

Course “EU integration and ethics” – case *D*

A. National law

12 The **Human Fertilisation and Embryology Act 2008** [United Kingdom] provides in section 54 that, on an application made by two people, a court may make an order giving them **parental responsibility** for a child (a parental order), so that the child is treated in law as the child of the applicants if:

- the child has been **carried** by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her **artificial insemination**,
- the **gametes of at least one** of the applicants were **used** to bring about the creation of the embryo, and
- certain **other conditions** are satisfied, including the condition that the applicants be husband and wife or in some analogous **relationship**.

13 Section 47C of the Employment Rights Act 1996 states that an **employee** has the **right not to be subjected to any detriment** by any act, or any deliberate failure to act, by his employer done for a prescribed reason. A prescribed reason is one which is **defined** by regulations made by the Secretary of State and which relates to, inter alia, pregnancy, childbirth or maternity; ordinary, compulsory or additional maternity leave; and ordinary or additional adoption leave.

14 Under The Maternity and Parental Leave etc. Regulations 1999, an **employee** is **entitled** to ordinary **maternity leave** and to additional maternity leave where certain **conditions** are satisfied, and the terms and conditions of her employment are protected during maternity leave. These regulations also give the employee the right to return to work after maternity leave and protection against unfair dismissal.

15 In accordance with regulation 19 of these Regulations, an employee is **entitled** under section 47C of the Employment Rights Act 1996 **not to be subjected to any detriment** by any act, or any deliberate failure to act, by her employer done for the reason, inter alia, that the employee took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave.

16 The Equality Act 2010 states, in particular, that a woman is **discriminated** against if she is treated less favourably than others **on the grounds of her sex, pregnancy or maternity leave**.

B. Circumstances of the case

17 It is apparent from the order for reference that **Ms D.** has been employed by S. T. since 7 July 2001 at a hospital managed by S. T.

18 Ms D. entered into a **surrogacy agreement** to have a baby; the agreement was **compliant with** the Human Fertilisation and Embryology Act 2008. The **sperm** was provided by Ms D.’s **partner** but the **egg was not Ms D.’s**. At **no** material time was Ms D. herself **pregnant**.

19 S. T. has a maternity leave and pay policy and an adoption leave and pay policy which equate to the statutory provisions on paid leave. The **policies do not provide for leave and pay for commissioning mothers in cases of surrogacy**. S. T. also has a special leave policy, which does not concern surrogacy. On 15 October 2009, S. T.’s Director of Human Resources stated in reply to a request from a trade union concerning provision for commissioning mothers that, ‘on an

individual basis, should the need arise, requirements would be addressed by arrangements for maternity leave or adoption’.

20 Ms D. made an **application** to her employer for paid leave under its adoption policy. By letter of 14 March 2011, S. T. informed Ms D. that her surrogacy arrangement did **not meet** the **requirements** of that policy, as Ms D. could not provide a ‘matching certificate’ issued by an adoption agency, certifying that the future adoptive parent has been matched with a child for adoption.

21 On the same day, after receiving that letter, Ms D. made a **formal request** to S. T. for surrogacy leave, which, according to Ms D., equated to adoption leave except for the fact that she could not provide a matching certificate because she was not undergoing adoption proceedings. On 11 April 2011, S. T. replied that if Ms D. was proceeding with adoption she would be entitled to paid leave, but if she was not there was **‘no legal right to paid time off for surrogacy’**.

22 On 7 June 2011, Ms D. brought an **action** before the Employment Tribunal, Newcastle upon Tyne, claiming **discrimination on the grounds of sex and/or pregnancy** and maternity under the Equality Act 2010. She also claimed that the Employment Rights Act 1996 and The Maternity and Parental Leave etc. Regulations 1999 had been infringed. She further claimed that she had been subject to a **detriment by reason of pregnancy** and maternity and by reason of the fact that she had sought to take ordinary or additional maternity leave. In addition, Ms D. relied on an infringement of Articles 8 and 14 of the **European Convention** for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

23 On 10 June 2011, following a further application by Ms D., S. T. stated that it had a ‘residual discretion’ to consider the request for paid leave and that, using that discretion, it had decided that the terms of the adoption leave policy should be applied in favour of Ms D., requiring, inter alia, certain documents to be produced. Ms D. was therefore granted paid leave under that policy, under the conditions set out in a letter of 29 June 2011.

24 On 8 July 2011, S. T. asserted before the Employment Tribunal, Newcastle upon Tyne that Ms D. was **not entitled to maternity pay, because the right to such pay rests with the child’s birth mother**.

25 The **baby was born** on 26 August 2011. Ms D. wished to be present at the birth but the baby’s birth was somewhat sudden. Within an hour of the birth, **Ms D. began to mother and breastfeed the child. She continued breastfeeding the child for three months**.

26 Ms D. and her partner **applied** to the competent court for a parental order under section 54 of the Human Fertilisation and Embryology Act 2008. By order of 19 December 2011, they were **granted** full and permanent **parental responsibility** for the child. Ms D. and her partner are therefore treated in law as the parents of that child.

Judgment in *D*, C-167/12, EU:C:2014:169