

Course “EU integration and ethics” – case Z

A. National law

25 Surrogacy is **unregulated** in Ireland.

26 Section 8 of the **Maternity Protection Act 1994**, in the version applicable at the material time, provides that a **pregnant** employee is to be **entitled to maternity leave** from her employment for a period of not less than 26 weeks.

27 Section 9 of that Act sets out the **conditions** for the granting of maternity leave, including that the employee should have given to her employer a medical or other appropriate **certificate** confirming the pregnancy and **specifying** the **expected week** of confinement.

28 Section 6 of the Adoptive Leave Act 1995, in the version applicable at the material time, gives an employed adopting mother or sole male adopter the right to a minimum period of **adoptive leave** of 24 weeks from the date of placement of the adopted child.

29 Section 7 of that Act provides, inter alia, for **notification** to the employer in advance of the adoption taking place and for the provision to the employer of a certificate of placement or, in the case of a foreign adoption, a certificate of eligibility and suitability.

30 Chapters 9 and 11 of the Social Welfare Consolidation Act 2005 lay down the rules relating to the grant of **maternity benefit and adoptive benefit** respectively.

31 Section 2 of the Employment Equality Acts 1998 to 2011 **defines disability** as being inter alia the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body, and defines family status as being responsibility, inter alia, as a parent or as a person in loco parentis in relation to a person who has not attained the age of 18 years.

32 Section 6(1) and (2) of those Acts **defines discrimination** as being taken to occur, inter alia, where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the specified grounds. Those grounds, as between two persons, include the fact that one is a woman and the other is a man, referred to as ‘the gender ground’, and that one is a person with a disability and the other either is not or is a person with a different disability, referred to as ‘the disability ground’.

33 Section 6(2A) of those Acts provides that, without prejudice to the generality of subsections (1) and (2), **discrimination on the gender ground** is to be taken to occur where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated.

B. Circumstances of the case

34 It is apparent from the order for reference that **Ms Z.** is employed as a post-primary school teacher in a school managed by the Board of Management, pursuant to terms and conditions of employment determined by the Government department, which is responsible for her pay.

35 Ms Z. has a rare condition which has the effect that, although she has **healthy ovaries** and is **fertile**, she has **no uterus** and **cannot support a pregnancy**. In 2008 and 2009, Ms Z. and

her husband opted for **surrogacy** and turned to a specialist agency in **California** (United States), a State in which the **law provides for detailed regulation** of surrogate pregnancies and births.

36 **In vitro fertilisation** treatment took place in **Ireland**, with **egg transfer** to the surrogate mother occurring in California in August 2009.

37 On 7 April 2010, Ms Z. **travelled** to California in order **to be present** at the birth of the child, a girl, on 28 April 2010. The child is the **genetic child** of Ms Z. and her husband, having been created **from their gametes**. As a matter of **Californian law**, Ms Z. and her husband are **considered** the **baby's parents** and the surrogate mother is not identified on the child's birth certificate. Ms Z., with the help of her husband, has been taking **care of the child** since the birth. On 18 May 2010, Ms Z. and her husband **returned** with their baby to **Ireland**, a Member State in which surrogacy arrangements are **unregulated**.

38 The **terms and conditions** of Ms Z.'s **employment include** a right to paid maternity leave and adoptive leave. When either kind of leave is taken by a teacher employed subject to those terms and conditions, the **payment** in respect of such leave is, in the majority of cases, disbursed in part by the Government department, and the balance paid by the Department of Social Protection in the form of maternity benefit.

39 Since she had **not been pregnant** and could not give birth to a child, Ms Z. was **unable to satisfy the requirements** under the Maternity Protection Act 1994 for taking maternity leave. Nor was she in a position to qualify for adoptive leave, as provided by the Adoptive Leave Act 1995, since she was not adopting a child born through surrogacy.

40 Furthermore, there is **no express provision** in statute or in Ms Z.'s contract of employment for leave to be granted following the birth of a child under **surrogacy** arrangements.

41 On 10 February 2010, Ms Z. made an **application** to the Government department for leave equivalent to adoptive leave. On 5 March 2010, the Government department **refused** that application on the ground that she did not satisfy the requirements laid down by the existing maternity or adoptive leave schemes.

42 The Government department indicated, **however**, that it was prepared to grant Ms Z. **unpaid leave** for the time she was in California prior to the birth of the child. It added that, once the child was born, Ms Z. could avail of statutory parental leave for the period from the birth until the end of May 2010 and again from the beginning of the next school year. It stated that Ms Z. had a right to parental leave of a maximum duration of 14 weeks and that she would be paid for the summer months in the normal way.

43 Through a combination of school closures and certified paid sick leave, for reasons not based on her disability but arising from stress, Ms Z. worked approximately nine days in the period from 12 April 2010 until early January 2011. The Government department paid Ms Z. in full for this entire period.

44 In November 2010, Ms Z. brought an action against the Government department before the Equality Tribunal. She **claimed** that she had been the subject of **discriminatory treatment on the grounds of gender, family status and disability**, that the Government department had failed to reasonably accommodate her as a person with a disability, and that the Government department had refused to provide her with paid leave equivalent to maternity or adoptive leave, although she had undergone in vitro fertilisation treatment.

Judgment in Z, C-363/12, EU:C:2014:159