

INTERNATIONAL AND EUROPEAN LABOUR AND SOCIAL SECURITY LAW

European maternity protection – perfected or excessive?
Comments on the latest judgments of the ECJ*

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1. The protection of pregnant women and women who have recently given birth is a legal issue of high importance. The matter is taken into account by diverse mechanisms, in particular, obligations in respect of work organisation, prohibitions as to employment activities, as well as guaranteed maternity leave. It is exactly these privileges which however contribute to the fact that the continued employment of a mother-to-be or woman who has recently given birth is endangered. It is not in the interests of an employer to employ workers who cannot be engaged in accordance with their contracts and yet are simultaneously entitled to numerous claims for payment. The avoidance of employment contracts with pregnant women appears to be all the more desirable from the employer's point of view.

2. The protection of pregnant women and mothers therefore also regularly extends to the protection of employment of the woman concerned. This is also the case in European Community law. The protection of pregnant women and mothers under Community law is based on two legal sources.

3. The first of these legal sources, the "Equal Treatment Directive" 76/207 EEC,¹ does not directly envisage this area of protection: the Directive, which is based on Article 235 of the EC Treaty (now Article 308 EC) is aimed at realising the principle of equal treatment of men and women regarding access to employment, vocational training and promotion as well as working conditions. The ECJ has also developed this Directive into an instrument for the protection of pregnant women and mothers.

4. The more specific Directive 92/85/EEC, the "Directive for Maternity Protection",² is of a later date. This Directive is founded on Article 118 of the EC Treaty (now Article 138 EC) and aims at protecting health in the workplace. The Directive also considers dismissal to be a health hazard for pregnant workers and women who have recently given birth.³

Therefore, the Member States are obliged to prohibit the dismissal of those employees (Article 10).

5. On 4 October 2001, the ECJ pronounced for the first time decisions on questions regarding the prohibition of dismissal on grounds of pregnancy under Article 10 of Directive 92/85/EEC in the decisions *Melgar* and *Tele Danmark*.

6. Before a commentary of both of these judgments, the preceding ECJ case-law which concerns comparable questions in connection with the Equal Treatment Directive 76/207/EEC and which is supplemented and rounded off by the judgments of 4 October, should first of all be outlined.

a) If a woman is refused employment due to her pregnancy or is dismissed on this ground, it is construed as discrimination based on sex. This thesis is in no way a matter of course. In the 1980's, the German courts saw this differently. The Federal Labour Court ("Bundesarbeitsgericht", hereafter BAG) held that the refusal to appoint a woman on grounds of pregnancy constituted a violation of the European law prohibiting discrimination, only where male candidates were also being considered.⁴ In two sparsely founded decisions in 1990, the ECJ rejected this "split solution". In the case of *Dekker*,⁵ a matter from the Netherlands, the Court noted that "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on the grounds of sex".⁶ Should an appointment be refused on grounds of pregnancy, this decision is directly connected with the sex of the applicant, therefore it is irrelevant that no male had also applied for the position.⁷ The Court was of the opinion that this constituted a contravention of the principle of equal treatment within the meaning of Articles 2(1) and 3(1) of Directive 76/207/EEC. Consequently, in accordance with the judgment in the Danish case of *Hertz*, the dismissal of an employee on grounds of her pregnancy also constitutes direct discrimination on the basis of sex and invariably violates Article 5 of Directive 76/207/EEC.⁸

Since then, the Court has adhered to this idea of material equality,⁹ without allowing itself to be dissuaded by German

* ECJ 4 October 2001 – C-109/00 – *Tele Danmark*, in this issue at 548 and ECJ 4 October 2001 – C-438/99 – *Melgar*, in this issue at 551.

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¹ 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 at 40.

² Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), OJ 1992 L 348 at 1.

³ The 14th recital of the preamble provides: "Whereas the risk of dismissal for reasons associated with their condition may have harmful effects on the physical and mental state of pregnant workers, workers who have

recently given birth or who are breastfeeding; whereas provision should be made for such dismissal to be prohibited; (...)."

⁴ BAG (D) 20 February 1986, 51 BAGE 167, 174 et seq. = AP no. 31 on § 123 BGB.

⁵ ECJ 8 November 1990 – C-177/88 – *Dekker* [1990] ECR I-3941.

⁶ *Dekker* (supra note 5), para. 13.

⁷ *Dekker* (supra note 5), para. 17.

