



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2023/013

Judgment No.: UNDT/2023/083

Date: 1 August 2023

Original: English

Before: Judge Sean Wallace

Registry: Nairobi

Registrar: Eric Muli, Officer-in-Charge

JSV and J-PSV

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicants:

Self-represented

Counsel for the Respondent:

Isabel Martinez, UNEP

Camila Fuomene Nkwenti, UNEP

Saidou N'dow, UN-Habitat

Nana Elsler, UN-Habitat

Introduction

1. The Applicants are staff members of the United Nations Environment Programme (“UNEP”) and the United Nations Settlements Programme (“UN-Habitat”).

2. On 10 February 2023, they filed an application in which they state that their daughter is being discriminated against with regards to the parental leave that has been given to her parents, a same-sex United Nations staff member married couple in comparison to children of heterosexual United Nations staff member married couples and the parental leave currently provided to them.

3. The Respondent filed a reply on 16 March 2023 in which it is argued, *inter alia*, that the application is not receivable.

4. By Order No. 078 (NBI/2023), issued on 8 May 2023, the Tribunal directed the Applicants to provide a response to the reply, with a specific focus on whether they challenge the decision based on the inadequacy of the administrative issuances governing parental leave or their application in their specific case.

5. On 7 June 2023, the Applicants complied with Order No. 078 (NBI/2023) and filed the required submissions.

6. The Tribunal held a case management discussion (“CMD”) on 25 July 2023. During the CMD the parties indicated that there was no need for the filing of further documents, calling of witnesses or conducting a hearing.

Facts

7. On 19 April 2022, Mr. JSV sent an email to the United Nations Office at Nairobi (“UNON”) requesting for information on how he could apply for special leave

for adoption purposes, anticipating the birth of their child.¹

8. On 20 April 2022, UNON replied stating:

the request is usually submitted in Employee Self Service (“ESS”) but share with us the documentation for review and we will advise you on further steps.²

9. Following the inquiry, the Applicants submitted a request for parental leave of four weeks for Mr. J-PSV and eight weeks adoption leave for Mr. JSV.³

10. On 31 May 2022, UNON replied to the request for adoption leave for JSV and explained that they were not able to approve the request without the required official documents confirming the adoption in accordance with section 3 of ST/AI/2005/2 (Family leave, maternity leave and paternity leave), and further consultation with the Department of Operational Support (“DOS”) was required to accommodate his request.

11. At the time Mr. JSV indicated that he was unable to provide these documents just yet as first the Kenyan birth certificate of the child would need to be validated by the German Embassy that would take weeks following the birth of the child. Mr. JSV was going to adopt the child through both the German and the Mexican Embassies. UNON was informed at the time that while the Mexican Embassy was aware of the case already, they would require the German birth certificate to commence the adoption paperwork for the staff member.⁴

12. On 7 June 2022, UNON requested advice from DOS as it was noted that no applicable provisions for surrogacy existed in the United Nations policies at the time and hence advice from DOS was needed. After stating the facts of the matter, UNON inquired:

We would like to know what parental and adoption leave they can both apply to and how does the policy apply to this particular case. Can JSV

¹ Reply, annex 1.

² *Ibid.*

³ *Ibid.*, annex 3 (an email submitted on 12 July 2022).

⁴ Reply, para. 9.

apply for 8 weeks of adoption leave? Can J-PSV apply for 4 weeks of paternity leave? Do they have to divide the leaves, i.e. JSV takes 4 weeks of adoption leave and J-PSV takes 2 weeks of paternity leave?

13. In response, DOS informed UNON that they were also consulting with the Office of Human Resources (“OHR”) for further guidance.

