UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/041
Judgment No.: UNDT/2022/090
Date: 28 September 2022
Original: English

Before: Judge Francis Belle

Registry: New York

Registrar: Morten Michelsen, Officer-in-Charge

BARBULESCU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Dorota Banaszewska, OSLA

Counsel for Respondent:
Yehuda Goor, AAS/ALD/OHR, UN Secretariat

Introduction

1. By application filed on 23 September 2021, the Applicant, a staff member of the Department of Management Strategy, Policy and Compliance ("DMSPC"), contests the Administration's decision not to grant her 14 weeks of maternity leave or, alternatively, special leave with full pay ("SLWFP") following the birth of her daughter on 27 February 2021.

Facts and procedural history

2. The Applicant joined the Organization on 1 August 1999. She serves on a permanent appointment with the Secretariat.

3. In 2019, the Applicant was diagnosed with a medical condition that makes her unable to carry a child to term and, thus, she and her husband decided to become parents via surrogacy.

4. In January 2021, the Applicant reached out to the Administration to request in advance maternity leave for the period of time after the birth of her biological daughter who was due in April 2021.

5. On 22 February 2021, the Applicant informed the Administration that due to a medical condition developed by the gestational carrier, her daughter would be delivered earlier than expected.

6. On 25 February 2021, a Human Resources Officer, Department of Operational Support ("DOS"), informed the Applicant that surrogacy cases had been handled through SLWFP in the form of eight weeks of adoption leave under sec. 3 of ST/AI/2005/2 (Family leave, maternity leave and paternity leave).

7. On 25 February 2021 and 26 February 2021, the Applicant wrote to the Human Resources Officer, DOS, and to the Chief, Headquarters Clients Support Service, respectively, requesting an "exception to the rule" and that her situation involving surrogacy be treated "closer" to maternity leave as opposed to adoption.

8. On 27 February 2021, the Applicant's daughter was born via surrogacy. As a premature baby, she was considered medically fragile and required special care and attention. The medical specialists treating her had expressed an opinion that it was essential for her well-being that her mother be at home taking care of her in the coming weeks, at least until the baby received clearance from the community paediatrician.

9. On 31 March 2021, the Applicant was informed in an email by Human Resources, DOS, that:

> Having carefully reviewed your circumstances and all underlying implications, [the Assistant Secretary-General for Human Resources ("ASG/OHR")] has decided that the eight weeks of SLWFP would continue to be applied in your case. Doing otherwise (e.g., granting a longer period) would result in inequality of treatment of other staff members who were placed on similar type of leave and facing similar circumstances.

10. On 23 April 2021, the Applicant requested management evaluation of the contested decision referred to in para. 1 above.

11. By letter dated 25 June 2021, the Under-Secretary-General for Management, Strategy, Policy and Compliance, responded to said request by informing the Applicant that she had decided to uphold the contested decision.

12. On 23 September 2021, the Applicant filed the application mentioned in para.1 above.

13. On 14 October 2021, the Respondent filed a motion requesting the Tribunal to enforce Practice Direction No. 4 on Filing of Applications and Replies, on the grounds that the application was six pages longer than required.

14. By email dated 25 October 2021, the Tribunal decided to allow the application as filed due to the formatting applied by the Applicant and the complexity of the matter.

15. On 25 October 2021, the Respondent filed his reply.

16. On 1 July 2022, the present case was assigned to the undersigned Judge.

17. By Order No. 66 (NY/2022) of 19 July 2022, the Tribunal instructed the Respondent to provide his interpretation of staff rule 6.3(a), in particular, its chapeau, in accordance with art. 31.1 of the Vienna Convention on the Law of Treaties ("VCLT") by 2 August 2022, and invited the Applicant to file her comments, if any, by 16 August 2022.

18. On 2 August 2022, the Respondent filed his submissions pursuant to Order No. 66 (NY/2022).

19. On 16 August 2022, the Applicant filed her comments on the Respondent's submissions of 2 August 2022.

Consideration

Scope and standard of judicial review

20. In the present case, the Applicant contests the Administration's decision not to grant her maternity leave or, alternatively, SLWFP for the requested period of 14 weeks following the birth of her daughter.

