Spotlight on "maternity" rights for men

A recent Labour Court decision which ordered an employer to pay maternity benefits to a gay man in a registered civil union and who became a parent of a new born in terms of a legally binding surrogacy agreement **(*M I A v State Information Technology Agency (Pty) Ltd* (D312/2012) [2015] ZALCD 20 (26 March 2015),** has sparked much debate as to whether the ruling could extend to a father in a heterosexual relationship.

Currently, the wording of legislation which deals with the right to maternity leave (sections 25 and 26 of the Basic Conditions of Employment Act 75 of 1997), maternity benefits (other than those accorded to adoptive parents) (section 12 of the Unemployment Insurance Act 63 of 2001) and not be unfairly dismissed as a result of pregnancy (section 187(1)(e) of the Labour Relations Act 66 of 1995) have been interpreted as applying only to the mother. The right to paid leave for biological and adoptive fathers of new born babies is limited to three days leave in terms of the family responsibility leave provisions in the BCEA (section 27) and the right to maternity benefits in terms of the Unemployment Insurance Act only apply to adoptive fathers.

The *MIA* case hinged on whether the employer's maternity policy unfairly discriminated against the employee or not. The employer argued that because the word "maternity" defined the character of the leave, it was only due to and a right to be enjoyed by female employees. It was especially designed, said the employer, "… to cater for employees who give birth … based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and during the post-partum period".

The following facts played a major role in the judge's decision that the policy unfairly discriminated against the employee.

- The surrogacy agreement specifically provided that the newly born child was to be handed over to the employee and his spouse immediately after birth.
- The employee and his spouse had decided that he would perform the role usually performed by the birthmother by taking immediate responsibility for the child and accordingly he would apply for maternity leave.
- The child was taken straight from the surrogate and given to him – the surrogate did not even have sight of the child.
- Only one parent was permitted to be present at the birth and he had accepted this role.

Said the judge: "Given these circumstances, 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".

Hence, the judge found that the employer's policy on maternity leave discriminated unfairly against employees in the position of the applicant and directed that the employer, in applying its policy regarding maternity leave, recognise the status of parties to a Civil Union and recognise the rights of commissioning parents in a surrogacy agreement.

What impact, if any, does this case have on "maternity" rights for biological fathers in a heterosexual relationship?

In my view, the answer, in part, lies in the reasoning of the judge. In rejecting the employer's argument regarding the import of the word "maternity", the judge said that the employer's approach ignored the fact that the right to maternity leave created in the Basic Conditions of Employment Act was "in the current circumstances ... an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act".

Another point made by labour commentators is that adoptive parents, irrespective of gender, are entitled to maternity benefits provided for in section 27 of the Unemployment Insurance Act, which accords the right to adoption benefits to either parent, provided that:

- the child is below the age of two and was legally adopted;
- only one contributor of the adopting parties is entitled to the adoption benefits;
- and the period that the contributor is not working is spent caring for the child.

Writing in the April 2015 *Worklaw* newsletter, Professor Alan Rycroft makes the following point.

"If this is true for the adoptive father, is there a legitimate government purpose in distinguishing between him and a biological father in terms of maternity leave? The answer could be that the right to adoption benefits are gender-free precisely because neither of the parents has given birth and either parent could play the primary role in child-rearing. The provision also accommodates adoptive parents in same-sex relationships. The government purpose in differentiating between the biological father and an adoptive parent would have to lie (a) in a preference for the biological mother to care for the new-born child and (b) in not increasing spending under the UIA by granting benefits to both parents. It is likely that the courts would interpret these as policy choices which Parliament and not the courts must make."

He goes on to say: "It is interesting that the judge in the MIA case never once states that the couple are a same sex couple. He simply states that they were married in terms of the Civil Union Act 17 of 2006 – an option open to both heterosexual and homosexual partners. [The] judgment is therefore potentially radical. It is not primarily about the rights of same-sex couples. It is arguably about the right of a partner in a relationship who is not the birth parent to be given maternity leave because that partner wants to take primary responsibility for the rearing of the child in the first four months after the birth."

So, what does all this mean for a biological father and mother who decide that the father should be the predominant care-giver from birth or for the biological father who wants to contribute equally with the mother during the first four months of the baby's life?

Firstly, the wording of the legislation relative to maternity leave and maternity benefits could be attacked as being unconstitutional in that they discriminate against men. In the *MIA* judgment, the court stipulated that, although this case was not about the interpretation of the BCEA but rather scrutiny of the employer's maternity policies, in order to "deal properly with these matters", it is necessary to amend the legislation, in particular the BCEA.

As Prof Rycroft concludes from this "[I]t is then perhaps a small step for the court in future situations, when the focus is more on giving effect to maternity rights under the BCEA, to interpret and apply such rights in a non discriminatory manner".

Secondly, as Prof Rycroft points out, the motivation for arguing that the impact of the judgment could be extended further to a heterosexual man, married or not, who wants to share in the child care in the first four months, will be that the wording of section 25(1) of the BCEA (namely that "[a]n employee is entitled to at least four months' maternity leave") is gender-free. Further, he says, "it is socially and psychologically desirable (and widely recognised in Europe) for the father to also bond with the child for more than the three days' family responsibility leave currently provided".

Finally, I am of the view that, because the courts are bound to apply the "what is in the best interests of the child" standard in these matters, if the biological heterosexual parents of a new born are able to make out a case that it is in the best interests of the child for the biological father to be the major caregiver or for him to share equally during the first four months after birth, a claim for him to receive the same maternity leave and maternity benefits provided by the employer to female employees, must succeed. Obviously this would have to be decided on a case-by-case basis.

Concerns have been raised about the cost involved in allowing both parents to claim unemployment insurance benefits if both parents decide to take maternity leave having made out a case that it is in the best interests of the child. This, I believe, can be easily remedied by adding a proviso to a gender-free provision in the Unemployment Insurance Act, similar to that provided for adoptive parents – that only one parent will be entitled to the benefit.

There is no doubt that, as Prof Rycroft says, the *MIA* judgment has changed the landscape and employers would do well to note his recommendation that they carefully audit their existing maternity policies, in order to anticipate future disputes and avoid those which are based on discriminatory policies and practices.

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