

JUDGMENT OF THE COURT (Grand Chamber)

18 March 2014 (*)

(Reference for a preliminary ruling – Social policy – Directive 92/85/EEC – Measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding – Article 8 – Commissioning mother who has had a baby through a surrogacy arrangement – Refusal to grant her maternity leave – Directive 2006/54/EC – Equal treatment of male and female workers – Article 14 – Less favourable treatment of a commissioning mother as regards the grant of maternity leave)

In Case C-167/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Employment Tribunal, Newcastle upon Tyne (United Kingdom), made by decision of 29 March 2012, received at the Court on 3 April 2012, in the proceedings

C. D.

v

S. T.,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen and M. Safjan (Rapporteur), Presidents of Chambers, J. Malenovský, E. Levits, A. Ó Caoimh, J.-C. Bonichot, D. Šváby, M. Berger, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 March 2013,

after considering the observations submitted on behalf of:

- Ms D., by K. Ewing, Solicitor, K. Monaghan QC and J. Russell, Barrister,
- S. T., by C. Jeans QC and A. Edge, Barrister,
- the United Kingdom Government, by A. Robinson, acting as Agent, and by E. Dixon, Barrister,
- Ireland, by E. Creedon, acting as Agent, and by G. Durcan SC and C. Smith BL,
- the Greek Government, by E.-M. Mamouna and D. Tsagkaraki, acting as Agents,
- the Spanish Government, by A. Rubio González, acting as Agent,
- the Portuguese Government, by L. Inez Fernandes and E. Pedrosa, acting as Agents,
- the European Commission, by J. Enegren and C. Gheorghiu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2013,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 1(1), 2(c), 8(1) and 11(2)(b) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), and of Article 2(1)(a) and (b) and (2)(c) and Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).
- 2 The request has been made in proceedings between Ms D., an intended mother (also referred to as a commissioning mother) who has had a baby through a surrogacy arrangement, and S. T., her employer, a National Health Service Foundation Trust, concerning the refusal to grant her paid leave following the birth of the baby.

Legal context

European Union law

Directive 92/85

- 3 The first, eighth, ninth, fourteenth and seventeenth recitals in the preamble to Directive 92/85 are worded as follows:

'Whereas Article 118a [EC] provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to protect the safety and health of workers;

...

Whereas pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;

Whereas the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;

...

Whereas the vulnerability of pregnant workers, workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave of at least 14 continuous weeks, allocated before and/or after confinement, and renders necessary the compulsory nature of maternity leave of at least two weeks, allocated before and/or after confinement;

...

Whereas, moreover, provision concerning maternity leave would also serve no purpose unless accompanied by the maintenance of rights linked to the employment contract and or entitlement to an adequate allowance'.

4 Article 1(1) of Directive 92/85 states:

'The purpose of this Directive, which is the tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC, is to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding.'

5 Article 2 of that directive contains the following definitions:

'For the purposes of this Directive:

- (a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
- (b) *worker who has recently given birth* shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice;
- (c) *worker who is breastfeeding* shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice.'

6 Article 8 of that directive, headed 'Maternity leave', provides:

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

2. The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

7 Article 10 of Directive 92/85, headed 'Prohibition of dismissal', provides:

'In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

- (1) Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;

...'

8 Article 11 of that directive, headed 'Employment rights', provides:

'In order to guarantee workers within the meaning of Article 2 the exercise of their health and safety protection rights as recognised under this Article, it shall be provided that:

...

- (2) in the case referred to in Article 8, the following must be ensured:

...

- (b) maintenance of a payment to, and/or entitlement to an adequate allowance for,

workers within the meaning of Article 2;

...'

Directive 2006/54

9 Article 1 of Directive 2006/54 states:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

...

(b) working conditions, including pay;

...'

10 Article 2 of that directive provides:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) "indirect discrimination": where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

...

2. For the purposes of this Directive, discrimination includes:

...

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.'

