



Reports of Cases

Case C-167/12

C. D.
v
S. T.

(Request for a preliminary ruling from the Employment Tribunal Newcastle upon Tyne)

(Reference for a preliminary ruling — Social policy — Directive 92/85/EEC — Measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding — Article 8 — Commissioning mother who has had a baby through a surrogacy arrangement — Refusal to grant her maternity leave — Directive 2006/54/EC — Equal treatment of male and female workers — Article 14 — Less favourable treatment of a commissioning mother as regards the grant of maternity leave)

Summary — Judgment of the Court (Grand Chamber), 18 March 2014

1. *Social policy — Protection of the safety and health of workers — Pregnant workers and workers who have recently given birth or are breastfeeding — Directive 92/85 — Entitlement to maternity leave — Commissioning mother who has had a baby through a surrogacy arrangement — Female worker not covered by Article 8 of Directive 92/85 — Member States' ability to apply or introduce more favourable provisions*

(Council Directive 92/85, Art. 8)

2. *Social policy — Male and female workers — Access to employment and working conditions — Equal treatment — Directive 2006/54 — Refusal to grant maternity leave to a commissioning mother — Less favourable treatment related to pregnancy or maternity leave — None*

(European Parliament and Council Directive 2006/54, Arts 2(1)(a) and (b) and (2)(c) and 14; Council Directive 92/85, Art. 8)

1. Directive 92/85 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 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.

It follows from the objective of Directive 92/85, from the wording of Article 8 thereof, which expressly refers to confinement, and from the case-law of the Court of Justice that the purpose of the maternity leave provided for in Article 8 is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy. Whilst it is true that the Court has held that maternity leave is also intended to ensure that the special relationship between a woman and her child is protected, that objective concerns only the period after pregnancy and childbirth. It follows

from this that the grant of maternity leave pursuant to Article 8 of Directive 92/85 presupposes that the worker entitled to such leave has been pregnant and has given birth to a child. In those circumstances, a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not fall within the scope of that provision, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby. Consequently, Member States are not required to grant such a worker a right to maternity leave pursuant to that article.

However, the purpose of Directive 92/85 is to establish certain minimum requirements in respect of the protection of pregnant workers and workers who have recently given birth or who are breastfeeding. Consequently that directive does not in any way preclude Member States from applying or introducing laws, regulations or administrative provisions more favourable to the protection of the safety and health of commissioning mothers who have had babies through a surrogacy arrangement by allowing them to take maternity leave as a result of the birth of the child.

(see paras 35-37, 40-43, operative part 1)

2. Article 14 of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 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.

The refusal to provide maternity leave in such a situation constitutes direct discrimination on grounds of sex within the meaning of Article 2(1)(a) of that directive if the fundamental reason for that refusal applies exclusively to workers of one sex. However, there is no such direct discrimination if, under national legislation, 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 equivalent to maternity leave either. Nor, moreover, is there indirect discrimination within the meaning of Article 2(1)(b) of the directive where there is nothing to establish that the refusal of leave puts female workers at a particular disadvantage compared with male workers.

Further, under Article 2(2)(c) of Directive 2006/54, any less favourable treatment of a woman that is related to pregnancy or maternity leave within the meaning of Directive 92/85 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 constitutes discrimination within the meaning of Directive 2006/54. However, a commissioning mother who has had a baby through a surrogacy arrangement cannot, by definition, be subject to less favourable treatment related to her pregnancy, given that she has not been pregnant with that baby. Moreover, given that Directive 92/85 does not provide that maternity leave must be granted to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, that commissioning mother is not subject to less favourable treatment related to the taking of maternity leave within the meaning of Directive 92/85.

(see paras 46, 47, 49, 51-53, 55, operative part 2)