⁸ ECJ 8 November 1990 – C-179/88 – *Hertz* [1990] ECR I-3979, para. 13 with reference to the judgment in the case of *Dekker*.

⁹ Cf. ECJ 5 May 1994 – C-421/92 – *Habermann-Beltermann* [1994]

criticism.¹⁰ The BAG subsequently concurred with the ECJ and now in principle considers the question about pregnancy in an interview to be inadmissible irrespective of the sex of the other candidates.¹¹

b) In the case of *Dekker*, an employment contract with the pregnant applicant was not concluded. Four years later, the ECJ had to decide a case wherein an employment contract was concluded with a woman whose pregnancy had begun only a few days earlier. According to the employment contract, the woman was to be employed as a night-watch at an old-age home. This proved to be impossible due to the pregnancy, since night work by pregnant women is prohibited by law (§ 8(1) of the Maternity Protection Act (Mutterschutzgesetz)).¹² The employer therefore wanted to regard the employment contract as null and void *ab initio*, because of contravention of a statutory prohibition. The conduct giving rise to the objection of “nullity of the contract *ab initio*”, could also be construed as avoidance of the contract on the ground of mistake regarding important qualities of the employee at the time of conclusion of the contract, in the opinion of the referring Labour Court (Arbeitsgerichts Regensburg). The ECJ decided that following either one of the two interpretations, the employer discriminated against the pregnant woman on grounds of pregnancy;¹³ this is also the case where the employer did not want to end the relationship due to the employee’s pregnancy as such, but rather due to the employment prohibition resulting therefrom.¹⁴ The Court at the same time stressed that an employment relationship of an indefinite period was in question, so that the employee would only be unable to perform the stipulated occupation temporarily.¹⁵

Advocate General Tesauo proposed that the claim of invalidity of the contract due to an infringement of law be regarded as refusal of access to employment, and hence be classified under Article 3 of Directive 76/207/EEC. He wanted to subsume the avoidance of the contract under the aspect of dismissal according to Article 5(1) of the Directive.¹⁶ The ECJ did not commit itself on this dogmatic question and simply cited both provisions.¹⁷

c) A further decision in 1994, the case of *Webb*,¹⁸ concerned

ECR I-1657, para. 15; ECJ 14 July 1994 – C-32/93 – *Webb* [1994] ECR I-3567, para. 19; ECJ 30 June 1998 – C-394/96 – *Brown* [1998] ECR I-4185, para. 16; ECJ 3 February 2000 – C-207/98 – *Mahlburg* [2000] ECR I-549, para. 20, cf. also para. 26: substantial, and not formal equality as the purpose of the Directive on Equal Treatment.

¹⁰ Cf. *Gamillscheg*, *Arbeitsrecht I*, 8th ed., Munich (D), 2000, at 245 with numerous references.

¹¹ BAG (D) 15 October 1992, 71 BAGE 252 = AP no. 8 on § 611a BGB with commentary from *Coester*.

¹² Gesetz zum Schutz der erwerbstätigen Mutter (Mutterschutzgesetz - MuSchG), as printed on 17 January 1997, BGBl. I, at 22, amended at 293, last amended by the Act of 30 November 2000, BGBl. I, at 1638.

¹³ *Habermann-Beltermann* (*supra* note 9), para. 15.

¹⁴ *Habermann-Beltermann* (*supra* note 9), para. 16 et seq.; the facts were very similar in *Mahlburg* (*supra* note 9), where a pregnant woman was, in contravention of the Directive, refused appointment due to the feared employment prohibition (cf. para. 19 et seq.); on this judgment, see *Stürmer*, [2001] NZA 526.

¹⁵ *Habermann-Beltermann* (*supra* note 9), para. 23 et seq.

¹⁶ *Habermann-Beltermann* (*supra* note 9), at 1662, para. 7.

¹⁷ *Habermann-Beltermann* (*supra* note 9), para. 26.

