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MEASURES OF PROTECTING MATERNITY AND CHILDBIRTH UNDER THE IMPACT OF NEW MEDICAL TECHNOLOGIES OF ASSISTED HUMAN REPRODUCTION

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Abstract: Maternity leave is one of the rights of female employees whose purpose is to ensure, on the one hand, the protection of the health of the mother and child during the final period of pregnancy and the first months after birth and, on the other hand, the reconciliation between family and professional responsibilities of workers who have the status of natural mothers. Directive 92/85/EEC establishes minimum requirements and measures to promote the improvement of safety and health at work for pregnant female workers, those who have recently given birth or those who are breastfeeding regarding the granting of maternity leave, distinct from the paternity and parental leave. But what about female workers who have a child through the means of modern medical technology, for example through the agency of a surrogate mother? In this article we discuss two cases from the jurisprudence of the European Court of Justice (Case C-167/12 and Case C-506/06) that are illustrative of the way in which the new technologies of assisted human reproduction have impacted the field of labor relations.

Keywords: maternity leave, female worker, pregnancy, birth, child.

1. THE RIGHT TO RECONCILE FAMILY LIFE AND PROFESSIONAL LIFE

One of the newly implemented strategies on the labor market is flexicurity, which combines two concepts – flexibility and security. Flexibility consists in "the flexible organization of work, able to respond quickly and efficiently to new productivity requirements and skills and to facilitate the reconciliation of professional life with the responsibilities of private life"[1], and security includes

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[1] Luminiţa Dima, *Relaţii de muncă şi industriale în Uniunea Europeană*, Bucharest, C.H. Beck Publishing, 2012, p. 17.

various aspects such as: job retention, professional training opportunities , support for finding a new job, career advancement.

The Charter of Fundamental Rights of the European Union, which was consolidated by the Treaty of Lisbon, provides – in art. 32 para. 3 – the right to reconcile family life and professional life[2] on the basis of which any person has the right to be protected against any dismissal for reasons of maternity, the right to benefit from paid maternity or paternity leave, such as and parental leave granted following the birth or adoption of a child. Member States should, in cooperation with the social partners, to continue fighting against the persistent problem of different remuneration on the basis of sex and gender segregation issue that is and remains evident in the labor market, in particular by means of flexible arrangements regarding the duration of working time, allowing both men and women, to combine better professional life and family life (the principle of reconciliation of family life with professional life). It could also include appropriate provisions with regard to parental leave, which could be claimed by any of the parents, as well as the implementation of accessible and economic infrastructures in the field of child protection and care for dependent persons.

One of the levers through which reconciliation between the family and professional responsibilities of workers who have the status of natural/ adoptive parents or those who became parents by artificial means (the "in vitro" fertilization procedure, the procedure of resorting to a surrogate mother) is leave for child rearing[3] (parental leave). The situation of maternity leave, discussed in this paper, is completely different. This is an exclusive right of the woman who gave birth to a child.

Parental leave is granted for a period of at least four months and, in order to promote equality of opportunity and treatment between men and women[4]. To encourage equality between the two parents in terms of parental leave, at least one of the four months should in principle be granted on a non-transferable basis. The methods of application of the non-transferable period are established at national

[2] For details, see Roxana Cristina Radu, *Statuarea drepturilor sociale şi economice şi includerea principiului solidarităţii în Tratatul de la Lisabona,* in *Evoluţia sistemului legislativ românesc şi european în contextul Tratatului de la Lisabona*, Craiova, Sitech Publishing, 2008, pp. 36-43; Cezar Avram, Mihaela Bărbieru, *Răspunderea statelor membre ale Uniunii Europene pentru încălcarea dreptului comunitar*, in *Influenţa sistemului juridic comunitar asupra dreptului intern*, Craiova, Sitech Publishing, 2009, pp. 61–70

[3] For details concerning the reglementation of this leave, see Roxana Cristina Radu, *Concediul pentru creşterea copilului în reglementările Uniunii Europene*, in "Arhivele Olteniei", Serie Nouă, no. 27/2013, pp. 417–424.

