



Press and Information

Court of Justice of the European Union

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Judgment in Cases C-167/12 C. D. v S.T.  
and C-363/12 Z. v A Government Department and the Board of Management  
of a Community School

## **EU law does not require that a mother who has had a baby through a surrogacy agreement should be entitled to maternity leave or its equivalent**

*The Pregnant Workers Directive merely lays down certain minimum requirements in respect of protection, although the Member States are free to apply more favourable rules for the benefit of such mothers*

Ms D., who is employed in a hospital in the United Kingdom, and Ms Z., a teacher working in Ireland, both used surrogate mothers in order to have a child.

Ms D. entered into a surrogacy agreement in accordance with UK law. The child was conceived using her partner's sperm and another woman's egg. Some months after the birth, a UK court, with the surrogate mother's consent, granted Ms D. and her partner full and permanent parental responsibility for the child in accordance with UK legislation on surrogacy.

Ms Z. has a rare condition which has the effect that, although she has healthy ovaries and is otherwise fertile, she has no uterus and therefore cannot support a pregnancy. Ms Z. and her husband had a child as a result of an agreement with a surrogate mother in California. Genetically, the child is the couple's, and there is no reference to the surrogate mother's identity on the child's US birth certificate. Under Californian law, Ms Z. and her husband are considered the baby's parents.

Both women applied for paid leave equivalent to maternity leave or adoption leave. The applications were refused on the grounds that Ms D. and Ms Z. had never been pregnant and the children had not been adopted by the parents.

The national tribunals before which the two mothers brought actions have asked whether such a refusal is contrary to the Pregnant Workers Directive<sup>1</sup> or whether it constitutes discrimination on grounds of sex or of disability (both types of discrimination being prohibited under the Equal Treatment Directive<sup>2</sup> and Employment Equality Framework Directive<sup>3</sup> respectively).

In its judgments delivered today, the Court of Justice replies that **EU law does not provide for commissioning mothers to be entitled to paid leave equivalent to maternity leave or adoption leave.**

**As regards the Pregnant Workers Directive**, the Court points out that the objective of that directive is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding, such workers being considered a specific risk group. In that directive, the provision relating to maternity leave expressly refers to confinement, and its purpose is to protect the mother in the especially vulnerable situation arising

<sup>1</sup> 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, p. 1).

<sup>2</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

from her pregnancy. The Court adds that although 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 the directive presupposes that the worker concerned has been pregnant and has given birth to a child. Therefore, a commissioning mother** who has used a surrogate mother in order to have a child **does not fall within the scope of the directive**, 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, on the basis of the directive, to grant such a worker a right to maternity leave.

Nevertheless, the Court adds that since the purpose of that directive is to establish certain minimum requirements in respect of the protection of pregnant workers, the Member States are free to apply more favourable rules for the benefit of commissioning mothers.

**As regards the Equal Treatment Directive**, the Court finds that **a refusal to grant maternity leave to a commissioning mother does not constitute discrimination on grounds of sex**, given that a commissioning father is not entitled to such leave either and that the refusal does not put female workers at a particular disadvantage compared with male workers.

Furthermore, **a refusal to grant paid leave equivalent to adoption leave to a commissioning mother is outside the scope of the Equal Treatment Directive**. That directive leaves the Member States free to choose whether or not to grant adoption leave. It merely provides that when such leave is granted, the workers concerned must be protected against dismissal and are entitled to return to their jobs or to equivalent posts.

Lastly, **as regards the Employment Equality Framework Directive** which prohibits any discrimination on the ground of disability in employment and occupation, the Court considers that it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her. However, **the concept of 'disability'** within the meaning of that directive **presupposes that the limitation from which the person suffers**, in interaction with various barriers, **may hinder that person's full and effective participation in professional life** on an equal basis with other workers.

**In principle, the inability to have a child by conventional means does not, in itself, prevent the commissioning mother from having access to**, participating in or advancing in employment.

That being the case, the Court finds that the inability to have a child does not constitute a 'disability' within the meaning of the Employment Equality Framework Directive and, therefore, that that directive is not applicable in a situation such as that at issue here.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The full texts of the judgments ([C-167/12](#) & [C-363/12](#)) are published on the CURIA website on the day of delivery.*

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*Pictures of the delivery of the judgments are available from "[Europe by Satellite](#)" ☎ (+32) 2 2964106*