¹⁸ *Webb* (*supra* note 9), at 3567.

a British employee, who was appointed for an indefinite period. To begin with, she was supposed to replace a pregnant woman. After her appointment she proved to be pregnant herself, whereupon the employer dismissed her. In this case the Court explicitly found the dismissal to be a contravention against Article 5 of Directive 76/207/EEC. The Court referred to Article 10 of Directive 92/85/EEC on Maternity Protection, whose deadline for incorporation had not expired at that time, as the “context”.¹⁹

The decision in the case of *Brown* in 1998,²⁰ was much the same. In this decision the Court once again in light of Article 5 of Directive 76/207/EEC, rejected the dismissal of a British woman, who was employed indefinitely and unable to work because of her pregnancy. Once more, the Court referred to the Maternity Protection Directive as the “context”.²¹

7. On 4 October 2001, the ECJ handed down for the first time decisions on preliminary questions, in which the interpretation of the prohibition of dismissal under the Maternity Protection Directive 92/85/EEC was directly queried. The *Melgar* case was referred to the Court by a Spanish court, the *Tele Danmark* case by a Danish Court, which moreover also submitted a question on the interpretation of the prohibition of dismissal under Article 5 of the Equal Treatment Directive 76/207/EEC. The Court found in the *Melgar* decision that Article 10 of the Maternity Protection Directive has direct effect. Of more importance, is that both decisions contribute to the clarification of the relationship of the two Directives to one another, and to the interpretation of Article 10 of the Directive on Maternity Protection 92/85/EEC. Above all, the decisions are however, explosive because they consistently develop existing case law and now also extend their protective system to employment relationships of limited duration.

a) In the opinion of the referring Spanish Court, it was uncertain whether Ms Melgar could rely on Article 10 of the Directive on the Maternity Protection 92/85/EEC directly, because Spain had implemented the Directive late and incompletely.²² The Court was not surprisingly of the view that the provision has direct effect after expiry of the deadline for incorporation and then confers rights upon an individual, which may be enforced in a national court vis-à-vis the public authorities of that state. According to the settled case-law of the Court, this effect depends on whether the provision of the directive in question is sufficiently precise and unconditional as to its content.²³ Advocate General Tizzano had correctly pointed out that these prerequisites relating to Article 10 are given, since the provision is defined unconditionally, as well as

¹⁹ *Webb* (*supra* note 9), paras. 21-23.

²⁰ *Brown* (*supra* note 9), at 4185 et seq.

²¹ *Brown* (*supra* note 9), para. 18 et seq.

²² Cf. the closing arguments of Advocate General Tizzano on 7 June 2001, para. 30.

²³ Cf. to some extent ECJ 26 February 1986 – C-152/84 – *Marshall*, [1986] ECR I-723, paras. 46-56 on Article 5(1) of Directive 76/207/EEC; cf. also *Schmidt*, in: *Groeben/Thiesing/Ehlermann* (eds.), *Kommentar zum EU-/EG-Vertrag*, Vol. 4, 5th ed., Baden-Baden (D), 1997, Articles 137-209a of the EC Treaty, and Article 189 at para. 41.

clearly and precisely with regard to its object (prohibition of dismissal), the class of protected persons (pregnant employees) and the duration of protection.²⁴ In a few words, the ECJ was in agreement with him.²⁵

b) A certain systematic clarification of the relationship of the two directives to one another follows on the one hand, from the fact that the ECJ, in the case of *Tele Danmark*, measured the dismissal of the pregnant woman, Ms Brand-Nielsen, against Article 5 of Directive 76/207 as well as against Article 10 of Directive 92/85/EEC.²⁶ In this respect, the Court also follows the Advocate General, who accentuated: "To my mind, the application of either directive in this case will lead to the same conclusion, albeit by different routes."²⁷ On the other hand, it also becomes clear from the decision in the *Melgar* case, that the Directive on Maternity Protection is only concerned with protection of an existing employment relationship. Amongst other things, the access of pregnant women to employment, is a theme dealt with exclusively by the Directive on Equal Treatment, and indeed also in the case of renewal of a fixed-term employment relationship; where non-renewal is due to the pregnancy of the employee, discrimination under Articles 2(1) and 3(1) of Directive 76/207/EEC follows.²⁸

c) Of further interest are certain clarifying remarks made by the Court in its decision in the *Melgar* case with regard to the prohibition of dismissal under Article 10 no. 1 of the Directive on Maternity Protection 92/85/EEC.