[4] To encourage men to take parental leave and to promote equality between men and women, the agreement aimed to provide for an individual right to parental leave, which is in principle non-transferable, meaning that governments and/or social partners can introduce the right to parental leave in a way that takes into account both the principle of non-transferability and national circumstances. See *Acordul cadru revizat privind concediul pentru creşterea copilului. Ghid de intrepretare al CES*, available at: http://www.etuc.org/IMG/pdf/Romania.pdf.

level through legislation and/or collective agreements, taking into account the leave provisions existing in the member states. At the end of child rearing leave, workers have the right to return to the same job or, if this is not possible, to an equivalent or similar job that corresponds to their contract or employment relationship[5].

Before the adoption of Lisbon Treaty, Directive 96/34/EC entitled both parents to time off following the birth of a child. In some Member States, parental leave is unpaid so it is not a realistic option for many employees[6]. In other European states, this leave need to be paid and the maternity allowances are a real bargain for social security systems. In other Member States (e.g. Netherlands) enterprises offer flexible working hours in order to allow new parents to accommodate their family responsibilities and ease the financial burden of childcare.

Although the adoption of Directive 96/34/EC was auspicious for the member states as the targeted objectives could be better achieved at the EU level, over time the need to introduce new measures to protect the family life of workers and, implicitly, children emerged them.

One of the issues raised by the new medical procedures to help those who want their own children but cannot have them naturally is the labor rights of new parent workers under EU employment law. The most "sensitive" issue is that of maternity leave, which is an exclusively female right.

2. MATERNITY LEAVE

Maternity leave is one of the rights of female employees whose purpose is to ensure, on the one hand, protection of the health of the woman who gave birth to a child and, on the other hand, the reconciliation between family and professional responsibilities of female workers who have the status of natural parents[7]. As

[5] Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment between men and women in matters of employment and work contains similar provisions regarding the return from maternity, paternity or adoption leave. Thus, as a measure to protect women upon returning from maternity leave, art. 15 of this directive mandates that a woman on maternity leave has the right, at the end of this leave, to find her job or an equivalent job under conditions that are no less favorable for her, as well as to benefit from any improvement in working conditions to which he would have been entitled during his absence. Also, the directive does not affect the faculty of the member states to recognize the distinct rights of paternity and/or adoption leave. Member States which recognize these rights shall take the necessary measures to protect workers against dismissal resulting from the exercise of these rights and to ensure that they have the right, at the end of such leave, to find their job or a place of employment. equivalent work under conditions that are not less favorable to them and to benefit from any improvement in working conditions to which they would have been entitled during their absence. See Luminița Dima, *cit. work*, p. 148; Roxana Cristina Radu, *Dreptul Uniunii Europene privind relațiile de muncă*, Craiova, Aius Publishing, 2013, pp. 173–174.

[6] Rhona K. M. Smith, *Textbook on International Human Rights*, fifth edition, New York, Oxford University Press, 2012, p. 326.

[7] Roxana Cristina Radu, *Dreptul Uniunii Europene privind …*, p. 170.

Directive 2010/18/EU of implementing the revised framework agreement on parental leave establishes minimum requirements and provisions regarding the granting of parental leave, distinct from the maternity leave and paternity leave, and the conditions under which employees can take advantage of absent or motivated days off for reasons of force majeure[8], Directive 92/85/EEC on the introduction of measures to promote the improvement of safety and health at work for pregnant workers, those who have recently given birth or those who are breastfeeding was adopted[9] taking into account the following considerations[10]:

– pregnant workers, who have recently given birth or who are breastfeeding must be considered, in many respects, a group exposed to specific risks and measures must be taken regarding their security and health;