21. As for any discretionary decision of the Organization, the Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see, e.g., *Sanwidi* 2010-UNAT-084, para. 42; *Abusondou*s 2018-UNAT-812, para. 12). In this regard, the Tribunal recalls that it is not its role "to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40).

22. Nevertheless, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see *Belkhabbaz* 2018-UNAT-873, para. 80). "When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision" (see *Belkhabbaz*, para. 80).

23. In view of the foregoing, and having reviewed the parties' submissions and the evidence on record, the Tribunal defines the issues to be examined in the present case as follows:

a. Whether the Applicant is entitled to maternity leave under staff rule 6.3(a);

b. Whether the Administration properly exercised its discretion in equating the Applicant's surrogacy case with adoption; or

c. Alternatively, whether the Administration properly denied an exception under staff rule 12.3; and

d. Whether the Applicant is entitled to any remedies.

24. The Tribunal will address these issues in turn.

Whether the Applicant is entitled to maternity leave under staff rule 6.3(a)

25. The Applicant submits that she is entitled to maternity leave pursuant to staff rule 6.3(a) and secs. 5 and 7 of ST/AI/2005/2.

26. The Respondent contends that the Applicant does not have a right to maternity leave under staff rule 6.3(a). He specifically argues that staff rule 6.3(a) exclusively applies to child-bearing staff members and it does not expressly refer to leave for staff members who become parents through surrogacy. He further contends that the Applicant has no right to maternity leave under ST/AI/2005/2, which implements staff rule 6.3.

27. In this respect, the Tribunal notes that staff rule 6.3, entitled "Maternity and paternity leave", provides in its relevant part that:

> (a) Subject to conditions established by the Secretary-General, a staff member shall be entitled to maternity leave for a total period of 16 weeks:
>
> (i) The pre-delivery leave shall commence no earlier than six weeks and no later than two weeks prior to the anticipated date of birth upon production of a certificate from a duly qualified medical practitioner or midwife indicating the anticipated date of birth;
>
> (ii) The post-delivery leave shall extend for a period equivalent to the difference between 16 weeks and the actual period of pre-delivery leave, subject to a minimum of 10 weeks;
>
> (iii) The staff member shall receive maternity leave with full pay for the entire duration of her absence under subparagraphs (i) and (ii) above.

28. For the purpose of implementing staff rule 6.3, ST/AI/2005/2/Amend.2 (Family leave, maternity leave and paternity leave) provides in its relevant parts that:

> **Section 6**
> **Pre-delivery leave**
>
> 6.1 Upon submission by the staff member of a certificate from a licensed medical practitioner or midwife indicating the expected date of birth, the executive or local human resources office shall normally grant pre-delivery leave commencing no earlier than six weeks and no later than two weeks prior to the expected date of birth. Any questions or doubts as to the validity of the medical certificate shall be referred to the Medical Director or designated medical officer.
>
> 6.2 A staff member who is granted a period of pre-delivery leave of less than six weeks in accordance with section 6.1 above may, at her request, be permitted to work part-time between the sixth and second week preceding the expected date of birth. In such cases, the half days of absence shall be charged to the staff member's maternity leave entitlement.

> 6.3 If during the period of less than six weeks prior to anticipated date of birth and the start of the required two weeks pre-delivery leave, the staff member is not fit to continue to work, the matter shall be referred to the Medical Director or designated medical officer by the executive or local human resources office. When the Medical Director or designated medical officer determines that the staff member is not fit to continue to work on a full time or part time basis, the staff member's absence from work shall be charged to her sick leave entitlement.
>
> **Section 7**
> **Post-delivery leave**
>
> 7.1 On the basis of the birth certificate, post-delivery leave shall be granted for a period equivalent to the difference between 16 weeks and the actual period of pre-delivery leave. However, if owing to a miscalculation on the part of the medical practitioner or midwife, the pre-delivery leave was more than six weeks, the staff member shall be allowed post-delivery leave of no less than 10 weeks.

29. Turning to the present case, the Tribunal notes that one main issue before it is the interpretation of staff rule 6.3(a). While the Staff Regulations and Rules of the United Nations is not a treaty, the Tribunal recognizes that art. 31.1 of the VCLT sets forth generally accepted rules for interpreting an international document, which refers to interpretation according to the "ordinary meaning" of the terms "in their context and in the light of its object and purpose" (see, e.g., UN Administrative Tribunal Judgment No. 942, *Merani* (1999), para. VII; *Avognon et al*. UNDT/2020/151, para. 50; *Andreeva et al.* UNDT/2020/122, para. 64; *Applicant* UNDT/2021/165, para. 37).