This provision obliges Member States to prohibit dismissal of employees during the period from the beginning of their pregnancy to the end of maternity leave. The exceptions are "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". As regards this exemption provision, it was questionable on the one hand, whether the Member States were obliged to specify in the legislation the grounds for dismissal in exceptional cases. As for the wording of the provision, the Court convincingly decided that the Member States were not obliged to compile a particular catalogue of grounds which by way of exception make dismissal admissible.²⁹ Examples of such grounds for dismissal not connected with pregnancy or motherhood were mentioned by Advocate General Colomer in the concluding arguments, i.e. dismissal on the ground of a *force majeure* situation which permanently prevented a person from working, or a collective dismissal for financial, technical, organisational or production reasons affecting an undertaking.³⁰

It was furthermore questionable whether the Member States were obliged to make provision for intervention by an authority whose prior permission would be conditional for the dismissal to be effective. In this respect the Court pointed out that such reservations of consent were provided for in some Member States. The Directive wanted to take this fact into account, without however binding other Member States, where no such practice existed, to introduce such a procedure.³¹ Under Paragraph 9(3) of the German Maternity Protection Act, the Higher Federal State Authority (oberste Landesbehörde) responsible for employment protection or such authority appointed by him, may "in special cases, which are not connected with the condition of a woman during pregnancy or her condition up until expiry of four months after confinement, declare by way of exception a dismissal to be permissible". It therefore follows from the decision of the ECJ in the *Melgar* case, that as regards the German procedure, there is no need for amendment.

d) Of considerable effect is the further statement in the decisions of *Melgar* and *Tele Danmark*, that the protection of pregnant workers and women who have recently given birth also applies in respect of termination of existing employment relationships and access to employment, then, when the existing employment contract, or as the case may be, when the still to be concluded employment contract, is limited to a fixed period, or is to be limited to a fixed period.

In its case-law to date, the ECJ has repeatedly accentuated the fact that the protection envisaged by the Equal Treatment Directive 76/207/EEC applied to employment relationships unlimited in time. Two of these cases related to the termination of open-ended employment relationships.³² In the latest decision, the Court dealt with the refusal of an appointment in the context of an open-ended employment relationship.³³ It was concluded from the literature that in cases of fixed-term appointments, refusing to employ someone on the ground of pregnancy and thus also asking the question during the interview of whether a candidate was pregnant, was permissible.³⁴ The BAG had also held that the prohibition of discrimination was by way of exception not contravened, when the applicant in a fixed-term employment relationship would from the outset be unable to work in case of pregnancy, due to an employment prohibition.³⁵

This possible "loophole" has now been closed by the Court. It has now decided in the *Tele Danmark* case, that the protec-

nant woman on disciplinary grounds also comes into question, when the breach of duty has nothing to do with her condition.

²⁴ *Supra* note 22, para. 33.

²⁵ ECJ 4 October 2001 – C-438/99 – *Melgar*, para. 33.

²⁶ ECJ 4 October 2001 – C-109/00 – *Tele Danmark*, cf. in particular para. 25.

²⁷ Closing arguments of Advocate General Colomer of 10 May 2001, para. 21.

²⁸ *Tele Danmark* (*supra* note 26), para. 46; cf. in detail the closing arguments of Advocate General Tizzano (*supra* note 22), paras. 48-54.

²⁹ *Melgar* (*supra* note 25), para. 37.

³⁰ *Supra* note 27, para. 44; in a footnote, further reference is made to the opinion of a Spanish author, in whose opinion the dismissal of a preg-

³¹ *Melgar* (*supra* note 25), para. 51 et seq.

³² Cf. once again *Habermann-Beltermann* (*supra* note 9), para. 23 and *Webb* (*supra* note 9), para. 27.

³³ *Mahlburg* (*supra* note 9), paras. 23 and 30.

³⁴ To this effect, *Stürmer*, NZA 2001, at 530.

³⁵ To this effect see BAG (D), 71 BAGE 258 = AP No. 8 on § 611a BGB with additional commentary from Coester (sub II 2 b); furthermore BAG (D) AP No. 36 on § 123 BGB with insofar affirmative commentary by Wank; literature to this effect: *Buchner*, in: *Richardi/Wlotzke* (eds.), *Münchener Handbuch zum Arbeitsrecht*, Vol. 1, 2nd ed., Munich (D), 2000, § 41, paras. 79-82; *Müller-Glöge*, in: *Rebmann/Säcker/Rixecker* (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 4, 3rd ed., Munich (D), 1997, § 611a BGB, para. 30.

