

## [Avis juridique important](#)

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# 61983J0184

**Judgment of the Court of 12 July 1984. - Ulrich Hofmann v Barmer Ersatzkasse. - Reference for a preliminary ruling: Landessozialgericht Hamburg - Germany. - Equal treatment for men and women - Maternity leave. - Case 184/83.**

*European Court reports 1984 Page 03047*  
*Spanish special edition Page 00719*

[Summary](#)

[Parties](#)

[Subject of the case](#)

[Grounds](#)

[Decision on costs](#)

[Operative part](#)

## Keywords

*SOCIAL POLICY - MALE AND FEMALE WORKERS - ACCESS TO EMPLOYMENT AND WORKING CONDITIONS - EQUAL TREATMENT - DIRECTIVE 76/207 - PURPOSE - PROTECTION OF WOMEN IN RELATION TO PREGNANCY AND MATERNITY - SCOPE - DISCRETION OF MEMBER STATES - ADDITIONAL MATERNITY LEAVE GRANTED TO THE MOTHER - GRANT OF SUCH LEAVE TO THE FATHER - DUTY OF MEMBER STATES - NONE*

*( COUNCIL DIRECTIVE 76/207 , ARTS 1 , 2 ( 3 ) AND ( 4 ) , AND 5 ( 1 ) )*

## Summary

*1 . DIRECTIVE 76/207 IS NOT DESIGNED TO SETTLE QUESTIONS CONCERNING THE ORGANIZATION OF THE FAMILY , OR TO ALTER THE DIVISION OF RESPONSIBILITY BETWEEN PARENTS .*

2. BY RESERVING TO MEMBER STATES THE RIGHT TO RETAIN OR INTRODUCE PROVISIONS WHICH ARE INTENDED TO PROTECT WOMEN IN CONNECTION WITH ' ' PREGNANCY AND MATERNITY ' ' , DIRECTIVE 76/207 RECOGNIZES THE LEGITIMACY , IN TERMS OF THE PRINCIPLE OF EQUAL TREATMENT , OF PROTECTING A WOMAN ' S NEEDS IN TWO RESPECTS . FIRST , IT IS LEGITIMATE TO ENSURE THE PROTECTION OF A WOMAN ' S BIOLOGICAL CONDITION DURING PREGNANCY AND THEREAFTER UNTIL SUCH TIME AS HER PHYSIOLOGICAL AND MENTAL FUNCTIONS HAVE RETURNED TO NORMAL AFTER CHILDBIRTH ; SECONDLY , IT IS LEGITIMATE TO PROTECT THE SPECIAL RELATIONSHIP BETWEEN A WOMAN AND HER CHILD OVER THE PERIOD WHICH FOLLOWS PREGNANCY AND CHILDBIRTH , BY PREVENTING THAT RELATIONSHIP FROM BEING DISTURBED BY THE MULTIPLE BURDENS WHICH WOULD RESULT FROM THE SIMULTANEOUS PURSUIT OF EMPLOYMENT .

3. MATERNITY LEAVE GRANTED TO A WOMAN ON EXPIRY OF THE STATUTORY PROTECTIVE PERIOD FALLS WITHIN THE SCOPE OF ARTICLE 2 ( 3 ) OF DIRECTIVE 76/207 , INASMUCH AS IT SEEKS TO PROTECT A WOMAN IN CONNECTION WITH THE EFFECTS OF PREGNANCY AND MOTHERHOOD . THAT BEING SO , SUCH LEAVE MAY LEGITIMATELY BE RESERVED TO THE MOTHER TO THE EXCLUSION OF ANY OTHER PERSON , IN VIEW OF THE FACT THAT IT IS ONLY THE MOTHER WHO MAY FIND HERSELF SUBJECT TO UNDESIRABLE PRESSURES TO RETURN TO WORK PREMATURELY .

4. DIRECTIVE 76/207 LEAVES MEMBER STATES WITH A DISCRETION AS TO THE SOCIAL MEASURES WHICH THEY ADOPT IN ORDER TO GUARANTEE , WITHIN THE FRAMEWORK LAID DOWN BY THE DIRECTIVE , THE PROTECTION OF WOMEN IN CONNECTION WITH PREGNANCY AND MATERNITY AND TO OFFSET THE DISADVANTAGES WHICH WOMEN , BY COMPARISON WITH MEN , SUFFER WITH REGARD TO THE RETENTION OF EMPLOYMENT . SUCH MEASURES ARE CLOSELY LINKED TO THE GENERAL SYSTEM OF SOCIAL PROTECTION IN THE VARIOUS MEMBER STATES . THE MEMBER STATES THEREFORE ENJOY A REASONABLE MARGIN OF DISCRETION AS REGARDS BOTH THE NATURE OF THE PROTECTIVE MEASURES AND THE DETAILED ARRANGEMENTS FOR THEIR IMPLEMENTATION .