14. Between 12-15 July 2022, Mr. JSV took annual leave for four days.

15. On 12 July 2022, Mr. JSV wrote to UNON informing that the child had been born on 2 July 2022, though the expected due date was in August 2022. They also indicated that they had returned home with the baby on 9 July 2022 and requested their leave to be approved.⁵

16. On 15 July 2022, DOS provided the following advice to UNON.

We consulted OHR on the parental leave entitlements applicable for JSV and J-PSV. Please be advised that OHR confirmed that the maximum duration of combined leave for Mr. J-PSV and Mr. JSV should not exceed 8 weeks. This is consistent with previous advice provided by OHR regarding entitlement in the context of birth through surrogacy.

In the absence of specific provisions applicable to surrogacy, it has been the practice of the Organization to grant staff members who become parents through surrogacy a leave of a duration equivalent to adoption leave, the rationale being that similar to adoptive parents, staff members who resort to surrogacy need time to bond with the newborn child and complete any necessary administrative procedures. It therefore follows that the logic of section 3.3. of ST/AI/2005/2 [Family leave, maternity leave and paternity leave] would apply in this case as well.

3.3 When both adoptive parents are staff members and both request adoption leave, their combined periods of leave under this section may not exceed eight weeks. The periods of leave of each spouse may be taken concurrently or sequentially.

Although only Mr. JSV is adopting and Mr. J-PSV is the biological father via surrogacy, they should not receive more leave entitlements than two staff members adopting a child without surrogacy. This would otherwise result in unequal treatment vis-à-vis adoptive parents whose entitlement is limited to a combined leave of 8 weeks.

⁵ Reply, annex 3.

In the case in hand, Mr. J-PSV the biological father of the child, may avail of 4 weeks of paternity leave for his biological child, under the provisions of section III of ST/AI/2005/2. An additional period of 4 weeks of special leave with full pay may be granted to make the combined leave period of the two staff members reach 8 weeks. This 4-week period of special leave with full pay may be taken by Mr. JSV or split between the two staff members as they wish. The periods of special leave with full pay of each spouse may be taken concurrently or sequentially.⁶

17. Based on the advice from DOS, on 19 July 2022, UNON granted a maximum of eight weeks of leave to both Applicants (four weeks for paternity leave and four weeks for adoption leave).⁷

18. On 25 August 2022, the Applicants requested management evaluation challenging a decision to grant them a combined parental leave of eight weeks following the birth of their daughter.⁸

19. During the pendency of the management evaluation, UNON revised the leave period earlier granted by providing eight weeks adoption leave for Mr. JSV, in addition to the four-week leave granted to Mr. J-PSV earlier.

20. On 15 November 2022, the Management Evaluation Unit (“MEU”) informed the Applicants that their request had become moot following UNON’s revision of the leave earlier granted.⁹

Receivability

Respondent’s submissions on receivability

21. The Respondent contends that pursuant to art. 2(1)(a) of the UNDT Statute, the decision contested is not receivable. The Tribunal lacks the jurisdiction to conduct a judicial review of the propriety of United Nations Staff Regulations and Rules.

⁶ *Ibid.*, annex 4.

⁷ Application, section VII, p. 6; reply, annex 5.

⁸ Application, annex 5.

⁹ *Ibid.*, annex 6.

22. The Applicants are challenging the decision not to grant them additional paternity leave and adoptive leave on the basis that the decision is discriminatory in nature, and they are not receiving equal treatment as other couples in the United Nations, i.e., heterosexual couples with children born via surrogacy or couples with children born through “a conventional pregnancy”. In essence, they are arguing that the applicable policies, ST/SGB/2018/1/Rev.1 (Staff Regulations and Rules of the United Nations) and ST/AI/2005/2 result in discriminatory outcomes for children of staff members with regard to their parents’ sexual orientation and family composition.

23. In view of the above and relying on *Reid*¹⁰, the Respondent submits that the Tribunal does not have the competence or jurisdiction to review whether a United Nations policy is discriminatory in nature and how it is applied towards heterosexual couples and same-sex couples. Its jurisdiction is limited to a review of the Respondent’s application of the Organization’s legal framework and does not extend to a review of United Nations General Assembly resolutions.