tion against unlawful dismissal under both Directives apply also then, when an employee who was appointed for a fixed period is dismissed on the ground of pregnancy, and in fact, even when it is certain that she would be unable to work for a considerable period of the contract due to her pregnancy, as was the case with the plaintiff, Ms Brandt-Nielsen: she was appointed for six months; scarcely two and a half months after the start of her employment, her right to paid maternity leave had already arisen. In support of this conclusion, the Court first referred to its case-law on Directive 76/207/EEC, according to which the protection of a woman during pregnancy and after confinement may not be limited in view of the financial and other disadvantages for the employer.³⁶ The fact that the employment contract was concluded for a specific period, did not change this interpretation.³⁷ Whether dismissal on the ground of pregnancy is to be considered as direct discrimination, is to be decided without regard to the foreseeable economic loss for the employer, so that it is insignificant whether the employment contract was concluded for a fixed term or for an unlimited period.³⁸ A legal-factual argument follows to the effect that even the duration of employment relationships based on fixed-term contracts was from the outset uncertain, since the same could be renewed or extended.³⁹ Hereby, the Court followed the approach of the Commission and Advocate General Colomer, according to which the consequences of maternity leave in the case of a fixed-term contract would not necessarily be more significant than in the case of a contract for an unlimited period. In the last decades, undertakings have been relying on temporary employees much more frequently than in the past; fixed-term contracts generally tend to be renewed and have to a large extent shed the stigma of instability which characterised them at the outset.⁴⁰ With this argument, the categorical difference between fixed-term and open-ended employment relationships was dismissed for lack of reality. Finally, the Court put forward an argument based on the wording, to the effect that the scope of both Directives was not related to the duration of the employment relationship. The Court was of the opinion that the directives would have clearly expressed the fact, if exceptions were supposed to apply to fixed-term contracts, which are common in practice.⁴¹

In the *Tele Danmark* case, the Court was faced for the first time with a case in which a pregnant worker who was aware of her pregnancy at the time of conclusion of the employment contract, was dismissed. She did not inform the employer of this circumstance. This in itself, in the opinion of the employer, had justified the dismissal. In this regard, the ECJ decided that, under the Directives, the dismissal of an employee on the ground of pregnancy was precluded, also where she failed to inform the employer of the pregnancy and even

though she was aware of it at the time of conclusion of the employment contract.⁴² This was not substantiated any further by the Court. Apparently the ECJ agreed with the statements of the Commission and the EFTA Surveillance Authority,⁴³ to which it made reference, without commenting thereon. The Commission noted that an employee was not obliged to inform the employer of her pregnancy, since the employer had no right to take this into account in regard to her appointment. The EFTA Surveillance Authority had added that an obligation to inform the employer would render the protection of pregnant workers established by the directive ineffective, even though the Community legislature intended that such protection to be especially high. Advocate General Colomer also denied the employer the right to ask a worker whether she is pregnant, since this constituted an infringement of the worker's right to privacy and moreover, would seriously impede access to the labour market for pregnant women.⁴⁴

Finally, it can be gathered from the decision in the *Melgar* case that the refusal to employ a female worker based on her state of pregnancy also constitutes direct discrimination on grounds of sex, contrary to Articles 2(1) and 3(1) of Directive 76/207/EEC in the case of non-renewal of a fixed-term contract.⁴⁵

So it is certain that the protection of pregnant women and women who have recently given birth under European law has exactly the same effect on fixed-period employment relationships as on open-ended employment relationships.

8. Considering that the new judgments of the ECJ extend the protection afforded by the Directive on Equal Treatment and the Directive on Maternity Protection to fixed-term employment relationships in respect of dismissal or employment as the case may be, existing case-law is to be developed accordingly. Nevertheless apprehension remains.

This uneasiness is also connected with the fact that the legislative competence of the Community, which forms the basis of both Directives, is by no means beyond all doubt. Within the scope of social protection of pregnant women, the Council made extensive use of its legislative powers under labour law, which in itself were very selective. The Equal Treatment Directive can already not be legitimised from the viewpoint of equality of wages (Article 119 EC Treaty, now Article 141 EC), but rather, also requires resort to the rounding-off competence under Article 235 of the EC Treaty (now Article 308 EC). In the *Dekker* case, the Court then developed this Directive into an instrument for the social protection of pregnancy and motherhood through its material concept of discrimination.

In addition, the Directive for Maternity Protection is based on a very broad understanding of the relevant regulatory competence of Community. In Article 118a of the EC Treaty

³⁶ *Tele Danmark* (supra note 26), para. 28 et seq. with reference to the *Dekker* case (supra note 5), para. 12 and *Mahlburg* (supra note 9), para. 29.

