

NEWS FLASH: Rights for Males to Maternity Leave Benefits

By Kellie Hennessy

*It is time to reconsider your policies on maternity leave benefits. Are these policies **only** applicable to **female** employees?*

A welcomed judgment in the Labour Court in *MIA v State Information Technology Agency (Pty) Ltd (D 312/2012) [2015] ZALCD 20; 2015 (6) SA 250 (LC); [2015] 7 BLLR 694 (LC); (2015) 36 ILJ 1905 (LC) (26 March 2015)* found these maternity leave policies to be discriminatory against both males and homosexuals as an arbitrary consequence thereof. This should not be a surprise in our constitutional democracy, however, the sad reality is that there is a strong need to amend legislation to account for the changes in laws governing “civil unions” as well as surrogacy agreements.

The Labour Court upheld the argument that a denial issued to a homosexual employee who was married in terms of our laws and taken custody of a new born child was unfair discrimination and prohibited in terms of the Employment Equity Act. Judge Gush stated that the brazen denial based on gender “*ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is 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.*” In the circumstances of the case the applicant had explained that he would achieve the role usually performed by the birthmother by taking immediate responsibility for the child and accordingly he would apply for maternity leave. The applicant explained that the child was taken straight from the surrogate and given to him and that the surrogate did not even have sight of the child. The court held “*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.*”

This is a victory for the gay and lesbian community and is a welcomed breath of fresh air! Our law recognises same-sex marriages and regulates the rights of parents who have entered into surrogacy agreements and as a consequence of this any policy adopted by an employer must recognise or be interpreted or amended to adequately protect the rights that flow from the Civil Union Act and the Children’s Act. It is unfortunate that despite the recent amendments to the labour legislation, the legislature has failed to make these amendments to the exclusion of those engaged in civil unions; those who are single fathers or even just those males charged with the care of a new born child.

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