– the protection of the safety and health of pregnant workers, who have recently given birth or who are breastfeeding must not disadvantage women on the labor market nor act to the detriment of the directives regarding the equality of treatment applied to women and men;

– the vulnerability of pregnant workers, who have recently given birth or who are breastfeeding makes it necessary to grant the right to a maternity leave of at least 14 consecutive weeks, distributed before and/or after the birth and to carry out a mandatory maternity leave of at least two weeks, distributed before and/or after birth;

– because the risk of dismissal for reasons related to their condition can have harmful effects on the physical and mental state of pregnant workers, who have recently given birth or who are breastfeeding, a ban on dismissal in these cases must be provided for;

– work organization measures aimed at protecting the health of pregnant workers, who have recently given birth or who are breastfeeding, have no effect unless they are accompanied by the maintenance of rights related to the individual employment contract, including the maintenance of remuneration or the granting of an adequate benefit;

– the provisions regarding maternity leave would have no effect if they were not accompanied by the maintenance of the rights related to the employment contract or the granting of an adequate benefit;

– the notion of adequate benefit in the case of maternity leave must be regarded as a technical point of reference in order to set the minimum level of protection and must not be interpreted, in any case, as implying an analogy between pregnancy and illness.

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[8] *Ibidem*, p. 170.

[9] Amended by Directive 2007/30/EC of the European Parliament and of the Council amending Directive 89/391/EEC of the Council, its special directives and Directives 83/477/EEC, 91/383/EEC, 92/29/ EEC and 94/33/EC of the Council in order to simplify and rationalize the reports on the implementation.

[10] See the Preamble of Directive 92/85/EEC.

Directive 92/85/EEC applies to workers who are pregnant, have recently given birth or are breastfeeding. The provisions of Directive 89/391/EEC, except for art. 2 para. 2, applies in its entirety to all categories of workers that constitute the scope of Directive 92/85/EEC, without prejudice to the more restrictive and/or special provisions included in the latter directive.

Directive 92/85/EEC cannot have the effect of reducing the level of protection granted to pregnant workers, who have recently given birth or who are breastfeeding, compared to the situation existing in each member state on the date of its adoption. Member States have the right to develop different protection provisions, in compliance with the minimum conditions established by the directive.

Directive 92/85/EEC defines the following terms as follows:

a) pregnant worker means any pregnant worker who informs her employer about her condition, in accordance with national legislation and/or practices;

b) a worker who has recently given birth means any worker who has recently given birth, within the meaning of national legislation and/or practices, and who informs her employer of her condition, in accordance with these legislations and/or practices;

c) breastfeeding worker means any worker who is breastfeeding, in the sense of national legislation and practice, and who informs her employer of her condition, in accordance with these legislations and/or practices.

For all activities that may present a specific risk of exposure to agents, processes or working conditions, listed in Annex I to the directive[11], the employer must assess the nature, degree and duration of exposure of female workers in the

[11] Agents, processes and working conditions referred to in Annex 1 are:

"A. Agents

1. Physical agents where these are regarded as agents causing foetal lesions and/or likely to disrupt placental attachment, and in particular: (a) shocks, vibration or movement; (b) handling of loads entailing risks, particularly of a dorsolumbar nature; (c) noise; (d) ionizing radiation (*); (e) non-ionizing radiation; (f) extremes of cold or heat; (g) movements and postures, travelling - either inside or outside the establishment - mental and physical fatigue and other physical burdens connected with the activity of the worker within the meaning of Article 2 of the Directive.

2. Biological agents

Biological agents of risk groups 2, 3 and 3 within the meaning of Article 2 (d) numbers 2, 3 and 4 of Directive 90/679/EEC (¹), in so far as it is known that these agents or the therapeutic measures necessitated by such agents endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II.

