts of this case, Directive 92/85 had not been transposed into the Spanish legal order. In fact, it was only with the 'Ley 39/1999 para Promover la Conciliación de la Vida Familiar y Laboral de las Personas Trabajadoras' (Law for reconciliation of family life with working life), [7] that, in order to implement the Directive, some amendments were made to the Estatuto de los Trabajadores.

6 — Approved by Legislative Royal Decree No 521/1990 of 27 April 1990 (BOE 2 May 1990).

7 — Law No 39 of 28 October 1999 (BOE 6 November 1999).

In particular, the following amendments were made to Article 55(5) (cited above):

'Dismissals shall also be void in the following cases:

where they occur during the period of suspension of a contract of employment on grounds of maternity, risks during pregnancy, adoption or fostering referred to in Article 45(1)(d) of this Law, or any dismissal notified on a date such that the period of notice ends within that period; when a pregnant worker is dismissed between the date of commencement of the pregnancy and the date of commencement of the period of suspension referred to in subparagraph (d) above, and the dismissal of workers who have applied for leave of a kind referred to in Article 37(4) and (5) of this Law, or are benefiting from such leave, or have applied for unpaid leave under Article 46(3) hereof.

The provisions of the foregoing paragraphs shall apply except where, in both cases, the decision terminating the employment relationship is declared valid for reasons unconnected with the pregnancy or with the exercise of the right to the leave, paid or unpaid, referred to above.'

Facts and procedure

13. The plaintiff, Mrs M.L. Jiménez Melgar, became an employee of the defendant, the Municipality of Los Barrios (hereinafter 'the Municipality'), on 3 June 1998 to work as a home help assisting retired persons without families, working 20 hours a week. The contract, which was a part-time contract for a period of three months, was extended twice until 2 December 1998. The employment relationship and remuneration were governed by the collective agreement for public and municipal workers.

14. On 3 December 1998 and, therefore, without any break, a new fixed-term part-time contract was concluded with the Municipality for help with cleaning and for the care of school-age children in the December/January 1998/99 school holidays for families experiencing financial difficulties. In this contract, which took effect from the date of its conclusion, the termination date was left blank, although, on 14 January 1999, the Municipality notified the plaintiff that 'pursuant to the terms of your contract, it will terminate on 2 February 1999'.

15. Once again without a break, the plaintiff signed a new employment contract on 3 February 1999, on a fixed-term and part-time basis for the performance of tasks of assistance, the care of and home help for children who had difficulties in reaching school, during the academic year 1998/99. Like the previous contract, no termination date was specified, but, on 14 April 1999, the Municipality notified the plaintiff that 'pursuant to the terms of your contract, it will terminate on 2 May 1999'.

16. For a fourth time, and once again without a break, on 3 May 1999 Mrs Jiménez Melgar signed a fixed-term part-time contract to perform the service of home help for large families experiencing difficulties in the schooling of their children of pre-school age, in relation to transport to public educational facilities in their locality during the school year 1998/99, its specific duration being stipulated as from 3 May 1999 until '...'. Just as it had done on the termination of the three previous contracts, on 12 May 1999 the Municipality sent the plaintiff a letter in the following terms:

'We hereby inform you that, in accordance with your contract, the contract will terminate on 2 June 1999. Nevertheless, during the statutory period of notice for termination, you will be informed of any possibility of extension or renewal thereof, and you should go to our personnel department before 2 June 1999 in order, if appropriate,

to sign the appropriate extension or renewal, or else to arrange the payment due to you for termination of the above-mentioned employment contract ...'.

17. It should be noted that, at the time of the termination of this last contract, Mrs Jiménez Melgar had already notified the Municipality that she was pregnant, although neither the exact date of this notification nor that of the beginning of her pregnancy are known (since, however, her son was born on 16 September 1999, the latter date can be traced back to January of the same year).

