

SUMMARY

ECJ (Grand Chamber) 18 March 2014, case C-167/12 (C.D. - v - S.T.), Working time and leave, Maternity and parental leave

Facts

Ms D, an employee in the UK, entered into a surrogacy agreement to have a baby. The sperm was that of her partner but the egg was not hers. Her employer had a maternity leave and pay policy as well as an adoption leave and pay policy. Neither of those policies provided for leave and pay for “intended mothers” who have a baby through a surrogate arrangement with a “surrogacy mother”. Ms D requested her employer for surrogacy leave, which, according to her, equated to adoption leave. Her request was denied. On 7 June 2011, she brought an action before the local Employment Tribunal, claiming, inter alia, on the grounds of sex and/or pregnancy and maternity.

The baby was born on 26 August 2011. Ms D immediately began to mother and breastfeed the child. She continued doing this for three months. On 19 December 2011 Ms D and her partner were granted full and permanent parental responsibility for the child.

National proceedings

The Employment Tribunal referred seven questions to the ECJ. With its first and second questions it asked whether the Maternity Directive 92/85 is to be interpreted as meaning that a “commissioning mother” (= an intended mother who has had a baby through a surrogacy agreement) is entitled to maternity leave under Article 8 of the directive, in particular in circumstances where the commissioning mother breastfeeds. In its questions 3-5 the referring court asked whether an employer’s refusal to provide maternity leave to a commissioning mother constitutes sex discrimination under Directive 2006/54.

ECJ's findings

1. Maternity leave is intended (i) to protect a woman's health during and after pregnancy and (ii) to protect the special relationship between a woman and her child by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment. Objective (ii) concerns only the period after pregnancy and childbirth. Therefore, the grant of maternity leave pursuant to Article 8 of Directive 92/85 presupposes that the worker has been pregnant and has given birth to a child. Thus, a worker such as Ms D does not fall within the scope of Article 8, even where she breastfeeds (§ 34-40).

2. Member States may apply more favourable laws (§ 42).

3. The refusal to provide maternity leave in the situation of Ms D constitutes direct sex discrimination if the fundamental reason for the refusal applies exclusively to workers of one sex. This is not the case in the UK, given that a commissioning father who has had a baby through a surrogacy arrangement is not entitled to maternity leave either (§ 46-47).

4. There is nothing in the ECJ's file to establish that the refusal of leave at issue puts female workers at a particular disadvantage compared with male workers. Consequently, the refusal to grant Ms D maternity leave does not constitute (direct or) indirect sex discrimination (§ 48-50).

Ruling

1. Council Directive 92/85 [...] must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.

2. Article 14 of Directive 2006/54 [...] read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, must be interpreted as meaning that an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.

Creator: European Court of Justice (ECJ)

Verdict at: 2014-03-18

Case number: C-167/12