30. Having interpreted the above-mentioned provisions governing maternity leave in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, the Tribunal is not persuaded by the Respondent's argument that the Applicant does not have a right to maternity leave under staff rule 6.3(a).

31. Indeed, from a legal point of view, the ordinary meaning of "maternity leave" is "the amount of time that a woman is legally allowed to be absent from work in the weeks before and after she has a baby".[1] The ordinary meaning of "maternity" is "the state of being a mother".[2] Nor does the text of staff rule 6.3(a) itself specify that a staff member needs to physically deliver the baby herself so as to be entitled to maternity leave. It follows that a staff member's right to maternity leave is not conditioned by childbearing. As such, a staff member who becomes a mother through surrogacy is also entitled to maternity leave.

32. This interpretation is also in line with the purpose and object of the maternity leave which are "[to support] staff members with leave time as they prepare for and adjust to the arrival of new children and also to help ensure the health and well-being of the expectant mother."[3] Similar to a childbearing mother, a commissioning mother also needs to prepare for and adjust to the arrival of a new child and her health and well-being should equally be ensured.

33. Therefore, the Tribunal cannot conclude that staff rule 6.3(a) unambiguously excludes from maternity leave staff members who have become mothers through surrogacy.

34. In this connection, the Tribunal would "rule in favour of adopting the interpretation that gives rise to least injustice by applying the internationally recognized principle of interpretation that an ambiguous term of a contract is to be construed against the interests of the party which proposed or drafted the contract or clause". This principle, also known as *contra proferentem*, has been affirmed by the Tribunal in several cases such as *Tolstopiatov* UNDT/2010/147, para. 66 and *Simmons* UNDT/2012/167, para. 15.

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[1] Statutory maternity leave, Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/statutory-maternity-leave, accessed on 30 August 2022.
[2] Maternity, Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/maternity, accessed on 30 August 2022.
[3] See Maternity Leave, Human Resources Factsheet for Staff, available at: https://hr.un.org/sites/hr.un.org/files/MaternityLeave.pdf, accessed on 5 September 2022.

35. Accordingly, the Tribunal finds that the Applicant is entitled to maternity leave under staff rule 6.3(a).

Whether the Administration properly exercised its discretion in equating the Applicant's surrogacy case with adoption

36. The Applicant submits that the practice of equating surrogacy with adoption is arbitrary and unlawful. In her view, the surrogacy cases shall fall, at the very least *mutatis mutandis*, under the provisions regarding the maternity leave and not the adoption leave.

37. The Respondent refutes this claim by arguing that absent the medical distinction of childbearing, there is no rational basis to distinguish between a staff member who becomes a parent through surrogacy, such as the Applicant, and a staff member who becomes a parent through adoption of a child. In his view, granting the Applicant a leave period equivalent to maternity leave would have been arbitrary and discriminatory vis-à-vis staff members who have become parents through adoption.

38. Having found that the Applicant is entitled to maternity leave under staff rule 6.3(a), the Tribunal finds that the Administration did not properly exercise discretion in equating the Applicant's leave arising out of her having had a biological baby via surrogacy with the adoption leave.

39. Even assuming, *arguendo*, that the surrogacy cases do not fall within the scope of application of staff rule 6.3(a), the Tribunal finds that the Administration still erred in equating the Applicant's leave with adoption leave. In this connection, the Tribunal considers that the Secretary-General has failed to fulfil his obligation to establish a maternity leave for staff members who become mothers via surrogacy under staff regulation 6.2, which provides that:

> … The Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave, maternity and paternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

40. The fact that there is a *lacuna* in the legal framework to specifically deal with maternity leave for staff members who become mothers via surrogacy cannot play to the detriment of the staff members in such situation.