Applicants’ submissions on receivability

24. The Applicants’ position is that their application is receivable. They emphasize that, whereas their case brings attention to the United Nations policies and the issue of differential treatment based on family composition, which may lead to discrimination against children of staff members due to their parents’ sexual orientation; they are not seeking a revision or evaluation of the policies by the Tribunal. Instead, they are requesting that the Tribunal acknowledge the harm caused by the Respondent’s handling of this case and issue a decision accordingly.

Considerations

25. Article 2(1)(a) of the UNDT Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual...(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of

¹⁰ UNDT/2014/095.

appointment or contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

26. The Tribunal’s competence to apply pertinent regulations and rules to the administrative decision in a particular case does not include the power to review the Rules enacted by resolutions of the General Assembly.¹¹

27. In examining the application, the Tribunal concludes that the Applicants are not challenging the Staff Regulations and Rules. Instead, they are challenging how the Administration applied those Staff Regulations and Rules, alleging that that was done in a discriminatory manner.

28. Accordingly, the Tribunal finds that this case is receivable.

Merits

Applicants’ submissions

29. The Applicants submit that they are challenging the decision based on the application of the policies in their case and highlight the Administration’s mishandling of their situation. The evidence provided, including email exchanges, demonstrates the Administration’s consistent lack of responses, provision of unclear information, clearly establish the Administration’s breach of duty of care towards the Applicants, and violates their right to be treated fairly, justly and transparently. Furthermore, the Administration’s inefficiency in reaching a decision and the flawed processing of the Applicants’ case further support their claim.

30. The Applicants further submit that they repeatedly requested for information about the leave entitlement for heterosexual couples with children born via surrogacy, including in the management evaluation request. They highlight that this response has never been given to them. They, thus, underscore that lack of a clear response directly

¹¹ See *Reid, op. cit.*

targeting this question led to disinformation by the Administration on leave entitlements.

31. The Applicants maintain that it is clear from the Administration's (in)action, confusion, misguidance, mishandling, and undue delay (leave approval four months after submitting the parental leave requests, and 17 days after the birth of the child), that their case was not being treated in the same manner as a conventional family. This differential treatment can only be viewed as discriminatory.

32. Finally, the Applicants submit that the Administration's profound inability or lack of understanding in managing their case resulted in immense stress and loss of dignity. Given the circumstances and sequence of events, including the additional steps they had to undertake via MEU to obtain leave and the involvement of multiple offices in handling their request, it is reasonable to assume that their situation amounted to discrimination.

33. The Applicants thus request the Tribunal by way of remedies to order:

- a. "an equal treatment of outcome with regards to the children of heterosexual staff members. If our child would have been born to a heterosexual staff member couple, the total parental care would have been 24 weeks. We have been granted 12 weeks in total."
- b. "that the UN places the health of the SMs new born child first and foremost."
- c. "that the week of annual leave taken by [JSV] to bridge the period of uncertainty caused by UNON's inefficiency is retroactively restored to [him]".

Respondent's submissions

34. The Respondent's position is that the contested decision was lawful. The Respondent clarifies that Mr. J-PSV was granted four weeks leave, as the biological father of the child, in line with staff rule 6.3 of ST/SGB/2018/1/Rev.1 and section 10.3 of ST/AI/2005/2. Mr. JSV was granted eight weeks leave as the adoptive parent, in line with staff rule 5.3(iii), ST/SGB/2018/1/Rev.1 and sections 3.1 and 3.2 of

ST/AI/2005/2.

35. The Respondent maintains that the Administration complied with ST/AI/2005/2. The leave days were given to the Applicants in accordance with the applicable rules and the Organization acted fairly and indeed gave the Applicants what was entitled to them.¹²

36. With regard to the length of time the Administration took to address the Applicants' request, and which seem to have caused them grief and unhappiness, the Respondent submits that the Applicants were not entitled to any leave entitlements prior to the birth of their child. Their child was born prematurely on 2 July 2022, yet she was expected in August 2022. By the time the child was born on 2 July 2022, none of the Applicants was entitled to any form of leave as they were not maternal parents of the child.