5. ARTICLES 1 , 2 AND 5 ( 1 ) OF DIRECTIVE 76/207 MUST BE INTERPRETED AS MEANING THAT A MEMBER STATE MAY , AFTER THE PROTECTIVE PERIOD HAS EXPIRED , GRANT TO MOTHERS A PERIOD OF MATERNITY LEAVE WHICH THE STATE ENCOURAGES THEM TO TAKE BY THE PAYMENT OF AN ALLOWANCE . THE DIRECTIVE DOES NOT IMPOSE ON MEMBER STATES A REQUIREMENT THAT THEY SHALL , AS AN ALTERNATIVE , ALLOW SUCH LEAVE TO BE GRANTED TO FATHERS , EVEN WHERE THE PARENTS SO DECIDE .

## Parties

*IN CASE 184/83*

*REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE LANDESSOZIALGERICHT ( HIGHER SOCIAL COURT ) HAMBURG FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN*

*ULRICH HOFMANN , RESIDING IN HAMBURG ,*

*AND*

*BARMER ERSATZKASSE , WUPPERTAL ,*

## **Subject of the case**

*ON THE INTERPRETATION OF ARTICLES 1 , 2 AND 5 ( 1 ) OF COUNCIL DIRECTIVE 76/207 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 ,*

## **Grounds**

*1 BY AN ORDER OF 9 AUGUST 1983 , RECEIVED AT THE COURT REGISTRY ON 29 AUGUST 1983 , THE LANDESSOZIALGERICHT ( HIGHER SOCIAL COURT ) HAMBURG REFERRED TO THE COURT FOR A PRELIMINARY RULING UNDER ARTICLE 177 OF THE EEC TREATY TWO QUESTIONS CONCERNING THE INTERPRETATION OF COUNCIL DIRECTIVE 76/207/EEC OF 9 FEBRUARY 1976 ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , VOCATIONAL TRAINING AND PROMOTION , AND WORKING CONDITIONS ( OFFICIAL JOURNAL 1976 , L 39 , P . 40 ) , IN ORDER TO DETERMINE WHETHER PARAGRAPH 8A OF THE MUTTERSCHUTZGESETZ ( LAW FOR THE PROTECTION OF WORKING MOTHERS ) OF 18 APRIL 1968 , AS AMENDED BY THE LAWS OF 25 JUNE 1979 AND 22 DECEMBER 1981 ( BUNDESGESETZBLATT I , 1968 , P . 315 , 1979 , P . 797 , AND 1981 , P . 1523 ) , IS COMPATIBLE WITH COMMUNITY LAW .*

*2 THE ORDER MAKING THE REFERENCE TO THE COURT DISCLOSES THAT MR HOFMANN , THE PLAINTIFF IN THE MAIN PROCEEDINGS , IS THE FATHER OF AN ILLEGITIMATE CHILD , OF WHICH HE HAS ACKNOWLEDGED PATERNITY . HE OBTAINED UNPAID LEAVE FROM HIS EMPLOYER FOR THE PERIOD BETWEEN THE EXPIRY OF THE STATUTORY PROTECTIVE PERIOD OF EIGHT WEEKS WHICH WAS AVAILABLE TO THE MOTHER AND THE DAY ON WHICH THE CHILD REACHED THE AGE OF SIX MONTHS ; DURING THAT TIME HE TOOK CARE OF THE CHILD WHILE THE MOTHER CONTINUED HER EMPLOYMENT .*

3 AT THE SAME TIME THE PLAINTIFF SUBMITTED TO THE BARMER ERSATZKASSE , THE DEFENDANT IN THE MAIN PROCEEDINGS , A CLAIM FOR PAYMENT , DURING THE PERIOD OF MATERNITY LEAVE PROVIDED FOR BY PARAGRAPH 8A OF THE MUTTERSCHUTZGESETZ , OF AN ALLOWANCE PURSUANT TO THE COMBINED PROVISIONS OF PARAGRAPH 13 THEREOF AND PARAGRAPH 200 ( 4 ) OF THE REICHSVERSICHERUNGSORDNUNG ( GERMAN INSURANCE REGULATION ).

4 THE DEFENDANT REFUSED THE PLAINTIFF ' S REQUEST , AND HIS APPEAL AGAINST THAT REFUSAL WAS ALSO UNSUCCESSFUL . AN ACTION BROUGHT BEFORE THE SOZIALGERICHT ( SOCIAL COURT ) HAMBURG WAS DISMISSED BY A JUDGMENT OF 19 OCTOBER 1982 , ON THE GROUND THAT THE WORDING OF PARAGRAPH 8 ( A ) OF THE MUTTERSCHUTZGESETZ AND THE INTENTION OF THE LEGISLATURE INDICATED THAT ONLY MOTHERS COULD CLAIM MATERNITY LEAVE . ACCORDING TO THE SOZIALGERICHT , IT WAS THE DELIBERATE INTENT OF THE LEGISLATURE NOT TO CREATE ' ' PARENTAL LEAVE ' ' .