3. Chemical agents: The following chemical agents in so far as it is known that they endanger the health of pregnant women and the unborn child and in so far as they do not yet appear in Annex II: (a) substances labelled R 40, R 45, R 46, and R 47 under Directive 67/548/EEC (²) in so far as they do not yet appear in Annex II; (b) chemical agents in Annex I to Directive 90/394/EEC (³); (c) mercury and mercury derivatives; (d) antimitotic drugs; (e) carbon monoxide; (f) chemical agents of known and dangerous percutaneous absorption.

B. Processes: Industrial processes listed in Annex I to Directive 90/394/EEC.

C. Working conditions: Underground mining work".

respective enterprise and/or unit, either directly or through the protection and prevention services referred to in Article 7 of Directive 89/391/EEC, in order to assess any risk to the safety or health of workers and any possible effect on pregnancy or breastfeeding and to decide what measures should be taken.

Pregnant workers, female workers who have recently given birth or who are breastfeeding who may be in one of the above-mentioned situations and/or their representatives are informed by the employer of the results of the assessment and of all measures relating to health and safety at work.

The Commission, in consultation with the Member States and supported by the Advisory Committee for Safety, Hygiene and Health Protection at Work, establishes guidelines for the assessment of chemical, physical and biological agents and industrial processes considered dangerous for the safety or health of pregnant workers, who have recently given birth or who are breastfeeding. These guidelines must also take into account the movements and working positions, physical and mental fatigue and other types of physical and mental effort related to the activity carried out by the respective workers.

The purpose of these guidelines is to serve as a basis for the above-mentioned assessment. For this purpose, the member states must make these guidelines known to all employers and workers and/or their representatives in the respective member state.

If the results of the assessment show a risk to the safety or health of the workers or an impact on pregnancy or breastfeeding, the employer takes the necessary measures to avoid it, by temporarily changing the working conditions and/or the work schedule of the worker in question the exposure of this worker to the highlighted risks.

If the modification of the working conditions and/or the work schedule is not possible from a technical or objective point of view or cannot reasonably be requested, for well-founded reasons, the employer will take measures to change the workplace of the respective worker.

If the change of job is not technically possible and/or cannot reasonably be requested, for well-founded reasons, the respective workers must be granted, in accordance with national laws and/or practices, leave for the entire period necessary to protect their safety or health.

Employers must take the necessary measures to avoid exposing these categories of workers to risks that could have repercussions on pregnancy or breastfeeding, through a temporary improvement of working conditions and/or working time or by changing the workplace or by granting a leave according to national legislation, with the granting of an adequate remuneration or allowance.

In addition to the general provisions related to the protection of workers, especially those related to occupational exposure limit values, the categories of workers that fall within the scope of the directive benefit from the following protection measures:

a. pregnant workers cannot be forced, in any case, to carry out activities for which the evaluation highlighted the risk of exposure to the agents and the working conditions presented in Annex II section A[12], which may endanger the safety or health of these workers;

b. breastfeeding workers cannot be forced, under any circumstances, to carry out activities for which the assessment highlighted the risk of exposure to the agents and working conditions presented in Annex II section B[13], which may endanger the safety or health of these workers.

Pregnant workers, those who have recently given birth or who are breastfeeding must benefit from a maternity leave of at least 14 consecutive weeks, distributed before and/or after the birth, in accordance with national laws and/or practices, of which at least two weeks of mandatory leave, distributed before and/or after the birth.

Member States shall take the necessary measures so that pregnant workers benefit, in accordance with national legislation and/or practice, from paid time off to carry out antenatal consultations, if they take place during working hours.

Member States must take the necessary measures to prohibit the dismissal of pregnant workers, who have recently given birth or who are breastfeeding during the period from the beginning of pregnancy to the end of the above-mentioned maternity leave, except in special cases unrelated to their condition, allowed by national laws and/or practices and, if applicable, for which the competent authority has given its consent. If such a worker is fired during her maternity leave, the employer must present in writing well-founded reasons for the dismissal.