37. J-PSV is the biological father of the child, and he was entitled to paternity leave of four weeks only at the point when the child was born. This means, his leave was only allowable from 2 July 2022 when the child was born. The second part of this leave was adoptive leave, which was special leave granted to Mr. JSV, which was supposed to be applicable only when the adoption documents were provided to the Administration.

38. In relation to adoption, the Respondent emphasizes that pursuant to sec. 3(b) of ST/AI/2005/2, adoption leave is only granted when the legal adoption of the child has been recognized and finalized. Until present, the Applicants have not yet provided legal documents indicating that the child has been adopted by them. Despite the foregoing, the Organization was gracious enough to grant Mr. JSV at least four weeks leave in the absence of the required documentation on the adoption of the child.

39. Regarding the Applicants' allegation that the Organization did not provide them necessary assistance, the Respondent asserts that the allegation is incorrect and not true.

¹² Respondent's submissions during the CMD held on 25 July 2023.

The Organization listened to them and granted them several options, including taking annual leave or granting adoption leave even before the finalization of the adoption process.

Considerations

40. The nature of the Applicants' claim is somewhat hard to pin down. They repeatedly say that they are asking for equal treatment with respect to the parental leave they were granted for the birth of their child. However, what equal treatment amounts to seems to be a moving target.

41. On 11 July 2022 they stated that;

our request in the interest of the baby's health and care, and in the interest of having equal treatment to same-sex staff families is that [J-P's] paternity leave, which is only 4 weeks, is accepted immediately, and that my request for adoption leave with pay for 8 weeks is granted ... In the absence of accepting my request for special adoption leave, we request to have rule 5.3a.i) on special leave for childcare following clause ii) which states that in exceptional circumstances this leave can be granted with pay. We therefore request this leave to be granted with pay for 8 weeks to be able to care for the new-born.¹³

42. Later, in their request for management evaluation, the Applicants stated that:

for our case in particular, no discriminatory outcome would have been breached while allowing one of us, the genetic parent to take 4 weeks of parental leave; and the other, the adoptive parent, to take the 8 weeks of SLWFP for adoption purposes. This would have covered at least 12 weeks ...¹⁴

43. However, when the MEU granted that relief to the Applicants, their request changed. They now claimed that:

[w]hile the MEU's decision on the 15th of November to grant us with a combined total of 12 weeks of leave (4 weeks of paternity and 8 weeks of special leave for adoption) represents a non-discriminatory outcome with regards to parents that would be adopting, it still represents a

¹³ Application, annex 2, p. 3.

¹⁴ *Ibid.*, annex 5, pages 4-5.

discriminatory outcome with regards to same-sex couples who would be granted a total of 24 weeks.¹⁵

44. Finally, as noted above, their application to the UNDT requests 24 weeks total leave. This request is premised on the allegation repeatedly stated by the Applicants' that a heterosexual staff member couple would be granted 24 weeks.

45. The Applicants have never explained how they arrive at the conclusion that heterosexual couples would be granted 24 weeks of parental leave under the then-applicable administrative instruction. In an effort to understand the basis of this claim, at the CMD, the Tribunal repeatedly asked how the Applicants reached that 24-week amount, and the Applicants repeatedly refused to respond on this issue.

46. In the absence of any explanation from the Applicants on the basis for this 24-week allegation, or any other evidence in the record to support it, the Tribunal finds that this allegation lacks substantiation.

47. Since there is no evidence to support the premise that heterosexual couples would be awarded 24 weeks of leave (or any more than the 12 weeks awarded to the Applicants), the Applicants' claim of unequal treatment must be denied.

48. In their oral argument presented to the Tribunal *in lieu* of final written submissions, the Applicants now claim that the unequal treatment was in how their leave requests were handled by the Administration. The Applicants argue that the decision was unduly delayed, and that responses were incorrect and "misinforming".