5 THE PLAINTIFF APPEALED AGAINST THAT DECISION TO THE LANDESSOZIALGERICHT HAMBURG , ARGUING THAT THE MATERNITY LEAVE INTRODUCED BY THE MUTTERSCHUTZGESETZ WAS NOT IN FACT DESIGNED TO PROTECT THE MOTHER ' S HEALTH BUT WAS CONCERNED EXCLUSIVELY WITH THE MOTHER ' S CARE OF THE CHILD . IN THE COURSE OF THE PROCEEDINGS BEFORE THE LANDESSOZIALGERICHT , HE REQUESTED PRIMARILY THAT THE PROCEEDINGS SHOULD BE STAYED AND THAT CERTAIN QUESTIONS ON THE INTERPRETATION OF DIRECTIVE 76/207 SHOULD BE REFERRED TO THE COURT OF JUSTICE .

6 IN VIEW OF THE DOUBTS WHICH HAD ARISEN AS TO THE COMPATIBILITY OF THE NATIONAL LEGISLATION ON MATERNITY LEAVE WITH THE AFORESAID DIRECTIVE , THE LANDESSOZIALGERICHT GRANTED MR HOFMANN ' S REQUEST , PARTICULARLY SINCE IT HAD LEARNED THAT THE COMMISSION HAD BROUGHT PROCEEDINGS ON THE SAME ISSUE AGAINST THE FEDERAL REPUBLIC OF GERMANY CLAIMING THAT THE LATTER HAD FAILED TO FULFIL ITS TREATY OBLIGATIONS ( CASE 248/83 ). IT THEREFORE REFERRED TWO QUESTIONS TO THE COURT , WORDED AS FOLLOWS :

' ' 1 . ARE ARTICLES 1 , 2 AND 5 ( 1 ) OF COUNCIL DIRECTIVE 76/207/EEC ON THE IMPLEMENTATION OF THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , VOCATIONAL TRAINING AND PROMOTION , AND WORKING CONDITIONS ( OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES , L 39 , PP . 40 TO 42 ) INFRINGED IF , ON THE EXPIRY OF THE EIGHT-WEEK PROTECTIVE PERIOD FOR WORKING MOTHERS FOLLOWING CHILDBIRTH , A PERIOD OF LEAVE WHICH THE STATE ENCOURAGES BY PAYMENT OF THE NET REMUNERATION OF THE PERSON CONCERNED , SUBJECT TO A MAXIMUM OF DM 25 PER CALENDAR DAY , AND WHICH LASTS UNTIL THE DAY ON WHICH THE CHILD REACHES THE AGE OF SIX MONTHS CAN BE CLAIMED SOLELY

*BY WORKING MOTHERS AND NOT , BY WAY OF ALTERNATIVE , IF THE PARENTS SO DECIDE , BY WORKING FATHERS?*

*2. IF THE ANSWER TO QUESTION 1 IS IN THE AFFIRMATIVE , ARE ARTICLES 1 , 2 AND 5 ( 1 ) OF COUNCIL DIRECTIVE 76/207/EEC DIRECTLY APPLICABLE IN THE MEMBER STATES?*

*7 IN ITS ORDER , THE LANDESSOZIALGERICHT POINTS OUT THAT THE PLAINTIFF , AT THE SAME TIME , LODGED A VERFASSUNGSBESCHWERDE ( AN OBJECTION ON A POINT OF CONSTITUTIONAL LAW ) WITH THE BUNDESVERFASSUNGSGERICHT ( FEDERAL CONSTITUTIONAL COURT ) , PLEADING THAT SOME OF THE PROVISIONS OF THE LAW INSTITUTING THE MATERNITY LEAVE WERE UNCONSTITUTIONAL , ON THE GROUND THAT THEY INFRINGED THE RULE OF THE EQUALITY OF MEN AND WOMEN BEFORE THE LAW , ENSHRINED IN ARTICLE 3 ( 2 ) AND ( 3 ) OF THE GRUNDGESETZ ( BASIC LAW ) .*

*FIRST QUESTION ( SCOPE AND LIMITS OF THE PRINCIPLE OF EQUAL TREATMENT )*

*8 IT IS APPROPRIATE FIRST OF ALL TO SET OUT THE LEGISLATIVE PROVISIONS ON MATERNITY LEAVE WHICH FORM THE SUBJECT-MATTER OF THE PROCEEDINGS PENDING BEFORE THE LANDESSOZIALGERICHT .*