18. According to a report drawn up by the Municipal Counsellor responsible for Social Affairs, on 7 June 1999, Mrs Jiménez Melgar was summoned to the Municipality in order to sign a fifth part-time employment contract, to provide summer holiday cover for staff in the same category as her as home help. However, the plaintiff refused to sign the contract and the next day wrote to the Municipality objecting that her previous relationship with it had not been extinguished, because she had been dismissed in a manner that was illegal, involved discrimination and infringed her fundamental rights. The Municipality should not, therefore, be proceeding to sign a new contract, but merely to reinstate her in her job.

19. Therefore, on 7 July 1999, Mrs Jiménez Melgar instituted proceedings before the Juzgado de lo Social against the Municipality of Los Barrios in which she asked that her dismissal be annulled, that the defendant be ordered immediately to cease its discriminatory activities and that she be reinstated in her job, with the payment of outstanding wages until the date of service of the judgment (salarios de tramitación), and that the Municipality be ordered to pay a fine of ESP 100 000. It is, therefore, in the context of those proceedings that the court has made an order for a preliminary reference on the questions that we are examining today.

The questions submitted to the Court

20. In the order, the Juzgado de lo Social first of all examined the circumstances under which the employment relationship of Mrs Jiménez Melgar was entered into in order to ascertain whether the relevant contract had been concluded illegally. The features of continuity over time and the similarity of the work done do indeed justify the suspicion that the Municipality had misused the legislation on employment contracts with a view to concealing a relationship that, in reality, had the characteristics of a single contract for an indefinite period behind a series of fixed-term contracts. However, the Spanish court preferred for the time being to set aside this suspicion, reserving the right to go back to it after the Court's ruling on these preli-

minary questions. It therefore concentrated on the aspect of discrimination on grounds of sex, observing that if, on the evidence, it was ascertained that the pregnancy of the worker was the real cause of her dismissal, the employment contract could be declared void solely on the basis of national constitutional and legislative rules. However, as there were doubts as to the meaning and scope of Article 10 of Directive 92/85, the Juzgado de lo Social considered it preferable to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 10 of Directive 92/85/EEC sufficiently clear, precise and unconditional to be directly effective?

2. In providing that "Member States shall take the necessary measures to prohibit the dismissal of workers... [who are pregnant, have given birth or are breast-feeding], during the period from the beginning of their pregnancy to the end of the maternity leave..., save in exceptional cases not connected with their condition", does Article 10 of the Directive require the Member States to lay down, on a specific and exceptional basis, the available grounds for dismissing a worker who is pregnant, has given birth or who is breast-feeding, so that they must introduce into national legislation, together with the general rules on the extinguishment of employment contracts, a further special, exceptional and more limited set of rules expressly for those cases in which the worker is pregnant, has given birth or is breast-feeding?

3. What repercussions does Article 10 of the Directive have regarding non-renewal by an employer of a fixed-term contract of a woman who is pregnant under the same circumstances as prevailed in relation to earlier contracts? Does Article 10 of the Directive affect the protection enjoyed by a pregnant woman in the context of temporary employment relationships, and if so, in what way, according to what parameters and to what extent?

4. Where Article 10 of the Directive states that the dismissal of a worker who is pregnant, has given birth or is breast-feeding is to take place "where applicable, provided that the competent authority has given its consent", does the Directive require that a worker who is pregnant, has given birth or is breast-feeding may be dismissed only by means of a special procedure in which the appropriate competent authority gives its consent prior to the dismissal which the employer seeks?'

Legal arguments

Admissibility

21. As a preliminary point, the admissibility of the questions posed by the national court must be examined, given that this has been contested by more than one party during the course of the proceedings.