11 Article 14(1)(c) of that directive is worded as follows:

'There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article [157 TFEU]'.
'

United Kingdom legislation

12 The Human Fertilisation and Embryology Act 2008 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.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 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.
- 27 In those circumstances, the Employment Tribunal, Newcastle upon Tyne decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- 'In each of the following questions:
- The phrase "an intended mother who has a baby through a surrogacy arrangement" shall refer to circumstances where the intended mother in question is a worker and has not herself, at any material time, been pregnant, or given birth to the child in question.
 - The phrase "surrogate mother" shall refer to circumstances where a woman has been pregnant and given birth to a child on behalf of an intended mother.
- (1) Do Article 1(1) and/or Article 2(c) and/or Article 8(1) and/or Article 11(2)(b) of [Directive 92/85] provide a right to receive maternity leave to an intended mother who has a baby through a surrogacy arrangement?
 - (2) Does [Directive 92/85] provide a right to receive maternity leave to an intended mother who has a baby through a surrogacy arrangement, in circumstances where she:
 - (a) may breastfeed following birth and/or
 - (b) does breastfeed following birth?
 - (3) Is it a breach of Article 14, taken with Article 2(l)(a) and/or (b) and/or 2(2)(c) of [Directive 2006/54] for an employer to refuse to provide maternity leave to an intended mother who has a baby through a surrogacy arrangement?
 - (4) Is it by reason of the employee's association with the surrogate mother of the baby a potential breach of Article 14, taken with Article 2(l)(a) and/or (b) and/or 2(2)(c) of [Directive 2006/54] to refuse to provide maternity leave to an intended mother who has a

baby through a surrogacy arrangement?

- (5) Is it by reason of the intended mother's association with the surrogate mother of the baby a potential breach of Article 14, taken with Article 2(l)(a) and/or (b) and/or 2(2)(c) of [Directive 2006/54] to subject an intended mother who has a baby through a surrogacy arrangement to less favourable treatment?
- (6) If the answer to question 4 is "yes", is the intended mother's status as intended mother sufficient to entitle her to maternity leave on the basis of her association with the surrogate mother of the baby?
- (7) If the answer to any of questions 1, 2, 3 and 4 is "yes":
- (a) Is [Directive 92/85], in the relevant respects, directly effective; and
- (b) Is [Directive 2006/54], in the relevant respects directly effective?

Consideration of the questions referred

The first and second questions

- 28 By its first and second questions, which it is appropriate to consider together, the referring tribunal asks, in essence, whether Directive 92/85 is to be interpreted as meaning that a commissioning mother who has had a baby through a surrogacy arrangement is entitled to the maternity leave provided for in Article 8 of that directive, in particular in circumstances where the commissioning mother may breastfeed following birth or where she does breastfeed the baby.
- 29 As a preliminary point, it should be borne in mind that the objective of Directive 92/85, which was adopted on the basis of Article 118a EC, to which Article 153 TFEU corresponds, is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding (Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 27, and Case C-232/09 *Danosa* [2010] ECR I-11405, paragraph 58).
- 30 The eighth recital in the preamble to that directive states that pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group, and measures must be taken with regard to their safety and health.
- 31 In that context, Article 8(1) of Directive 92/85 provides that Member States are required to take the necessary measures to ensure that workers are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after 'confinement' in accordance with national legislation and/or practice.
- 32 According to the case-law of the Court, the right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law. The European Union legislature thus considered that the fundamental changes to the living conditions of the persons concerned during the period of at least 14 weeks preceding and after childbirth constituted a legitimate ground on which they could suspend their employment, without the public authorities or employers being allowed in any way to call the legitimacy of that ground into question (Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 49, and Case C-5/12 *Betriu Montull* [2013] ECR, paragraph 48).
- 33 As the European Union legislature acknowledged in the 14th recital in the preamble to Directive 92/85, pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave (see Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 40, and *Betriu Montull*, paragraph 49).