*9 UNDER PARAGRAPH 6 ( 1 ) OF THE MUTTERSCHUTZGESETZ , WOMEN MAY NOT BE EMPLOYED DURING THE EIGHT WEEKS WHICH FOLLOW CHILDBIRTH . ACCORDING TO PARAGRAPH 8A OF THAT LAW , MOTHERS ARE ENTITLED TO MATERNITY LEAVE FROM THE END OF THE PROTECTIVE PERIOD PROVIDED FOR BY PARAGRAPH 6 ( 1 ) UNTIL THE DAY ON WHICH THE CHILD ATTAINS THE AGE OF SIX MONTHS . THE LEAVE MUST BE CLAIMED BY THE MOTHER AT LEAST FOUR WEEKS PRIOR TO THE EXPIRY OF THE PROTECTIVE PERIOD AND IS SUBJECT TO THE CONDITION THAT THE MOTHER MUST HAVE HELD EMPLOYMENT FOR A PERIOD OF , GENERALLY SPEAKING , NINE MONTHS BEFORE THE BIRTH . IF THE CHILD DIES DURING THE PERIOD OF LEAVE , THE LEAVE IS , AS A GENERAL RULE , TERMINATED THREE WEEKS AFTER THE DEATH . UNDER PARAGRAPH 9A , THE EMPLOYER IS FORBIDDEN TO TERMINATE THE EMPLOYMENT CONTRACT DURING THE MATERNITY LEAVE AND FOR A PERIOD OF TWO MONTHS THEREAFTER . UNDER PARAGRAPH 13 OF THE LAW , THE MOTHER RECEIVES AN ALLOWANCE FROM THE STATE WHICH IS EQUAL TO HER EARNINGS , BUT SUBJECT TO AN UPPER LIMIT OF DM 25 PER DAY , ACCORDING TO THE PROVISIONS IN FORCE AT THE MATERIAL TIME .*

*10 THE PLAINTIFF CLAIMS , ESSENTIALLY , THAT THE MAIN OBJECT OF THE DISPUTED LEGISLATIVE PROVISIONS , IN CONTRAST WITH THE PROTECTIVE PERIOD PROVIDED FOR BY PARAGRAPH 6 , IS NOT TO GIVE SOCIAL PROTECTION TO THE MOTHER ON BIOLOGICAL AND MEDICAL GROUNDS BUT RATHER TO PROTECT THE CHILD . THE PLAINTIFF DRAWS*

THAT CONCLUSION , ON THE ONE HAND , FROM THE TRAVAUX PREPARATOIRES RELATING TO THE LAW INTRODUCING MATERNITY LEAVE AND , ON THE OTHER HAND , FROM CERTAIN OBJECTIVE CHARACTERISTICS OF THE LAW . HE DRAWS PARTICULAR ATTENTION TO THREE CHARACTERISTICS :

( I ) THE FACT THAT THE LEAVE IS WITHDRAWN IN THE EVENT OF THE CHILD ' S DEATH , WHICH DEMONSTRATES THAT THE LEAVE WAS CREATED IN THE INTERESTS OF THE CHILD AND NOT OF THE MOTHER ;

( II)THE OPTIONAL NATURE OF THE LEAVE , WHICH MEANS THAT IT CANNOT BE SAID TO HAVE BEEN INTRODUCED TO MEET IMPERATIVE BIOLOGICAL OR MEDICAL NEEDS ;

( III)LASTLY , THE REQUIREMENT THAT THE WOMAN SHOULD HAVE BEEN EMPLOYED FOR A MINIMUM PERIOD PRIOR TO CHILDBIRTH ; THIS INDICATES THAT IT WAS NOT CONSIDERED NECESSARY TO GRANT THE LEAVE IN THE INTERESTS OF THE MOTHER , OTHERWISE IT OUGHT TO HAVE BEEN EXTENDED TO ALL WOMEN IN EMPLOYMENT IRRESPECTIVE OF THE DATE ON WHICH THEIR EMPLOYMENT COMMENCED .

11 ACCORDING TO THE PLAINTIFF , THE PROTECTION OF THE MOTHER AGAINST THE MULTIPLICITY OF BURDENS IMPOSED BY MOTHERHOOD AND HER EMPLOYMENT COULD BE ACHIEVED BY NON-DISCRIMINATORY MEASURES , SUCH AS ENABLING THE FATHER TO ENJOY THE LEAVE OR CREATING A PERIOD OF PARENTAL LEAVE , SO AS TO RELEASE THE MOTHER FROM THE RESPONSIBILITY OF CARING FOR THE CHILD AND THEREBY ALLOW HER TO RESUME EMPLOYMENT AS SOON AS THE STATUTORY PROTECTIVE PERIOD HAD EXPIRED . THE PLAINTIFF FURTHER CLAIMS THAT THE CHOICE BETWEEN THE OPTIONS THEREBY CREATED SHOULD , IN CONFORMITY WITH THE PRINCIPLE ON NON-DISCRIMINATION BETWEEN THE SEXES , BE LEFT COMPLETELY AT THE DISCRETION OF THE PARENTS OF THE CHILD .

