



LexisNexis®

Surrogacy and rights to maternity leave

03/10/2013

Employment analysis: Emma Hawsworth, a principal lawyer (partner) in Slater & Gordon Lawyers' employment department, and Natalie Gamble, who leads Natalie Gamble Associates, the UK's only firm of solicitors to specialise exclusively in fertility and parenting law, consider the European Court's significant ruling on paid leave rights for those becoming parents through surrogacy.

Original news

Advocate General's Opinion in Case C-167/12 CD v ST

The woman who assumes responsibility for a baby born through a surrogacy arrangement (intended mother) should be entitled to maternity leave, Advocate General (AG) Kokott has found, although the minimum leave entitlement of 14 weeks must be split between both the surrogate and intended mother. Both the surrogate and intended mother must take at least two weeks, the AG added.

What is the significance of this advice from the CJEU?

Emma Hawsworth (EH): The AG's decision in the case of *CD v ST* C-167/12 is very significant, as it is the first time that it has been suggested that under European law intended mothers in surrogacy arrangements are entitled to maternity rights, as well as birth mothers. If the CJEU adopts the opinion, this will mark a huge step forward in terms of the employment rights of those becoming parents through surrogacy.

Natalie Gamble (NG): This is a significant recognition, at European level, that parents through surrogacy should be treated in the same way as other new parents.

Is this likely to lead to changes in the domestic legislation?

EH: Changes to the domestic legislation are already due to be brought in, in 2015. Following pressure in parliament last year, and a High Court claim brought by Surrogacy UK, the government agreed in November last year that new provisions to provide rights for those becoming parents through surrogacy would be included in the Children and Families Bill. The Bill is currently at the Committee Stage in the House of Lords.

The Children and Families Bill proposes the introduction of an entitlement to adoption leave rights. The AG in this case suggests that the intended mother is entitled to maternity leave, rather than adoption leave, and so the proposals may need to be reconsidered once the CJEU has ruled in this case. However, the intention is that the Children and Families Bill will iron out the differences between adoption leave and maternity leave in domestic law in any event.

NG: The government already announced last October (after this case was first sent to the European Court) that it would amend the Children and Families Bill to incorporate the equivalent of adoption leave and pay for parents who have a child through a surrogacy arrangement. The Bill is expected to come into force in 2015. Assuming it is enacted, it will give UK parents through surrogacy the same legal rights to leave and pay when their child is born that other new parents have.

What are the practical implications for employers and employees?

EH: There is a relatively small number of surrogacy arrangements each year in the UK, usually less than 100, so few employers are likely to have to consider this issue in practice. However, once the CJEU has ruled, employers should review their family leave policies to ensure the likely changes in relation to rights for those who become parents through surrogacy are dealt with.

Before then, employers considering a request for leave by an employee becoming a parent through surrogacy should consider providing discretionary maternity leave rights, and employees in this situation who encounter difficulties should lodge protective proceedings in the employment tribunal while the changes to the law in this area are clarified.

NG: From 2015 employers will, by law, be required to offer parents expecting a child through a surrogacy arrangement the same leave and pay as parents who adopt a child. In the meantime, employers will need to consider very carefully (in the light of this ruling) whether a failure to give such new parents the time off work they need to care for their newborn child may amount to discrimination. It would make sense for employers to start implementing policies for surrogacy as soon as possible.

How does the allocation of maternity leave work in cases involving surrogacy? What is the AG suggesting?

EH: The AG suggests that compulsory maternity leave of at least two weeks must be granted to both women in full. However, she says that other than in relation to this compulsory leave period, surrogacy cannot result in a doubling of the overall leave entitlement. Rather, maternity leave must be shared between the birth and intended mothers, to reflect the division of roles chosen by them. This means that, according to the AG, the leave already taken by the surrogate mother must be deducted from the leave entitlement of the intended mother, and vice versa.

This approach could be complicated in practice, and, if adopted by the CJEU, will need to be considered carefully in relation to the proposals for changes to domestic law. The CJEU sets a minimum benchmark, so it would be possible for domestic law to provide better protection, for example permitting both birth and intended mothers to benefit from maternity leave in full.

NG: Currently the woman who gives birth (the surrogate mother) is entitled to all the normal maternity leave rights, while the intended mother (or parents if a same sex couple) is not entitled to any maternity leave and pay even if caring for a newborn child in practice. The Children and Families Bill provides for additional leave for intended parents through surrogacy, which does not affect the birth mother's entitlement to maternity leave and pay. The AG's opinion suggests a slightly different approach, which is that the birth mother's entitlements might be reduced if the intended parents take leave (although this would not be consistent with adoption cases where both the birth mother and the adoptive parents are entitled to leave).

How might a cross-border element complicate matters? Which maternity leave regime will the court apply (the surrogate or the receiving family)?

EH: Cross-border elements are likely to complicate matters. The AG referred to cross-border situations in which the law of the intended mother's country of origin accepts the concept of surrogacy but the law in force at her place of employment does not. However, she did not give an opinion on this as it was not necessary to decide in the context of this case.

NG: Increasing numbers of UK parents are going overseas for surrogacy, which means that their child is born in a foreign country. It is critical for the parents in overseas surrogacy arrangements to be able to take leave from work, so that they can be in the destination country immediately from birth where they will assume responsibility for their child's care until the immigration processes are complete (which can take many months). The Hague Conference on Private International Law is currently researching whether to regulate international surrogacy arrangements, and the most popular foreign destinations for surrogacy are the USA, India and the Ukraine.

What were the reasons for the different AG opinions in *CD v ST* as opposed to *Z v A Government Dept and the Board of Management of a Community School C-363/12*?

EH: A different AG has given a contradictory opinion on this point in the case of *Z v A Government Dept and the Board of Management of a Community School* C-363/12, a reference from the Equality Tribunal in Ireland. AG Wahl took a different view of the objective of the Pregnant Workers Directive 92/85/EC, and concluded that it is to protect only those women who give birth, and are recovering from the effects of pregnancy and childbirth. He felt that to extend rights to those who become mothers through surrogacy would be inconsistent with the treatment afforded to adoptive mothers and also to fathers.

The CJEU is due to give its rulings in these cases early next year.

Emma Hawksworth has 15 years' experience in employment law. Recommended as a leader in her field by Chambers and Partners, Emma advises employees and employee organisations on all aspects of employment law, with particular emphasis on sex discrimination, maternity rights and flexible working.

Natalie Gamble was the first solicitor to pioneer fertility law in the UK and is now known internationally as the UK's leading fertility lawyer. Natalie Gamble Associates is a campaigning law firm and has a steady record of winning changes to law and policy.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.