³⁷ *Tele Danmark* (supra note 26), para. 30.

³⁸ *Tele Danmark* (supra note 26), para. 31.

³⁹ *Tele Danmark* (supra note 26), para. 32.

⁴⁰ Closing arguments of Advocate General Colomer, (supra note 27) para. 39.

⁴¹ *Tele Danmark* (supra note 26), para. 33.

⁴² *Tele Danmark* (supra note 26), para. 34.

⁴³ *Tele Danmark* (supra note 26), para. 24.

⁴⁴ Closing arguments of Advocate General Colomer, (supra note 27) para. 34.

⁴⁵ *Melgar* (supra note 25), para. 46 et seq.

(now Article 137(1)(2) and (5) EC) as amended by the Single European Act, the protection of the health and safety of employees is dealt with. That this also includes the protection against mental and physical consequences, is at least not obvious.

Above all however, it is the consequences of protecting pregnancy and motherhood under Community law for the employer, which causes apprehension. It is the employers who, to a large extent, must carry the organisational and financial burden, and indeed – in accordance with the latest judgments – also then, when they gain nothing, or almost nothing more from their female employee.

It is doubtful whether this outcome encourages, in particular, small and medium-sized undertakings to appoint women. From a legal point of view, such scepticism is justified because Article 137(2) sentence 2 of the EC Treaty expressly provides that directives for labour/ employment protection are to avoid imposing administrative or legal constraints, which would hinder the creation and development of small and medium-sized undertakings. Moreover, the objective of a high level of employment must be taken into account in the implementation of the Community policies (Article 127(2) of the EC Treaty). Of course the Court does not address this problem in its latest judgments because the concerned employers – in the case of *Melgar*, a municipality and in the *Tele Danmark* case, a large-scale enterprise⁴⁶ – were not small or medium-sized undertakings.⁴⁷

Nevertheless, in the *Mahlburg* judgment, a reference to the problem can be found.⁴⁸ Advocate General Saggio pointed out the solution to this dilemma in his closing arguments in the case. In his opinion, the fact that much of the burden of maternity protection often falls on the employer, is a real problem which deserves attention.⁴⁹ This problem, in his view, must be solved by means of positive protective measures in favour of the more vulnerable employer and should be achieved within the context of the social policy of Member States.⁵⁰

A further reference can be found in the closing arguments of Advocate General Colomer in the *Tele Danmark* case. He substantiates the argument that fixed-term contracts are to be treated in the same way as indefinite employment contracts under the Directive on Maternity Protection, with *inter alia* the argument, that only Article 11(4) of the Directive makes mention of different treatment of employment contracts in respect of their duration. Under this provision, Member States may make the woman's entitlement to pay or a social allowance during maternity leave, conditional upon the fact that

confinement must be preceded by a period of employment, which nevertheless may not be longer than twelve months. Should the right of women on maternity leave to payment be made conditional upon a twelve month period of prior employment before the estimated confinement date, those hotly debated cases⁵¹ where the acquirement of maternity protection benefits under false pretences is potentially the sole purpose for conclusion of the employment contract would at any rate be diffused.

The apprehension caused by the rulings of the ECJ can therefore to a certain extent be interpreted into national legislation.

⁵¹ In cases of feigned willingness to work, *Paul*, [2000] Der Betrieb 977, holds avoidance of the employment contract on the ground of willful deceit or duress for possible, irrespective of the Directive on Equal Treatment.

⁴⁶ Cf. also Closing arguments of Advocate General Colomer, (*supra* note 27), para. 48.

⁴⁷ The referring court raised the issue in the second question referred to for a preliminary ruling, of whether the very fact that *Tele Danmark* was a large undertaking which frequently makes use of temporary workers is of relevance to the interpretation of the prohibition of dismissal under the Directive; the ECJ answered the question in the negative (*Tele Danmark* (*supra* note 26), paras. 35-39).

⁴⁸ *Mahlburg* (*supra* note 9), para. 28 et seq.

⁴⁹ *Mahlburg* (*supra* note 9), para. 34 et seq. of the closing arguments.

⁵⁰ *Mahlburg* (*supra* note 9), para. 36 et seq.; to this effect already Coester, commentary on BAG (D) 15 October 1992, AP No. 8 on § 611a BGB (sub I at the end); furthermore *Sowka*, [1994] NZA 970.