12 THE PLAINTIFF ' S VIEWPOINT IS SUPPORTED BY THE COMMISSION , WHICH TAKES THE VIEW THAT THE PROVISIO IN ARTICLE 2 ( 3 ) OF DIRECTIVE 76/207 , WHICH PERMITS MEMBER STATES TO MAINTAIN PROVISIONS CONCERNING THE PROTECTION OF WOMEN , PARTICULARLY AS REGARDS PREGNANCY AND MATERNITY , CALLS FOR A RESTRICTIVE INTERPRETATION INASMUCH AS IT DEROGATES FROM THE PRINCIPLE OF EQUAL TREATMENT . SINCE THAT PRINCIPLE CONSTITUTES A ' ' FUNDAMENTAL RIGHT ' ' , ITS APPLICATION CANNOT BE LIMITED EXCEPT BY PROVISIONS WHICH ARE OBJECTIVELY NECESSARY FOR THE PROTECTION OF THE MOTHER . IF NATIONAL LEGISLATION , SUCH AS THAT IN THIS INSTANCE , SERVES THE INTERESTS OF THE CHILD AS WELL , ITS PURPOSE SHOULD PREFERABLY BE ACHIEVED BY NON-DISCRIMINATORY MEANS . IN THE PRESENT INSTANCE , HOWEVER , THE PROTECTION PROVIDED FOR BY ARTICLE 2 ( 3 ) OF THE DIRECTIVE MAY EQUALLY WELL BE ATTAINED BY A REDUCTION OF THE MOTHER ' S DOMESTIC DUTIES , ACHIEVED BY GRANTING THE LEAVE TO THE FATHER .

13 THE COMMISSION DRAWS ATTENTION TO THE FACT THAT , IN A NUMBER OF MEMBER STATES , SOCIAL LEGISLATION IS MOVING TOWARDS THE GRANT OF ' ' PARENTAL LEAVE ' ' OR OF ' ' CHILD-CARE LEAVE ' ' , WHICH IS TO BE PREFERRED TO LEAVE WHICH IS AVAILABLE TO THE MOTHER ALONE . IT STATED THAT IT WAS CONSIDERING WHETHER TO BRING ACTIONS FOR FAILURE TO FULFIL A TREATY OBLIGATION AGAINST A NUMBER OF MEMBER STATES WHICH , IN VARIOUS FORMS , RETAINED MEASURES WHICH WERE COMPARABLE TO THE MATERNITY LEAVE PROVIDED FOR BY THE GERMAN LEGISLATION .

14 THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY , SUPPORTING THE VIEWPOINT OF THE BARMER ERSATZKASSE , ARGUES THAT LEGAL PROTECTION AFFORDED TO THE MOTHER BY THE DISPUTED LEGISLATION AIMS TO REDUCE THE CONFLICT BETWEEN A WOMAN ' S ROLE AS A MOTHER AND HER ROLE AS A WAGE-EARNER , IN ORDER TO PRESERVE HER HEALTH AND THAT OF THE CHILD . IT ADMITS THAT THERE ARE DIFFERING VIEWS ON THE LENGTH OF TIME FOR WHICH A WOMAN SHOULD ENJOY SPECIAL TREATMENT FOLLOWING PREGNANCY AND CHILDBIRTH , BUT IT ARGUES THAT THE PERIOD IN QUESTION , ALTHOUGH VARYING FROM WOMAN TO WOMAN , EXTENDS CONSIDERABLY BEYOND THE END OF THE STATUTORY EIGHT-WEEK PERIOD OF PROTECTION LAID DOWN BY THE LAW . HENCE THE CREATION OF MATERNITY LEAVE IS JUSTIFIED FOR REASONS WHICH ARE CONNECTED WITH A WOMAN ' S BIOLOGICAL CHARACTERISTICS , SINCE ITS AIM IS TO AVOID PLACING THE MOTHER , ON EXPIRY OF THE STATUTORY PROTECTIVE PERIOD , UNDER AN OBLIGATION TO DECIDE WHETHER OR NOT TO RESUME HER EMPLOYMENT . INDEED , EXPERIENCE AND STATISTICS DEMONSTRATE THAT A CONSIDERABLE NUMBER OF WORKING WOMEN WERE COMPELLED , UNDER EARLIER LEGISLATION , TO GIVE UP THEIR EMPLOYMENT AS A RESULT OF MOTHERHOOD .