The member states are obliged to take the necessary measures for the protection of the respective workers against the consequences of the dismissal during the maternity leave which, based on the provisions of art. 10 point 1 of Directive 92/85/EEC, is illegal.

In all cases of pregnant workers, of those who have recently given birth or who are breastfeeding and who are not on maternity leave[14], they must be ensured, in accordance with national laws and practices, the rights related to the

[12] Agents and working conditions referred to in Annex 2 section A are:

1. Agents

(a) Physical agents. Work in hyperbaric atmosphere, e.g. pressurized enclosures and underwater diving.

(b) Biological agents. The following biological agents: toxoplasma, rubella virus, unless the pregnant workers are proved to be adequately protected against such agents by immunization.

(c) Chemical agents. Lead and lead derivatives in so far as these agents are capable of being absorbed by the human organism.

2. Working conditions. Underground mining work".

[13] Agents and working conditions referred to in Annex 2 section B are:

"1. Agents: (a) Chemical agents - Lead and lead derivatives in so far as these agents are capable of being absorbed by the human organism.

2. Working conditions: Underground mining work.

[14] Art. 5, 6 and 7 of Directive 92/85/EEC.

employment contract, including the maintenance of remuneration and /or the right of the workers in question to benefit from an adequate allowance.

Member States may condition the right to the appropriate remuneration or benefit on the fulfillment by the worker in question of the legal conditions for granting these benefits under national legislation, but these conditions may not include, in any case, previous periods of work greater than 12 months before the date on which the birth is supposed to take place.

Member States must introduce into their internal legal systems the necessary measures to allow any worker, who considers herself wronged by the non-application of the obligations arising from the directive, to exercise her rights through jurisdiction or, in accordance with national laws and/or practices, through recourse to other competent authorities[15].

In order to facilitate reintegration into the workplace following maternity leave, female workers and employers should be encouraged to maintain contacts during the leave and may make provisions in the individual employment contract for appropriate reintegration measures to be decided by the parties concerned, taking into account national legislation, collective agreements and/or national practices[16].

3. ISSUES RAISED BY THE NEW TECHNOLOGIES OF ASSISTED HUMAN REPRODUCTION

Maternity protection represents a goal that cannot be derogated from, and it consists in protecting the health of the mother and the child. In the case of maternity and childcare leave, the purpose is to protect the health of the mother and the fetus, as well as the health and interests of the newborn child; in the case of protection against dismissal and termination of the employment contract, the same purpose consists in ensuring the means of existence of the natural mother and her child.

But what about female workers who have a child through the means of modern medical technology, for example through the agency of a surrogate mother? Because the purpose of this leave is not only to protect the health of the mother and the fetus, but also to guarantee the protection of the health and interests of the newborn child. In the case of maternity leave[17], the female workers in question must be ensured: a) the rights related to the employment contract; b) maintaining a remuneration and/or the right to benefit from an adequate benefit. The respective benefit is considered adequate if it guarantees an income at least equivalent to that which the respective worker would receive in the event of

[15] Art. 12 of Directive 92/85/EEC.

[16] See Sandra Fredman, *Making Equality Effective: The role of proactive measures*, December 2009, pp. 36-38, available at: https://www.researchgate.net/publication/228184016_Making_Equality_Effective_The_Role_of_Proactive_Measures.

[17] Mentioned in art. 8 of Directive 92/85/EEC.

interruption of the activity for reasons related to her health, within the limit of a ceiling established by national legislation.

In Case C-167/12, a 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[18]. This case is reminiscent of another judgment handed down by the Court of Justice of the European Union in case C 506/06, having as its object a request for a preliminary ruling formulated on the basis of Article 234 EC by the Oberster Gerichtshof (Austria), by Decision of 23 November 2006, received by the Court on 14 December 2006, in the proceedings Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG. In this case, Mrs. Sabine Mayr was fired by her employer as part of an "in vitro" fertilization attempt, after she had started a hormone treatment that lasted one and a half months. These two cases are similar in the intention of assimilating the status of mother to female workers who have a child through the means of modern medical technology ("in vitro" fertilization, surrogate mother).