- 34 That maternity leave from which the female worker benefits is intended, first, to protect a woman's biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (see, in particular, Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25; *Kiiski*, paragraph 46; and *Betriu Montull*, paragraph 50).
- 35 Consequently, it follows from the objective of Directive 92/85, from the wording of Article 8 thereof, which expressly refers to confinement, and from the case-law of the Court cited in paragraphs 32 to 34 of the present judgment, that the purpose of the maternity leave provided for in Article 8 of that directive is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy.
- 36 It must be added in that regard that whilst the Court has held that maternity leave is also intended to ensure that the special relationship between a woman and her child is protected, that objective, as is clear from the wording of the judgments cited in paragraph 34 of the present judgment, concerns only the period after 'pregnancy and childbirth'.
- 37 It follows from the foregoing that the grant of maternity leave pursuant to Article 8 of Directive 92/85 presupposes that the worker entitled to such leave has been pregnant and has given birth to a child.
- 38 That finding is confirmed by the answer the Court gave in Case C-506/06 *Mayr* [2008] ECR I-1017 regarding the prohibition of dismissal of pregnant workers under Article 10(1) of Directive 92/85. In paragraph 37 of that judgment, the Court stated that it is apparent, both from the wording of Article 10 of Directive 92/85 and from the primary objective pursued by that directive – recalled in paragraph 29 of the present judgment – that to benefit from the protection against dismissal granted by that article the pregnancy in question must have started.
- 39 In the present case, it is apparent from the order for reference that Ms D. herself was not pregnant at any material time.
- 40 In those circumstances, a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not fall within the scope of Article 8 of Directive 92/85, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby. Consequently, Member States are not required to grant such a worker a right to maternity leave pursuant to that article.
- 41 It must nevertheless be added that the purpose of Directive 92/85, as the first recital in the preamble thereto makes clear, is to establish certain minimum requirements in respect of the protection of pregnant workers and workers who have recently given birth or who are breastfeeding.
- 42 Consequently that directive does not in any way preclude Member States from applying or introducing laws, regulations or administrative provisions more favourable to the protection of the safety and health of commissioning mothers who have had babies through a surrogacy arrangement by allowing them to take maternity leave as a result of the birth of the child.
- 43 In the light of the foregoing considerations, the answer to the first and second questions is that Directive 92/85 must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.

The third, fourth and fifth questions

- 44 By its third, fourth and fifth questions, which it is appropriate to consider together, the referring tribunal asks, in essence, whether Article 14 of Directive 2006/54, read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, is to be interpreted as meaning that an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement constitutes discrimination on grounds of sex.
- 45 Article 14(1) of Directive 2006/54 states that there is to be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation inter alia to employment and working conditions, including dismissals, as well as pay.
- 46 As regards discrimination as referred to in Article 2(1)(a) and (b) of that directive, the refusal to provide maternity leave in the situation outlined by the referring tribunal constitutes direct discrimination on grounds of sex within the meaning of Article 2(1)(a) if the fundamental reason for that refusal applies exclusively to workers of one sex (see, to that effect, Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 10; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 14; and *Mayr*, paragraph 50).
- 47 Under the national legislation applicable in a situation such as that at issue in the main proceedings, a commissioning father who has had a baby through a surrogacy arrangement is treated in the same way as a commissioning mother in a comparable situation, in that he is not entitled to paid leave equivalent to maternity leave either. It follows from this that the refusal of Ms D.'s request is not based on a reason that applies exclusively to workers of one sex.
- 48 The Court has consistently held that indirect discrimination on grounds of sex arises where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage than the other (see, to that effect, Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30; Case C-123/10 *Brachner* [2011] ECR I-10003, paragraph 56; and Case C-7/12 *Riežniece* [2013] ECR, paragraph 39).
- 49 As regards the indirect discrimination referred to in Article 2(1)(b) of Directive 2006/54, it must be noted that there is nothing in the file in the case to establish that the refusal of leave at issue puts female workers at a particular disadvantage compared with male workers.
- 50 Consequently, the refusal to grant maternity leave to a commissioning mother, such as Ms D., does not constitute direct or indirect discrimination on grounds of sex within the meaning of Article 2(1)(a) and (b) of Directive 2006/54.
- 51 Further, under Article 2(2)(c) of Directive 2006/54, any less favourable treatment of a woman that is related to pregnancy or maternity leave within the meaning of Directive 92/85 constitutes discrimination within the meaning of Directive 2006/54.
- 52 A commissioning mother who has had a baby through a surrogacy arrangement cannot, by definition, be subject to less favourable treatment related to her pregnancy, given that she has not been pregnant with that baby.
- 53 Moreover, it is apparent from the answer given to the first two questions that Directive 92/85 does not require Member States to provide maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement. Therefore, that commissioning mother is not subject to less favourable treatment related to the taking of maternity leave within the meaning of Directive 92/85.
- 54 Consequently, such a commissioning mother cannot be regarded as having been subject to discrimination on grounds of sex, for the purposes of Article 2(2)(c) of Directive 2006/54.
- 55 In the light of the foregoing observations, the answer to the third, fourth and fifth questions is that Article 14 of Directive 2006/54, read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, must be interpreted as meaning that an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does

not constitute discrimination on grounds of sex.

The sixth and seventh questions

56 In the light of the answers given to the first, second, third, fourth and fifth questions, it is not necessary to answer the sixth and seventh questions.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.**
- 2. Article 14 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, read in conjunction with Article 2(1)(a) and (b) and (2)(c) of that directive, must be interpreted as meaning that an employer's refusal to provide maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.**

[Signatures]

* Language of the case: English.