41. The Tribunal also wishes to highlight that a staff member's right to maternity leave during service is a fundamental human right and cannot be denied, limited, or restricted for any reason. As such, the Tribunal finds that the Administration should have applied the most favorable provision available in the Staff Regulations and Rules to the Applicant's case (see, e.g., Administrative Tribunal of the International Labour Organization Judgment No. 4250, In re *K.* (2020), para. 8; European Court of Justice Judgment of 18 March 2014, *C.D. v. S.T.* (2014), para. 42).[4]

42. In this connection, the Tribunal first notes that under sec. 3.2 of ST/AI/2005/2/Amend. 2, a staff member who becomes a parent via adoption was entitled to a special leave of eight weeks, which is less favourable than the leave entitlement contained in staff rule 6.3(a).

43. Second, in the Tribunal's view, the gestational surrogacy is significantly different from the adoption process. The former is often driven by medical reasons and may have significant psychological impact on the intended mother with possible medical emergencies and early delivery due to complications that are more common in surrogacy cases. It also requires the intended mother and/or father to be involved and take part in decisions in all phases of the baby's development in uterus during the surrogacy journey.

[4] Judgment, European Court of Justice, Case C-167/12, *C.D. v. S.T.*, 18 March 2014, paras. 41 and 42 (where the Court found that "the purpose of Directive 92/85 [, namely *Pregnant Workers Directive 1992*], 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" while emphasizing that "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."

44. Moreover, like the staff members who have physically delivered the baby themselves, the Applicant has a biological connection with her baby and must take care of her from the first days of her life. In contrast, the adoptive parents have lots of discretion in determining whether and when to adopt a child after considering several factors. The adoption usually involves an older child instead of a new-born and, thus, the bonding process and the level of care needed could be very different from the case of surrogacy.

45. Accordingly, the Applicant's situation involving the birth of her biological child via surrogacy is closer to a staff member who gives birth to a baby herself as opposed to adoption. As such, the Administration should have applied staff rule 6.3 (a) which is the most favourable provision to the Applicant's case as opposed to the provision governing adoption leave.

46. In light of the above, the Tribunal finds that the Administration should have granted the Applicant 14 weeks of maternity leave following the birth of her daughter on 27 February 2021 pursuant to staff rule 6.3(a). Consequently, the contested decision is unlawful.

Whether the Administration properly denied an exception under staff rule 12.3

47. In the alternative, the Applicant submits that the Administration should have exercised its discretion to grant her an exception under staff rule 12.3. In support of her submissions, she specifically argues that the decision to grant her a 14-week leave entitlement to take care of her newly born daughter could not have been inconsistent with any Staff Rules or Regulations, and that the Administration should have exercised its discretion in her favour to simply reflect the facts on the ground.

48. The Respondent contends that the Administration properly exercised its discretion in denying the request for an exception to staff rule 6.3(a) and that allowing an exception in the Applicant's case would result in inequality of treatment of other staff members who were placed on similar type of leave and faced similar circumstances.

49. In this respect, the Tribunal notes that staff rule 12.3, entitled "Amendments of and exceptions to the Staff Rules", provides in its relevant part that:

> (b) Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

50. It follows that for an exception to be granted under staff rule 12.3(b), the following three conditions must be met:

a. Such exception must be consistent with the Staff Regulations and other decisions of the General Assembly;

b. It must be agreed to by the staff member directly affected; and

c. In the opinion of the Secretary-General, the exception must not be prejudicial to the interests of any other staff member or group of staff members (see *Wilson* UNDT/2015/125, para. 25).

51. Moreover, "[t]he right to request and to be properly considered for an exception is a contractual right of every staff member[.] Under staff rule 12.3(b), any request for an exception to the Staff Rules—and, by extension, to administrative issuances of lesser authority (see *Hastings* UNDT/2009/030)—must be properly considered in order to determine whether the three parts of the test established by staff rule 12.3(b) are satisfied" (see, e.g., *Villamoran* UNDT/2011/126, para. 46; *Wilson* UNDT/2015/125, para. 25).

52. In the present case, the rejection of the Applicant's request for an exception was based on the third part of the test under staff rule 12.3(b), namely that the exception would be "prejudicial to the interests of […] other staff". In doing so, the Administration considered that granting the exception "would result in inequality of treatment of other staff members who were placed on similar type of leave and facing similar circumstances". To support the Administration's position, the Respondent specifically argues, in his reply, that "[g]ranting the Applicant a leave

period equivalent to maternity leave would have been arbitrary and discriminatory vis-à-vis staff members who have become parents through adoption".