22. According to the Spanish Government (which was supported on this at the hearing by the Irish Government), given the findings of fact and law, the conditions are not present in this case for holding these questions admissible. The national court could ascertain, solely on the basis of national law referred to above, that the employment relationship between Mrs Jiménez Melgar and the Municipality of Los Barrios was, in reality, a contract for an indefinite period, given that the plaintiff was employed, without any break, under a series of temporary contracts for carrying out the same tasks. On the other hand, while contesting that, in this case, the plaintiff was dismissed because of her pregnancy, the Spanish Government points out that, in any case, even if a finding were made to the contrary, she could equally be reinstated in her job by the national court, still applying only national law, and her employer ordered to pay her outstanding wages. It concludes that if the objection is raised that the contract was, in reality, a contract for an indefinite period and/or that the dismissal was motivated by the plaintiff's pregnancy, according to the Spanish Government, the case pending before the national court could be resolved solely on the basis of national legislation, which is, moreover, assumed to be in conformity with Directive 92/85. Therefore, the reference to the Court for a preliminary ruling should be considered inopportune, irrelevant and, in any case, premature at this stage and not necessary for reaching a decision in the main action.

23. Similar considerations were put forward by the Commission as well, which has also expressed doubts as to the usefulness of the reference, pointing out, in particular, that the Spanish court recognises that the dispute could be resolved without any great difficulty solely on the basis of national law. Likewise, the Commission also maintains that the questions posed by the Juzgado de lo Social have been raised at a premature stage of the national legal proceedings, when the court has not as yet ascertained whether the dispute turns on the legality of the contract or the cause of dismissal (the pregnancy of the worker).

24. Although not completely without foundation, I do not believe that the objections I have just referred to are sufficient to justify a finding that the reference under examination is inadmissible. In particular, it appears

to me that they do not take into account the fact that the Spanish court itself was concerned with forestalling them, explaining at some considerable length why it nevertheless deemed it necessary to request the assistance of the Court in the interpretation of Article 10 of the Directive and to make a reference specifically at this stage of the proceedings. There may be some disagreement as to whether its arguments are wholly persuasive and whether the procedural route chosen by the Juzgado de lo Social was the most appropriate, or, at least, the simplest and most speedy. But, in my opinion, that would mean criticising the reasoning underlying the choices made, I would repeat, in an explicit and reasoned fashion by the national court; that would mean pushing the appraisal of the court's determination beyond the limits that the Court of Justice itself has established in that regard.

25. In fact, as is well known, it is established case-law of the Court that 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court'; it is always for the national court to decide at which stage of the proceedings a preliminary question should be referred to the Court. The Court may decline jurisdiction only in exceptional cases when appraising the findings of the national court, excluding if necessary the admissibility of the reference in particular, with regard to what interests us here, 'where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'. [8]

26. In this case, however, despite the concern mentioned above, it would be difficult to go so far as to say that the questions posed by the Juzgado de lo Social clearly bear no relation to the actual facts or purpose of the main action, or that they are merely hypothetical in nature, or that the Court does not have the material necessary to give a useful answer to the questions submitted.

27. I therefore consider that the questions posed by the Juzgado de lo Social should be held admissible and I shall therefore proceed to examine them.

8 — See Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20. To the same effect see, from among many, Case C-437/97 *EKW and Wein & Co.* [2000] ECR I-1157, paragraph 52; Case C-421/97 *Taranik* [1999] ECR I-3633, paragraph 33; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; and Case 348/89 *Mecanarte* [1991] ECR 3277, paragraph 49.

The first question

28. First, the national court asks whether Article 10 of Directive 92/85 is directly effective or not.

29. In this regard, it hardly needs mentioning that, according to the case-law of the Court of Justice going back over some time, if the provisions of a Directive appear to be sufficiently clear, precise and unconditional, they are capable of producing direct effects, with the result that individuals can seek their enforcement before the courts of a Member State whenever the latter has not brought its national law into conformity with the Directive within the prescribed period, or whenever it has been incorrectly implemented, and this may occur where that State acts as employer or public authority. [9] Therefore, the failure to transpose or incorrect transposition constitutes one of the premisses of the theory of direct effect.