15 IN REPLY TO THE ARGUMENTS PUT FORWARD IN PARTICULAR BY THE PLAINTIFF IN THE MAIN PROCEEDINGS , THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY MAINTAINS THAT MATERNITY LEAVE UNDER GERMAN LEGISLATION CONSTITUTES AN UNINTERRUPTED CONTINUATION OF THE PROTECTION GIVEN TO A MOTHER BEYOND THE END OF THE PROTECTIVE PERIOD PROVIDED FOR BY PARAGRAPH 6 ( 1 ) OF THE MUTTERSCHUTZGESETZ . THE WITHDRAWAL OF THE LEAVE IN THE EVENT OF THE CHILD ' S DEATH IS JUSTIFIED BY THE FACT THAT ITS DEATH PUTS AN END TO THE MULTIPLICITY OF BURDENS BORNE BY THE WOMAN AS A RESULT OF MOTHERHOOD AND HER EMPLOYMENT . THE FACT THAT THE LEAVE IS OPTIONAL AND MAY BE CLAIMED BY THE MOTHER IS CONSISTENT WITH ITS OBJECTIVE , NAMELY TO ENABLE THE WOMAN TO CHOOSE FREELY , IN THE LIGHT OF HER PHYSICAL CONDITION AND OF OTHER FAMILY AND SOCIAL FACTORS , THE SOLUTION WHICH IS BETTER SUITED TO HER PERSONAL CIRCUMSTANCES ; BY VIRTUE OF THAT PROVISION THE PURPOSE OF THE LEAVE , NAMELY TO PROTECT THE MOTHER , MAY BE BETTER ACHIEVED THAN BY THE ADOPTION OF OTHER SOLUTIONS , SUCH AS THE GRANT OF LEAVE TO THE FATHER OR THE ASSUMPTION BY OTHER MEMBERS OF THE FAMILY OF RESPONSIBILITY FOR LOOKING AFTER THE CHILD . FINALLY , THE PROVISION WHICH MAKES THE GRANT OF LEAVE SUBJECT TO THE

*PREREQUISITE THAT THE MOTHER SHALL HAVE BEEN IN EMPLOYMENT FOR A MINIMUM PERIOD PRIOR TO GIVING BIRTH IS EXPLAINED BY THE CONCERN TO AVOID ABUSES WHEREBY EXPECTANT MOTHERS TAKE UP EMPLOYMENT DURING PREGNANCY FOR THE PURPOSE OF ENJOYING LEAVE AND THE PECUNIARY BENEFITS ATTACHING TO IT .*

*16 THE GOVERNMENT OF THE UNITED KINGDOM , AFTER SETTING OUT THE ARRANGEMENTS FOR PROTECTING MOTHERS UNDER THE SOCIAL LEGISLATION OF THE UNITED KINGDOM , SUPPORTS THE VIEWPOINT OF THE GERMAN GOVERNMENT . IT REACTS CRITICALLY TO THE CONTENTIONS PUT FORWARD BY THE COMMISSION , WHICH IN ITS VIEW PLACES TOO RESTRICTIVE AN INTERPRETATION ON ARTICLE 2 ( 3 ) OF THE DIRECTIVE , THEREBY DISCOURAGING MEMBER STATES FROM AVAILING THEMSELVES OF THE POSSIBILITIES OFFERED BY THAT PROVISION .*

*17 FOR THE PURPOSE OF ANSWERING THE QUESTION RAISED BY THE LANDESSOZIALGERICHT , IT IS APPROPRIATE IN THE FIRST INSTANCE TO SET OUT THE PROVISIONS OF DIRECTIVE 76/207 TO WHICH REFERENCE HAS BEEN MADE .*

*18 THE DIRECTIVE IS DESIGNED TO IMPLEMENT THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS INTER ALIA ' ' WORKING CONDITIONS ' ' , WITH A VIEW TO ATTAINING THE SOCIAL POLICY AIMS OF THE EEC TREATY TO WHICH THE THIRD RECITAL IN THE PREAMBLE TO THE DIRECTIVE REFERS .*

*19 TO THAT END , ARTICLE 1 DEFINES ' ' THE PRINCIPLE OF EQUAL TREATMENT ' ' AS MEANING THAT THE DIRECTIVE SEEKS TO PUT INTO EFFECT IN THE MEMBER STATES THE PRINCIPLE OF EQUAL TREATMENT FOR MEN AND WOMEN AS REGARDS ACCESS TO EMPLOYMENT , PROMOTION , VOCATIONAL TRAINING AND WORKING CONDITIONS . ACCORDING TO ARTICLE 2 ( 1 ) , THE PRINCIPLE OF EQUAL TREATMENT MEANS ' ' THAT THERE SHALL BE NO DISCRIMINATION WHATSOEVER ON GROUNDS OF SEX EITHER DIRECTLY OR INDIRECTLY BY REFERENCE IN PARTICULAR TO MARITAL OR FAMILY STATUS . ' ' UNDER ARTICLE 5 ( 1 ) , APPLICATION OF THE PRINCIPLE OF EQUAL TREATMENT WITH REGARD TO WORKING CONDITIONS ' ' MEANS THAT MEN AND WOMEN SHALL BE GUARANTEED THE SAME CONDITIONS WITHOUT DISCRIMINATION ON GROUNDS OF SEX ' ' ; PARAGRAPH ( 2 ) OF THE ARTICLE REQUIRES MEMBER STATES TO ABOLISH ANY LAWS , REGULATIONS AND ADMINISTRATIVE PROVISIONS CONTRARY TO THE PRINCIPLE OF EQUAL TREATMENT AND TO AMEND THOSE WHICH CONFLICT WITH THE PRINCIPLE ' ' WHEN THE CONCERN FOR PROTECTION WHICH ORIGINALLY INSPIRED THEM IS NO LONGER WELL FOUNDED ' ' .*