53. While the Administration enjoys discretion in determining whether granting the exception would be prejudicial to the interests of other staff members, the Tribunal is concerned that it has failed to properly consider relevant factors. Specifically, the Administration did not properly consider the Applicant's personal circumstances. As found in para. 45, the Applicant's situation involving the birth of her biological child via surrogacy is closer to a staff member who gives birth to a baby herself as opposed to adoption.

54. Also, apart from a general assertion that allowing an exception in the Applicant's case would result in inequality of treatment of other staff members who were placed on similar type of leave and faced similar circumstances, the Administration failed to determine "identifiable and sufficiently comparable interests of other staff that might be prejudiced by the exception" (see *Wilson* UNDT/2015/125, para. 42). It is thus difficult for the Tribunal to see how granting the Applicant an exception could be prejudicial to the interests of unidentified staff who may have chosen not to request exceptions.

55. Therefore, the Administration's failure to properly consider relevant factors precluded the proper exercise of discretion and deprived the Applicant of her right to maternity leave. Accordingly, the Tribunal finds that the Administration erred in denying an exception under staff rule 12.3.

56. Moreover, the Tribunal notes that the present application concerns circumstances that are undoubtedly exceptional and that the Administration has not yet established an appropriate scheme of social security to deal with such exceptional circumstances. It is thus fair to the Applicant and to any other staff member in similar situations that an exception be made which is most favourable to the Applicant under the circumstances. Also, granting the Applicant an exception does no harm to any other staff member and in particular it does no harm to the mother who has adopted a child since that process is totally different from giving birth to a child via surrogacy.

57. In light of the above, the Tribunal finds that, in the alternative, the Administration should have exercised its discretion to grant the Applicant an exception under staff rule 12.3.

Whether the Applicant is entitled to any remedies

58. In her application, the Applicant requests that the decision not to grant her 14 weeks of maternity leave following her daughter's birth be rescinded. In the alternative, she requests that the decision not to grant her 14 weeks of maternity leave or SLWFP to take care of her newly born daughter pursuant to staff rule 12.3 be rescinded and that she be granted either the maternity leave for the period of 14 weeks following the birth of her daughter or the additional six weeks of SLWFP beyond the already granted period of eight weeks.

59. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
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> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph[.]

60. Having found that the Applicant is entitled to maternity leave under staff rule 6.3(a) and that the Administration did not properly exercise discretion in equating the Applicant's leave arising out of her having had a biological baby via surrogacy with the adoption leave, the Tribunal decides to rescind the Administration's decision not to grant the Applicant 14 weeks of maternity leave following the birth of her daughter.

61. In the alternative, the Tribunal recalls its findings that the Administration did not properly deny an exception under staff rule 12.3 and that the Administration should have exercised its discretion to grant the Applicant an exception under staff rule 12.3. Accordingly, the Tribunal decides to rescind the Administration's decision not to grant the Applicant 14 weeks of maternity leave or SLWFP to take care of her newly born daughter pursuant to staff rule 12.3.

62. The Tribunal further recalls that a finding of unreasonableness, and consequent invalidity of a contested decision, will "give rise to the discretion to award specific performance, [i.e.], an order directing the Administration to act as it is contractually and lawfully obliged to act" (see *Belkhabbaz* 2018-UNAT-873, para. 80).

63. In light of the above, the Tribunal finds it appropriate to direct the Administration to grant the Applicant 14 weeks of maternity leave or, in the alternative, SLWFP following the birth of her daughter on 27 February 2021. In either case, the already granted 8 weeks of adoption leave shall be offset.

Conclusion

64. In view of the foregoing, the Tribunal DECIDES that:

a. The application is granted;

b. The contested decision is rescinded;

c. The Administration shall grant the Applicant 14 weeks of maternity leave or, in the alternative, SLWFP following the birth of her daughter on 27 February 2021; and

d. The already granted 8 weeks of adoption leave shall be offset.

(*Signed*)

Judge Francis Belle

Dated this 28th day of September 2022

Entered in the Register on this 28th day of September 2022

(*Signed*)

Morten Michelsen, Officer-in-Charge, New York