30. In this case, according to the order for a preliminary ruling, the question whether Article 10 has direct effect may be of importance precisely because of the late or incomplete transposition of the Directive, given that, as we have seen, even though it conformed in principle with the objective of Directive 92/85, the Spanish legislation in force at the material time was formulated in more general terms than the provisions of the Directive. It was only with the Ley 39/1999 para Promover la Conciliación de la Vida Familiar y Laboral de las Personas Trabajadoras that the Spanish legislature adopted the measures necessary to implement the Directive; and, moreover, in a manner which the national court does not believe can be considered with certainty to be in full conformity with its provisions.

31. From their point of view, both the Spanish Government and the Commission maintain, repeating the objections set out above, that the answer to the question under examination is not necessary for the decision in the main action, as is, however, required by Article 234 EC. With specific reference to the previously mentioned grounds for this question, then, they contend that the national legislation in force at the time of the facts of the case — and, therefore, even prior to the adoption of Law No 39/1999, intended to implement the Directive — was substantively in conformity with the objective of protecting working mothers because, nonetheless, it provided that a discriminatory dismissal was void and that the dismissed worker had to be reinstated in her job and her outstanding wages paid.

32. I have already expressed my view on the admissibility of the questions in this case and can only repeat it in relation to the question now under discussion. Whilst

9 — See, from among many, Case 152/84 *Marshall* [1986] ECR 723.

recognising that its usefulness may raise some doubts, I do not believe that the national court can be denied an answer once it has indicated the grounds for the question and has expressed reasoned doubts (on which see point 36 below) as to the conformity of the Spanish legislation in force at the time of the facts of the case with Community law. In any case, it does not appear to me to be worth pressing this point too much, given that, as far as the value of the answer is concerned, there is substantial unanimity of opinion on the fact that Article 10 of the Directive has direct effect.

33. As already stated, under the wording of the provision Member States are required to take 'the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1)...'. The obligation placed on Member States (like the corresponding right of those concerned) is, therefore, unconditional and is defined with clarity and precision, regarding both the subject-matter (prohibition of dismissal), and the parties protected (workers who, within the meaning of Article 2 and in conformity with national legislation and/or national practice, have informed their employer of their condition), and regarding the period to be taken into consideration (the prohibition of dismissal covers a period of time that can be determined with precision, starting from the date of the beginning of the pregnancy to the end of the maternity leave provided for in Article 8(1) [10]). There are therefore good grounds for concluding that Article 10 of Directive 92/85 has direct effect.

34. The case-law of the Court to some extent helps to confirm the correctness of that conclusion, in particular the judgments in *Webb* and *Brown*. In those judgments, the Court on the one hand stresses how the Directive has 'provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave', and, on the other, it underlines the unconditional nature of Article 10, which 'provides that there is no exception to, or derogation from, the prohibition of dismissal of pregnant women during that period, save in exceptional cases not connected with their condition'. [11]

35. As a consequence, I propose that the first question be answered to the effect that Article 10 of Directive 92/85, in providing that the Member States must take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases not connected with their condition,

10 — Under that provision, workers must be able to benefit from maternity leave of at least fourteen uninterrupted weeks, allocated before and/or after confinement in accordance with national legislation and/or practice.

11 — Case C-32/93 *Webb* v *EMO Air Cargo* [1994] ECR I-3567, paragraphs 21 and 22, and Case C-394/96 *Brown* v *Rentokil Ltd* [1998] ECR I-4185, paragraph 18.

imposes a clear, precise and unconditional obligation, capable of conferring rights on which individuals can rely before national courts.