*20 PARAGRAPHS ( 2 ) , ( 3 ) AND ( 4 ) OF ARTICLE 2 INDICATE , IN VARIOUS RESPECTS , THE LIMITS OF THE PRINCIPLE OF EQUAL TREATMENT LAID DOWN BY THE DIRECTIVE .*

*21 UNDER PARAGRAPH ( 2 ) , WHICH IS OF NO RELEVANCE TO THE PRESENT CASE , THE*



*DIRECTIVE IS EXPRESSED TO BE WITHOUT PREJUDICE TO THE RIGHT OF MEMBER STATES TO EXCLUDE FROM ITS FIELD OF APPLICATION THOSE OCCUPATIONAL ACTIVITIES FOR WHICH , ' ' BY REASON OF THEIR NATURE OR THE CONTEXT IN WHICH THEY ARE CARRIED OUT , THE SEX OF THE WORKER CONSTITUTES A DETERMINING FACTOR . ' '*

*22 PARAGRAPH ( 3 ) MAKES THE FOLLOWING PROVISION : ' ' THIS DIRECTIVE SHALL BE WITHOUT PREJUDICE TO PROVISIONS CONCERNING THE PROTECTION OF WOMEN , PARTICULARLY AS REGARDS PREGNANCY AND MATERNITY . ' '*

*23 REFERENCE SHOULD ALSO BE MADE IN THE PRESENT CONTEXT TO PARAGRAPH ( 4 ) , ACCORDING TO WHICH THE DIRECTIVE IS TO BE WITHOUT PREJUDICE TO MEASURES TO PROMOTE EQUAL OPPORTUNITY FOR MEN AND WOMEN , ' ' BY REMOVING EXISTING INEQUALITIES WHICH AFFECT WOMEN ' S OPPORTUNITIES IN THE AREAS REFERRED TO IN ARTICLE 1 ( 1 ) ' ' , THAT IS TO SAY , AS REGARDS ACCESS TO EMPLOYMENT , PROMOTION AND OTHER WORKING CONDITIONS .*

*24 IT IS APPARENT FROM THE ABOVE ANALYSIS THAT THE DIRECTIVE IS NOT DESIGNED TO SETTLE QUESTIONS CONCERNED WITH THE ORGANIZATION OF THE FAMILY , OR TO ALTER THE DIVISION OF RESPONSIBILITY BETWEEN PARENTS .*

*25 IT SHOULD FURTHER BE ADDED , WITH PARTICULAR REFERENCE TO PARAGRAPH ( 3 ) , THAT , BY RESERVING TO MEMBER STATES THE RIGHT TO RETAIN , OR INTRODUCE PROVISIONS WHICH ARE INTENDED TO PROTECT WOMEN IN CONNECTION WITH ' ' PREGNANCY AND MATERNITY ' ' , THE DIRECTIVE RECOGNIZES THE LEGITIMACY , IN TERMS OF THE PRINCIPLE OF EQUAL TREATMENT , OF PROTECTING A WOMAN ' S NEEDS IN TWO RESPECTS . FIRST , IT IS LEGITIMATE TO ENSURE THE PROTECTION OF A WOMAN ' S BIOLOGICAL CONDITION DURING PREGNANCY AND THEREAFTER UNTIL SUCH TIME AS HER PHYSIOLOGICAL AND MENTAL FUNCTIONS HAVE RETURNED TO NORMAL AFTER CHILDBIRTH ; SECONDLY , IT IS LEGITIMATE TO PROTECT THE SPECIAL RELATIONSHIP BETWEEN A WOMAN AND HER CHILD OVER THE PERIOD WHICH FOLLOWS PREGNANCY AND CHILDBIRTH , BY PREVENTING THAT RELATIONSHIP FROM BEING DISTURBED BY THE MULTIPLE BURDENS WHICH WOULD RESULT FROM THE SIMULTANEOUS PURSUIT OF EMPLOYMENT .*

