ECJ rules that surrogate mothers are not entitled to maternity or adoption leave or pay

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The ECJ has held in two recent cases that mothers who had children via a surrogate and were subsequently denied maternity or adoption leave and pay had not been discriminated against. The court found that there was no sex discrimination because a man who had organised a surrogacy would be treated in the same way. It held that the EU Pregnant Workers Directive protected those who were in a vulnerable position because they had recently given birth and therefore, "commissioning mothers" would not be protected under it. The ECJ also held that there was no disability discrimination under the Equal Treatment Framework Directive where a woman, who has a disability preventing her from giving birth and whose genetic child has been born via a surrogacy arrangement, is refused paid leave equivalent to maternity or adoption leave.

In the first case, CD v ST, the Claimant D had arranged to have the child through surrogacy but her employer did not provide her with maternity pay or leave. The ECJ held that the pregnant workers directive presupposes that the worker has been pregnant and given birth to the child. It found therefore that to benefit from the EU Pregnant Workers Directive, the individual must have been pregnant and given birth. As D was the commissioning mother, she had not been pregnant and therefore was not entitled to protection under the directive. It was also held that there was no sex discrimination in not allowing a commissioning mother maternity leave because a commissioning father who has had a baby through a surrogacy arrangement is treated in the same way.

In a similar case, Z was a surrogate mother who was unable to have children because she did not have a uterus. She brought sex discrimination and disability discrimination claims. The

ECJ rejected her sex discrimination claim for similar reasons to the above. In respect of her disability discrimination claim, the ECJ accepted that a woman's inability to have a child could be a source of suffering, pursuant to the legislation a "disability" prevents a person from full and effective participation in professional life when compared to another. As Z's condition did not restrict her from effective participation in professional life she was not considered disabled and therefore could not advance her discrimination claim under the Equal Treatment Directive.

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