The second question

36. Referring to the judgment in *Brown*, in which the Court emphasised the specific nature of the protection for women provided for by the Directive, [12] the national court points out that that the legislation in force at the time of the facts of the case did not provide for the detailed regulation of the grounds for dismissal, because it was only with Law No 39/1999 that the Spanish legislature provided for the transposition of Directive 92/85. Accordingly, with the second question, the Juzgado de lo Social asks whether that legislative framework conforms to the Directive. It wishes to know whether, in permitting derogation from the rule of the prohibition of dismissal of workers protected in 'exceptional cases not connected with their condition which are permitted under national legislation and/or practice', Article 10(1) of the Directive also obliges Member States to regulate, in a specific way, the grounds for dismissal of a worker who is pregnant, has recently given birth or is breastfeeding. In other words, it wishes to know whether the Directive imposes the obligation of introducing a special, exceptional and more limited set of rules into national legislation for cases in which the worker is pregnant, has recently given birth or is breastfeeding, alongside the general rules for terminating an employment relationship. If that were so, the Directive would not have been correctly and fully transposed into the Spanish legal order.

37. As was the case in respect of the previous question, there has also been broad consensus on this question among the parties who have presented observations in this case regarding the fact that both a literal and a schematic interpretation suggest that no such obligation can be derived from the Directive. The plaintiff herself, even though she had maintained in her written observations that Article 10 of the Directive imposed an obligation to set out, in a specific, exceptional and limited manner, the possible grounds for dismissing protected workers, changed her position at the hearing, no longer considering that a separate listing of those grounds was necessary.

38. It seems clear to me that the aim of Article 10(1) is to emphasise the exceptional nature of the dismissal and, in particular, the prohibition on linking it, where relevant, to the worker's pregnancy, confinement or breastfeeding. For that reason too, Article 10(2) expressly requires that, if a protected worker is dismissed during the period referred to in Article 10(1), 'the employer must cite duly substantiated grounds for her dismissal in

12 — See Case C-394/96 *Brown*, cited in footnote 11 above, paragraph 18.

writing'. However, outside the scope of application of that prohibition, dismissal will be possible, always in exceptional cases, on other grounds permitted under national legislation and/or practice — grounds for dismissal that can be invoked, therefore, in general for any worker, such as, for example, dismissal on disciplinary grounds. In order to guarantee the result sought by the provision, however, and in particular to ensure that the prohibitions and the restrictions imposed by it are fully complied with, there is no reason to infer that Member States are required to provide a special and distinct list of grounds for dismissal that can be invoked in regard to protected workers; in any event, there is nothing to suggest that that was the intention of the provision. Of course, given that the Directive only imposes minimum rules, that does not prevent Member States from choosing to adopt measures that offer greater protection and, therefore, also to establish a specific and detailed set of rules for the grounds of dismissal of protected workers.

39. On this point, therefore, I propose that the reply to the Spanish court should be to the effect that Article 10(1) of Directive 92/85 does not require the Member States to introduce into national legislation, alongside the general rules on the termination of employment relationships, a further special, exceptional, and more limited set of rules specifically for those cases in which the worker is pregnant, has given birth or is breast-feeding.

The third question

40. In its third question, the national court asks whether Article 10 of Directive 92/85 applies for the protection of a worker who is pregnant to the non-renewal by an employer of a fixed-term contract under the same circumstances as prevailed in relation to earlier contracts; more generally, it wants to know whether and, if so, in what way, Article 10 also applies to fixed-term employment relationships.

41. There have also been some doubts expressed in respect of this question, in the written observations and at the hearing, regarding how useful a reply will be in resolving the main action. In particular, the Spanish Government and the plaintiff contend that there is no need to answer this question, as Mrs Jimenéz Melgar, owing to the characteristics of her employment relationship referred to on several occasions, should not be regarded as a temporary or casual worker, but as a worker with an employment relationship for an indefinite period. Merely on the basis of its national law, [13] the Spanish court could, therefore, establish that, in this regard, the employer had broken the law and hold that the employment contract in question was for an indefinite period. To ask, therefore,

13 — Article 15 of the Estatuto de los Trabajadores provides that temporary contracts that have been entered into illegally are to be deemed to be contracts entered into for an indefinite period.

whether the non-renewal of an employment contract of a worker protected by the Directive was possible and, if so, to what extent, would, under these conditions, be wholly superfluous.