*26 IN PRINCIPLE , THEREFORE , A MEASURE SUCH AS MATERNITY LEAVE GRANTED TO A WOMAN ON EXPIRY OF THE STATUTORY PROTECTIVE PERIOD FALLS WITHIN THE SCOPE OF ARTICLE 2 ( 3 ) OF DIRECTIVE 76/207 , INASMUCH AS IT SEEKS TO PROTECT A WOMAN IN CONNECTION WITH THE EFFECTS OF PREGNANCY AND MOTHERHOOD . THAT BEING SO , SUCH LEAVE MAY LEGITIMATELY BE RESERVED TO THE MOTHER TO THE EXCLUSION OF ANY OTHER PERSON , IN VIEW OF THE FACT THAT IT IS ONLY THE MOTHER WHO MAY FIND HERSELF SUBJECT TO UNDESIRABLE PRESSURES TO RETURN TO WORK PREMATURELY .*

27 FURTHERMORE , IT SHOULD BE POINTED OUT THAT THE DIRECTIVE LEAVES MEMBER STATES WITH A DISCRETION AS TO THE SOCIAL MEASURES WHICH THEY ADOPT IN - ORDER TO GUARANTEE , WITHIN THE FRAMEWORK LAID DOWN BY THE DIRECTIVE , THE PROTECTION OF WOMEN IN CONNECTION WITH PREGNANCY AND MATERNITY AND TO OFFSET THE DISADVANTAGES WHICH WOMEN , BY COMPARISON WITH MEN , SUFFER WITH REGARD TO THE RETENTION OF EMPLOYMENT . SUCH MEASURES ARE , AS THE GOVERNMENT OF THE UNITED KINGDOM HAS RIGHTLY OBSERVED , CLOSELY LINKED TO THE GENERAL SYSTEM OF SOCIAL PROTECTION IN THE VARIOUS MEMBER STATES . IT MUST THEREFORE BE CONCLUDED THAT THE MEMBER STATES ENJOY A REASONABLE MARGIN OF DISCRETION AS REGARDS BOTH THE NATURE OF THE PROTECTIVE MEASURES AND THE DETAILED ARRANGEMENTS FOR THEIR IMPLEMENTATION .

28 IT FOLLOWS FROM THE FOREGOING THAT THE REPLY TO BE GIVEN TO THE QUESTION SUBMITTED BY THE LANDESSOZIALGERICHT HAMBURG IS THAT ARTICLES 1 , 2 AND 5 ( 1 ) OF COUNCIL DIRECTIVE 76/207 MUST BE INTERPRETED AS MEANING THAT A MEMBER STATE MAY , AFTER THE STATUTORY PROTECTIVE PERIOD HAS EXPIRED , GRANT TO MOTHERS A PERIOD OF MATERNITY LEAVE WHICH THE STATE ENCOURAGES THEM TO TAKE BY THE PAYMENT OF AN ALLOWANCE . THE DIRECTIVE DOES NOT IMPOSE ON MEMBER STATES A REQUIREMENT THAT THEY SHALL , AS AN ALTERNATIVE , ALLOW SUCH LEAVE TO BE GRANTED TO FATHERS , EVEN WHERE THE PARENTS SO DECIDE .

29 SINCE THE REPLY TO THE FIRST QUESTION SUBMITTED BY THE LANDESSOZIALGERICHT IS IN THE NEGATIVE , THE SECOND QUESTION , CONCERNING THE EFFECT OF DIRECTIVE 76/207 IN THE EVENT OF ITS PROVISIONS BEING DISREGARDED BY A MEMBER STATE , IS OTIOSE .

## Decision on costs

### COSTS

30 THE COSTS INCURRED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC AND BY THE COMMISSION OF THE EUROPEAN COMMUNITIES , WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT , ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE , IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED , IN THE NATURE OF A STEP IN THE PROCEEDINGS PENDING BEFORE THE NATIONAL COURT , THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

## Operative part

*ON THOSE GROUNDS ,*

*THE COURT ,*

*IN ANSWER TO THE QUESTIONS REFERRED TO IT BY THE LANDESSOZIALGERICHT  
HAMBURG , BY ORDER DATED 9 AUGUST 1983 , HEREBY RULES :*

*ARTICLES 1 , 2 AND 5 ( 1 ) OF COUNCIL DIRECTIVE 76/207 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 MUST BE INTERPRETED AS MEANING THAT A MEMBER STATE MAY ,  
AFTER THE PROTECTIVE PERIOD HAS EXPIRED , GRANT TO MOTHERS A PERIOD OF  
MATERNITY LEAVE WHICH THE STATE ENCOURAGES THEM TO TAKE BY THE PAYMENT OF  
AN ALLOWANCE . THE DIRECTIVE DOES NOT IMPOSE ON MEMBER STATES A REQUIREMENT  
THAT THEY SHALL , AS AN ALTERNATIVE , ALLOW SUCH LEAVE TO BE GRANTED TO  
FATHERS , EVEN WHERE THE PARENTS SO DECIDE .*