In Case C-506/06 (Sabine Mayr Case), the Grand Chamber of the European Court of Justice concluded that the protection provided by Community legislation against the dismissal of pregnant workers does not extend to the case of a worker who resorts to "in vitro" fertilization if, on the date on which her dismissal is ordered, the fertilization of the ovaries of this worker of his partner's spermatozoa has already been achieved, so that there are fertilized eggs "in vitro", but they have not yet been transferred to his uterus[19].

On the other hand, in Case C-167/12 the issue of the existence or non-existence of the right to maternity leave was raised about a female employee who became a mother through a surrogate mother. The questions raised were if the refusal to grant such a leave to the beneficiary mother does constitute direct or indirect discrimination and if the intended mother's status is sufficient to entitle the female worker to maternity leave "on the basis of her association with the surrogate mother of the baby?"[20].

According to ECtHR jurisprudence, in order to determine the existence of an act of discrimination prohibited by law, first "it must be established that persons placed in similar or comparable situations enjoy preferential treatment and that this distinction has no objective and reasonable justification"[21]. However, there are also

[18] For details, see https://curia.europa.eu/juris/document/document.jsf?text=&docid=149387&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=489315.

[19] See https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62006CJ0506.

[20] For details, see https://curia.europa.eu/juris/document/document.jsf?text=&docid=149387&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=489315.

[21] Decision of November 26, 2002, *Case Buchen v. Czech Republic*, in Corneliu Liviu Popescu, *Jurisprudenţa Curţii Europene a Drepturilor Omului (1999-2002)*, Bucharest, C.H. Beck Pulishing, 2003, p. 470.

cases that present certain peculiarities and "nuances" that must be taken into account and depending on which differentiations will be made in the way of regulation and sanctioning: "Within the inevitable distinctions in the application of the constitutional principle of equality, some will be taken into account, others will be considered reprehensible and, as such, will be qualified as discrimination"[22]. This must be the case of female workers who have a child through the means of modern medical technology (workers undergoing the "in vitro" procedure and commissioning mothers).

In this regard, it should be remembered that Article 2(1) of Directive 76/207 provides that "(…) the principle of equal treatment presupposes the non-existence of any discrimination based on sex that concerns, directly or indirectly, in particular the marital status or family". According to Article 5(1) of the same directive, "the application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, presupposes that men and women are guaranteed the same conditions, without discrimination on the basis of sex".

Of course, differences in treatment are allowed for strictly biological reasons that require special protection for women, especially during pregnancy and childbirth, in which case such a difference in treatment based on sex is not considered discrimination by the legislator/judge. If we refer strictly to the criterion of sex, in order to know if we are in the presence of a case of direct discrimination, it is enough to answer the question: "If the person in question belonged to a different sex, would she/he have been treated in the same way?". If the answer to this question is "yes", it is clear that no act of discrimination has been committed; if the answer is "no", we can say that we are in the presence of a case of direct discrimination[23].

The prohibition of discrimination represents only one facet of the principle of equal treatment. In reality, the prohibition of discrimination does not lead to a general and impersonal obligation to apply and respect equality of treatment, but only to the prohibition of differences based on certain specific factors (criteria) of discrimination provided for by law[24].

If the problem of determining the existence or non-existence of direct discrimination is apparently simple, the situation is different in the case of indirect discrimination. Indirect discrimination is a form of hidden discrimination, masked by the fact that the acts of exclusion, distinction, restriction or preference of an

[22] Réné Pelloux, *Les nouveaux discours sur l'inégalité en droit public français,* RDP 1982, p. 909, apud Simina Elena Tănăsescu, *Principiul egalităţii în dreptul românesc*, Bucharest, All Beck Publishing, 1999, p. 29.