42. However, in my opinion, these objections are not well targeted, because they overlook the fact that not only has the national court not yet decided on whether the employment relationship in question is temporary or not but, rightly or wrongly, it seems to want to make that decision conditional on the answer that the Court will give to its questions. In other words, it appears to me to follow from a careful reading of the order that, faced with the possible options before it, that court wishes to have at its disposal all the information that will help it to assess every possible implication of its choices and, for that reason, it has decided to make a reference to the Court at a stage which might otherwise indeed appear to be premature. If that supposition is correct, it follows that the doubts expressed about the usefulness of the question under examination are not justified and that it is therefore necessary to furnish the national court, as far as possible, with the requested information on which to base its assessment.

43. That said, I must, however, observe that the question under examination does not appear entirely clear. On a literal reading, in any case, it seems to contain two separate questions: one that can be inferred from the second part of the question, concerning the applicability of Article 10 of Directive 92/85 *in the course of* a fixed-term contract of employment; the other, set out more clearly in the first part of the question, concerning, instead, the applicability of the provision also in the case of the *non-renewal* of a contract of that kind.

44. As far as the first part of the question is concerned, it seems to me that the Spanish court wants to be reassured that the protection guaranteed to workers by Article 10 also refers to temporary work contracts. On that point, however, it seems to me there can be no doubt: neither the wording nor the clear purpose of the provision suggest that those contracts should be excluded from its scope of application. Therefore, every working mother — whether on a fixed-term contract or contract for an indefinite period — is entitled to the protection provided by the Directive; and, on this matter, it seems to me, there is substantial agreement among the parties taking part in these proceedings.

45. Furthermore, I must add that the prohibition against the dismissal of working mothers is also guaranteed by Directive 76/207 which, as I mentioned above, prohibits any form of discrimination on grounds of sex, even with regard to the conditions inherent in the dismissal.

46. The foregoing is also confirmed by Community case-law. The Court of Justice has clearly stated that, inasmuch as it only concerns women, dismissal motivated by pregnancy or for reasons solely based on that condition is direct discrimination on grounds of sex and is in breach of Articles 2(1) and 5(1), of Directive 76/207. With specific reference to the provision that the Court has been called upon to interpret; it has stated that: 'It was precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, women who have recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the Community legislature, pursuant to Article 10 of Council Directive 92/85/EEC of 19 October 1992... provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Article 10 of Directive 92/85 provides that there is to be no exception to, or derogation from, the prohibition of dismissal of pregnant women ... '. [14]

47. In conclusion, working mothers have dual legal protection connected to the employment relationship: protection of a more general nature deriving from the prohibition of discrimination on grounds of sex, set out in Directive 76/207; and more specific protection offered by Directive 92/85, which, in Article 10, prohibits dismissal.

48. Therefore, having clarified the fact that the prohibition of dismissal of working mothers applies as much to contracts for fixed-term employment as for employment contracts for an indefinite period, I shall now move on to examine the third part of the question. This involves, essentially, ascertaining whether the protection provided by Article 10 of Directive 92/85 also covers a prohibition against refusing to renew the fixed-term employment contract of a pregnant worker on the same conditions as previous contracts.

49. Considering that this provision is very clear in restricting the protection of working mothers to cases of dismissal, an affirmative answer to this question would be possible only if the non-renewal of the temporary employment contract could be regarded as equivalent to dismissal. It seems to me, however, that to regard them as equivalent would be really hazardous, because the natural expiry of the term of a contract, if it is in conformity with the legislation of a Member State, cannot of itself be treated as the breaking off of the employment contract by dismissal. The protection offered by Directive 92/85 is aimed at guaranteeing 'the maintenance of

14 — See Case C-394/96 *Brown*, cited in footnote 11 above, paragraph 18.

rights linked to the employment contract' and, therefore, obviously implies that the contract exists; that is, of course, not the case if the contract has expired. Therefore, although it is true that an employment contract cannot be interrupted because of the pregnancy of the worker, that is not the case where the contract has terminated as a result of the natural expiry of the term of its duration. In that case, Article 10 of the Directive cannot have any relevance.

