

SUMMARY

**ECJ 18 March 2014 (Grand Chamber),  
case C-363/12 (Z - v - A Government  
department and the Board of  
management of a community school),  
Gender discrimination, Disability  
discrimination**

**Facts**

Mr and Ms Z are fertile but because Ms Z has no uterus, she cannot support a pregnancy. In 2010 they had a child through a surrogacy arrangement. They are the legal and biological parents, even though the child was born of a surrogate mother. Ms Z applied, but was refused, paid maternity and adoptive leave for the period before the birth.

**National proceedings**

Ms Z brought an action before the Irish Equality Tribunal. It referred six questions to the ECJ.

**ECJ's findings**

By its first and second questions, the Equality Tribunal asks whether Directive 2006/54 is to be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement constitutes discrimination on grounds of sex (§ 46).

Under Irish law, a commissioning father who has had a baby through a surrogacy arrangement is treated in the same way as a commissioning mother in a comparable situation, in that he is not entitled to paid leave either. Thus, there is no direct sex discrimination. As regards indirect

sex discrimination, there is nothing in the documents submitted to the ECJ to establish that the refusal to grant Ms Z paid leave puts female workers at a particular disadvantage compared to male workers. Consequently, that refusal does not constitute direct or indirect sex discrimination within the meaning of Directive 2006/54. The fact that Ms Z has been responsible for the child from birth does not call this finding into question (§ 47-55).

In its judgment in C.D. (case C-167/12), the ECJ ruled that the Maternity Directive 92/85 does not require Member States to provide maternity leave to a commissioning mother (§ 58-59).

Directive 2006/54 preserves the freedom of the Member States to grant or not to grant adoption leave. It provides that the conditions for the implementation of adoptive leave, other than dismissal, are outside the scope of the Directive (§ 61-63).

By questions 3-6, the Equality Tribunal asks whether a refusal such as that at issue constitutes discrimination on grounds of disability within the meaning of Directive 2000/78 and, if not, whether that directive is valid in the light of the UN Convention on the Rights of Persons with Disabilities, which was approved on behalf of the EU by Council Decision 2010/48 (§ 68).

International agreements concluded by the EU prevail over acts of the EU. Hence, Directive 2000/78 must be interpreted in a manner consistent with the UN Convention. This is why, in its judgment in HK Danmark (case C-335/11, also known as “Ring”), the ECJ interpreted the concept of “disability” in Directive 2000/78 as referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers (§ 69-77).

A woman’s inability to bear her own child may be a source of great suffering for her. However, this inability does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. Thus, Ms Z’s condition does not constitute a “disability” within the meaning of Directive 2000/78 (§ 78-82).

The provisions of the said UN Convention are not, as regards their context, provisions that are unconditional and sufficiently precise to have direct effect in EU law (§ 84-90).

## **Ruling**

Directive 2006/54 [...], in particular Articles 4 and 14 thereof, must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave to a female worker, who as a commissioning mother has had a baby through a surrogacy arrangement, does not constitute

discrimination on grounds of sex. The situation of such a commissioning mother as regards the grant of adoptive leave is not within the scope of that directive.

Council Directive 2000/78 [...] must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed herself of a surrogacy arrangement does not constitute discrimination on the ground of disability. The validity of that directive cannot be assessed in light of the United Nations Convention on the Rights of Persons with Disabilities, but the directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2014-03-18

**Case number:** C-363/12