[23] For details, see Roxana Cristina Radu, *Discriminări interzise şi discriminări permise în materia angajării şi a raporturilor juridice de muncă*, in "Revista Română de Drept Privat", no. 5/2008, Bucharest, Universul Juridic Publishing, pp. 190–213.

[24] Simina Elena Tănăsescu, *cit. work,* pp. 29–30.

employee over another (others) are apparently based on criteria other than those provided by the EU norms, although they produce the effects of direct discrimination[25].

However, with regard to the indirect discrimination thus referred to in Article 2 paragraph (1) letter (b) of Directive 2006/54, in the analyzed case it is necessary to state that no element of the file can prove that the refusal to grant leave in cause would particularly disadvantage female workers compared to male workers.

Can we thus consider that - in the two illustrative cases presented from the Court's jurisprudence - it is about discrimination based on the state of pregnancy or maternity, a criterion of discrimination that neither the EU legislation nor the national legislation of the member states expressly mentions, but which is recognized in the doctrine? The answer is once again "no" because discrimination based on this criterion occurs when, during the entire period of pregnancy, as well as during maternity and paternity leave, a woman is treated less favorably than she would have been treated if he would not have been in this state. This form of discrimination can be manifested both in terms of employment and employee rights, as well as in terms of exercising her rights to maternity leave and allowance, respectively to leave and child-rearing allowance. The period in which the woman is protected against discrimination starts from the moment the employer becomes aware of the state of pregnancy and ends when the right to leave and allowance for raising the child ceases. But – in all these cases – it is about the pregnant woman and the one who gives birth to a child, the natural mother or, as in Case C-167/12, the surrogate mother.

Consequently, the refusal to grant maternity leave to a mother beneficiary of an assisted human reproduction contract was not considered by the European Court of Justice to constitute direct or indirect discrimination based on sex, within the meaning of Article 2 paragraph (1) letters (a) and (b) of Directive 2006/54.

On the other hand, according to article 2 paragraph (2) letter (c) of this directive, any less favorable treatment applied to a woman and determined by pregnancy or maternity leave within the meaning of Directive 92/85 constitutes discrimination within the meaning of Directive 2006/54. Or, on the one hand, a beneficiary mother who had a child thanks to an assisted human reproduction contract through a surrogate mother cannot, by definition, be subject to less favorable treatment related to her pregnancy, given that she was not pregnant.

In view of the preceding observations, we conclude that the provisions of Directive 92/85 and Directive 2006/54 must be interpreted in the sense that an employer's refusal to grant maternity leave to a beneficiary mother who had a child due to an assisted human reproduction contract through a surrogate mother does not constitute discrimination based on sex. It should also be emphasized that EU

[25] See Roxana Cristina Radu, *Dreptul muncii. Aspecte teoretice și practice*, Craiova, Aius Publishing, 2015, pp. 26–28.

Member States are not obliged to grant maternity leave to a female worker, in her capacity as a beneficiary mother who had a child thanks to an assisted human reproduction contract through a surrogate mother, not even if she can breastfeed the respective child after birth or actually breastfeeds him.

But we must emphasize the fact that the new medical technologies of assisted human reproduction have a non-negligible impact on the work relationship and that they produce important consequences on the health of the fetus and on the future harmonious development of the newborn child. The principle of the best interest of the child[26] should be taken from the field of family law and applied, accordingly, also in labor law. EU employment law should establish minimum requirements and provisions regarding the granting of specific maternity rights to female worker who had a child due to an assisted human reproduction contract through a surrogate mother, distinct from the paternity leave, and the conditions under which such employees can take advantage of absent or motivated days off for reasons of child's health. Also, these mothers should be granted access to flexible work schedules meant to allow parents to reconcile more easily their professional responsibilities with the parental ones and facilitate reintegration in the workplace, especially after returning from parental leave.

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