50. That said, however, the subject cannot be considered closed, because the question posed must also be assessed in the light of Directive 76/207. As the Commission in fact observed, both in its written observations and at the hearing, the non-renewal of a temporary contract for reasons linked to the pregnancy of the worker, in as far as it is equivalent to a refusal to employ, could constitute discrimination on grounds of sex, prohibited by Articles 2 and 3 of Directive 76/207. In other words, as far as we are given to understand, the Commission recognises that Article 10 of Directive 92/85 does not apply to the case of non-renewal of a temporary contract but considers that the provisions of Directive 76/207 may, however, be referred to.

51. In support of its argument, the Commission cites the decisions in *Dekker* and *Mahlburg*. In the former, the Court held, with regard to an employment relationship for an indefinite period, that a refusal to employ a worker considered suitable for the job in question because of her pregnancy constitutes direct discrimination on grounds of sex and is prohibited by Articles 2(1) and 3(1) of Directive 76/207. [15] In the more recent judgment in *Mahlburg*, concerning the case of an employee working at a hospital under a fixed-term contract who requested to be appointed under a contract for an indefinite period in a post that had in the meantime become vacant, the Court further specified that those provisions preclude 'a refusal to appoint a pregnant woman to a post for an indefinite period on the ground that a statutory prohibition on employment attaching to the condition of pregnancy prevents her from being employed in that post from the outset and for the duration of the pregnancy'. [16]

52. Although the case-law referred to concerns cases of refusal to employ in a post for an indefinite period, it seems to me that there are features which are of use regarding the case of a fixed-term contract. Although it is true that non-renewal of an employment contract which has reached the end of its term cannot be regarded as a dismissal, or be automatically treated as a refusal to employ an applicant because of

15 — Case 177/88 *Dekker* [1990] ECR 3941.

16 — Case C-207/98 *Mahlburg* [2000] ECR I-549, paragraph 30.

her pregnancy, it cannot, nevertheless, be excluded that this may, *de facto*, be the real cause of the non-renewal. In particular, where the non-renewal of a contract forms part of a series of successive temporary contracts, there may be all the more reason for presuming grounds of that kind.

53. Were it, therefore, to appear that non-renewal was determined solely by the pregnancy of the worker, it can then be assumed that there was direct discrimination on grounds of sex, prohibited by Directive 76/207. Naturally, such discrimination can only be ascertained by the national court on the basis of the factual and legal evidence available to it.

54. In the light of those considerations, I, therefore, propose that the third question put by the Juzgado de lo Social be answered to the effect that the prohibition of dismissal provided for in Article 10 of Directive 92/85 for the benefit of pregnant workers and workers who have recently given birth or are breast feeding applies both to employment relationships for an indefinite period and to fixed-term employment relationships. Even if it forms part of a series of successive contracts, the non-renewal of a temporary contract for work when its term has expired cannot, however, be treated of itself as equivalent to a dismissal prohibited by Article 10 unless it is motivated by the pregnancy of the worker; in that case, there would indeed be direct discrimination on grounds of sex, prohibited by Articles 2(1) and 3(1) of Directive 76/207. It is for the national court to ascertain whether there has been any such discrimination on the basis of the factual and legal evidence at its disposal.