49. While the Tribunal has sympathy for the Applicants, it cannot grant them any relief in this regard. As the Applicants pointed out, at the time of their child's birth, parental leave was governed by ST/AI/2005/2 which did not address how to deal with surrogacy. In the absence of clear policy guidance, the Organization could not be expected to provide prompt information to the Applicants.

50. Moreover, the record indicates that the Organization acted with kindness and

¹⁵ *Ibid.*, annex 7.

transparency in dealing with this matter. At the outset, JSV wrote:

I would like to ask for your advice on the process of applying for special leave for adoption purposes. I have read the policy but it's not clear to me when do I apply, how do I start the process and for how long am I entitled to apply for. Thank for any guidance you can give me.¹⁶

51. Within a day, the Administration replied, “The request is usually submitted in ESS but share with us the documentation for review and we will advise on further steps.”¹⁷

52. The Applicants refer to a request for parental leave submitted on 19th April 2022, although this is not in the record. They also refer to a response by UNON Human Resources on 31 May 2022 stating that it was not known how the policy would apply and they were awaiting an “official response” from United Nations Headquarters.

53. The record indicates that the child’s birth on 2 July 2022 resulted in a flurry of communication regarding the leave issue. (It should be noted that the expected birth date was at least a month later, sometime in August.) This communication reveals that the UNON Human Resources was trying to get information urgently, and the Applicants recognized this. They stated:

You were very helpful in looking right away into the paternity leave on [J-PSV’s] side and solving this. I can now confirm that he has submitted his leave request successfully. Thanks for that. You also explained to us that our case is extraordinary as you have not yet engaged with this situation yet and that the policy is not tailored for such a case. You offered your support in addressing this situation and ... suggested that the best possible track is to request for the adoption leave with pay in the hopes that during the next month we can provide some initial official documents for such request.¹⁸

54. Four days later, UNON delivered its decision, granting a total of eight weeks leave to the Applicants (four weeks paternity leave to J-PSV, and four weeks adoption leave to JSV). That decision pointed out that documentation was still needed to confirm

¹⁶ Reply, annex 1.

¹⁷ *Ibid.*

¹⁸ Application, annex 3.

the legal adoption proceedings, but that UN-Habitat could still exceptionally agree to adoption leave upon the expectation that the Applicants would submit the documents when available. The decision also expressed regret for any delay.¹⁹

55. Five weeks later, the Applicants requested management evaluation of the decision.²⁰

56. On 15 November 2022, the MEU review was issued, granting the total of 12 weeks leave that the Applicants had requested.²¹

57. In sum, the Applicants were trailblazers raising an issue that was not covered by the existing policies and had never been reviewed by the involved Human Resources staff. Under these circumstances, the Tribunal cannot find that the Applicants' case was handled with undue delay or misinformation.

58. Moreover, there is no evidence in the record about how the Administration handled any request for parental leave from a heterosexual couple whose child was the product of surrogacy. In the absence of such evidence, it is mere speculation to claim that heterosexual couples would have been treated differently. Thus, there is no support for the claim of unequal treatment in the manner that this case was handled.

59. Parenthetically, the Tribunal notes that, shortly after the MEU and while this case was pending before the UNDT, a new document was promulgated (ST/AI/2023/2 (Parental leave and family leave) which deals with all the issues raised in this case. Unfortunately for the Applicants, it entered into force on 1 January 2023, and specifically states that ST/AI/2005/2 applies to parental leave eligibility on or before 31 December 2022. The Applicants recognize this and have stated on the record that they are not seeking retroactive application of ST/AI/2023/2 to them.

¹⁹ *Ibid.*

²⁰ *Ibid.*, annex 4.

²¹ *Ibid.*, annex 6.

60. In conclusion, the Tribunal finds that the claim of unequal treatment has not been proven by the Applicants.

JUDGMENT

61. In view of the Tribunal's findings, the application is denied.

(Signed)

Judge Sean Wallace

Dated this 1st day August 2023

Entered in the Register on this 1st day of August 2023

(Signed)

Eric Muli, Officer-in-Charge, Nairobi