Do mothers who have children through surrogates have a right to maternity leave?

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The European Court of Justice has been asked to decide a mothers' right to maternity leave if she has a baby through a

surrogacy arrangement. Two cases have been referred to the ECJ and the Advocate Generals (advisers for the ECJ) have offered conflicting opinions. Such opinions are usually adopted as final judgments by the ECJ but in this scenario only one can be.

Case 1

C-D became a mother under a surrogacy agreement, using her partner's sperm but not her ova. C-D started breastfeeding the baby within an hour of the birth. Her employer refused her requests for maternity or adoption leave and instead offered her support by means of a career break, annual leave, reduced hours and unpaid leave. Consequently, she brought tribunal claims arguing sex and/or pregnancy and maternity discrimination.

However, the Advocate General made two points:

1. An intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave where she takes the child into her care following the birth, even if the intended mother does not breastfeed following birth. This is to protect the special relationship between the mother and the child following pregnancy.
2. The intended and surrogate mother should both be entitled to the two weeks compulsory maternity leave and the remainder leave entitlement should be divided between them.

Case 2

Z, an Irish citizen, had a child using an American surrogate. She had healthy ovaries but no uterus meaning she could not fall pregnant. Her employer only offered her unpaid leave on the grounds that there was no provision for paid leave arising from the birth of a child via a surrogacy agreement in her employment contract. Consequently, Z brought sex and

disability discrimination claims.

The Advocate General found that Z had not been discriminated against by having been denied the right to maternity leave. In brief, he said that the purpose of maternity leave was to protect the health and safety of female workers in a vulnerable condition and not as protecting a right to paid maternity leave in the case of a mother who has her genetic child through a surrogacy arrangement. He went onto say that whether Ireland should extend the scope of maternity leave to cover mothers through surrogacy was a matter for the Irish Parliament.

Interestingly, he said that there was no disability discrimination because Z's infertility did not hinder her professional life.

Summary

The conflicting opinions may be explained by the fact that each case was argued under different parts of anti-discrimination law and that Ireland does not allow for surrogacy (whereas the UK does). Whilst it will be up to the ECJ to decide which opinion they prefer, it will be an interim position only as the UK Government has recently announced its decision to extend maternity rights to parents through surrogacy. This should come into force in 2015.


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