IN THIS ISSUE

EMPLOYMENT

MATERNITY LEAVE FOR FATHERS

The case *MIA v State Information Technology Agency (Pty) Ltd* (D 312/2012) [2015] ZALCD 20 turned on whether an employer's refusal to grant a male employee 'maternity leave' amounted to unfair discrimination on the grounds of gender, s ex, family responsibility and s exual orientation in terms of s6 of the Employment Equity Act, No 55 of 1998.

On 23 May 2010, an employee of State Information Technology Agency (Employer) entered into a civil union with his spouse in accordance with the provisions of the Civil Union Act, No 17 of 2006 (Civil Union Act). A little over a year later – in line with s292 of the Children's Act, No 38 of 2005 (Children's Act) – the employee and his partner entered into a surrogacy agreement with a surrogate mother. The spouses agreed that the employee would take the role ordinarily performed by the birthmother. In anticipation of the birth of their child, the employee applied for paid maternity leave for four months. The Employer refused to grant him this leave on the grounds that the employee was not the biological mother of his child.

The law governing maternity leave is set out in s25 of the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) which provides that:

1. An employee is entitled to at least four consecutive months' maternity leave.
2. An employee may commence maternity leave:
    a. at any time from four weeks before the expected date of birth, unless otherwise agreed;
    b. "…"

The Employer's policy mirrored the above provision with one exception: the word may was replaced by shall, so that the policy dictated that the maternity leave "shall be taken four weeks prior to the expected date of birth or at an earlier date". Though this small but significant change was left uncontested, the Labour Court indicated that the policy was more restrictive than the rights coffered by the BCEA, thus suggesting that the wording would not survive scrutiny.

While on the one hand the Employer's maternity leave policy diluted rights granted in the BCEA, on the other hand, the Employer was more generous than the legislation prescribed because the policy also afforded employees two months' maternity leave on full salary to permanent employees adopting a child younger than 24 months' old.

Against this background, the Employer initially offered the employee family responsibility leave or special unpaid leave, and then compromised slightly by offering the employee two months' paid adoption leave and two months' unpaid leave. Objecting to this inequality, the employee referred a dispute to the CCMA. After being denied relief by the CCMA, the employee sought an order from the Labour Court.

The Employer's refusal pivoted on the argument that its policies and the BCEA only covered female employees and reiterated that the BCEA was silent on the issue of leave for surrogate parents.

The Employer denied that its policy was discriminatory and relied on the word 'maternity' as being the defining character of the leave, submitting that such leave was only available to female employees. The Employer also argued that the maternity leave policy was specifically crafted for employees who give birth. The underlying basis for this contention was that pregnancy and childbirth creates an undeniable physiological effect that prevents biological mothers from working during some stages of pregnancy and during the post-partum period.

As pointed out by the Labour Court, the Employer's argument ignored the fact that the right to maternity leave in terms of the BCEA is an entitlement which is not solely linked to the welfare and health of the child's mother but also connected to the child's best interests. To disregard this duality would be to deny s28 of the Constitution, which states that "every child has a right… to family care or parental care." Similarly, the Children's Act confirms that a child's interests are paramount in all matters concerning the care, protection and wellbeing of the child.

In light of the above, the Labour Court ruled that "there is no reason why an employee in the position of the applicant should not be entitled to 'maternity leave' and equally no reason why such maternity leave should not be for the same duration as the maternity leave to which a natural mother is entitled".

Although this specific matter scrutinised the Employer's maternity policy and its application, the Labour Court acknowledged that in order to properly address the issue of paternity leave, the legislation and BCEA would need to be amended to safeguard the protections afforded in the Civil Union Act and the Children's Act.

This decision paves the way for heteros exual fathers who are primary caregivers of their babies to argue that they too should be entitled to 'maternity' leave in appropriate circumstances. The judgment does not create a general right for maternity leave by fathers but highlights the circumstances under which the Labour Court may be willing to come to the assistance of employees who are of the view that their employer's policies do not provide them with appropriate rights or protection. Employers seeking to avoid such claims could pro-actively consider their internal policies against the judgment and determine the risk in the event of a court application.

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