The fourth question

55. Finally, with the fourth question, the Juzgado de lo Social wishes to know whether the fact that Article 10(1) of Directive 92/85/EEC states that the dismissal in exceptional cases of a protected worker has to take place 'provided that the competent authority has given its consent' means that Member States are obliged to provide for a special procedure which enables the competent authority to give its consent prior to the dismissal. The national court is, in fact, of the opinion that, if this were the case, the plaintiff in the main action will have been deprived of that guarantee, with the result that the dismissal should be considered void, even regardless of the fact that the employer could prove that it had not made its decision because of her pregnancy.

56. In her written observations and at the hearing, the plaintiff attached particular importance to this point, maintaining that the Directive obviously imposes that obligation in order to set up preventive monitoring of the existence of reasons for dismissal permitted by Article 10 of the Directive. Such a finding should not be entrusted to the employer, which is a party to the dispute, but to a third and impartial authority which could be the competent judicial authority for the resolution of disputes involving labour law.

57. However, that remained an isolated position; both the Commission and the Member States which submitted observations consider that a negative answer should be given to this question, because the Directive does not impose any obligation to obtain prior authorisation from a national authority with special competence. In particular, the Irish Government points out that an obligation of that kind, requiring important changes in the legal orders of some Member States and having an effect on the principle of their autonomy in adapting their procedural systems, would require a clear and explicit provision which, however, is completely missing in the Directive.

58. Nothing in the Directive supports the plaintiff's argument, starting from the wording of the provision itself, given that the phrase 'provided that the competent authority has given its consent' is preceded by the expression 'and, where applicable', confirming the mere possibility of the condition. In reality, as the Commission pointed out, the reference to the consent of the competent authority has its origin in the fact that provision is in fact made in some Member States' legislation for procedures of that kind, [17] so that, precisely in order to take that fact into account, Article 10 of the Directive provides that *(only)* where there is a specific procedure at national level requiring prior consent for dismissal on the part of the competent authority, this must in fact have taken place.

59. In the light of the foregoing considerations, I propose that the fourth question be answered to the effect that Article 10(1) of Directive 92/85 does not oblige the Member States to institute a special procedure in which the competent national authority, in the exceptional cases allowed, gives its prior consent to the dismissal, sought by the employer, of a pregnant worker or a worker who has recently given birth or is breast-feeding.

17 — That is the case, in particular, in Portugal, Greece and the Federal Republic of Germany, as is clear from the Report of the Commission on the transposition of Directive 92/85/EEC (COM (1999) 100 final of 15 March 1999).

Conclusion

60. On the basis of the foregoing considerations, I suggest the following answers to the questions submitted by the Juzgado de lo Social:

(1) Article 10 of Directive 92/85/EEC, in providing that Member States must take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases not connected with their condition, imposes a clear, precise and unconditional obligation, capable of conferring rights on which individuals can rely before national courts.

(2) Article 10(1) of Directive 92/85 does not require the Member States to introduce into national legislation, alongside the general rules on the termination of employment relationships, a further special, exceptional and more limited set of rules specifically for those cases in which the worker is pregnant, has given birth or is breast-feeding.

(3) The prohibition on dismissal provided for in Article 10 of Directive 92/85 for the benefit of pregnant workers and workers who have recently given birth or

are breast-feeding applies both to employment relationships for an indefinite period and to fixed-term employment relationships. Even if it forms part of a series of successive contracts, the non-renewal of a temporary contract for work when its term has expired cannot, however, be treated of itself as equivalent to dismissal prohibited by Article 10 unless it his motivated by the pregnancy of the worker; in that case, there would indeed be direct discrimination on grounds of sex, prohibited by Articles 2(1) and 3(1) of Directive 76/207. It is for the national court to ascertain whether there has been any such discrimination on the basis of the factual and legal evidence at its disposal.

(4) Article 10(1) of Directive 92/85 does not oblige the Member States to institute a special procedure in which the competent national authority, in the exceptional cases allowed, gives its prior consent to the dismissal, sought by the employer, of a pregnant worker or a worker who has recently given birth or is breast-feeding.