UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/002
Judgment No.: UNDT/2024/046
Date: 29 July 2024
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

BARBULESCU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant contests the decision, following the birth of her second child via gestational surrogacy on 18 September 2022, not to grant her (a) 14 weeks of maternity leave in accordance with former staff rule 6.3 and ST/AI/2005/2 Amend.2 (Family Leave, maternity leave and paternity leave), or (b) alternatively, 14 weeks of special leave with full pay ("SLWFP") on an exceptional basis as per staff rule 12.3(b).

2. The Respondent contends that the application is not receivable and, in any event, without merit.

3. For the reasons set out below, the application is granted.

Facts

4. On 27 February 2021, the Applicant's first child was born via gestational surrogacy.

5. On 31 March 2021, the Administration rejected the Applicant's request to be granted 14 weeks of SLWFP on an exceptional basis after the birth of her first child, noting that doing so "would result in inequality of treatment of other staff members who were placed on similar type of leave and facing similar circumstances".

6. On 28 September 2021, the Dispute Tribunal, in Judgment No. UNDT/2022/090, rescinded the 31 March 2021 decision regarding the Applicant's first child and held that the Administration should grant her request for 14 weeks of maternity leave pursuant to former staff rule 6.3 and ST/AI/2005/2 Amend.2 or, in the alternative, 14 weeks of SLWFP as an exception to the staff rules in accordance with staff rule 12.3(b).

7. On 18 July 2022, in expectancy of the birth of the Applicant's second child via gestational surrogacy, she requested the Administration that, as with her first child born in 2021, she should be granted 14 weeks of post-delivery maternity leave.

8. On 30 August 2022, the Administration declined the Applicant's 18 July 2022 request and instead advised her that she could "be granted eight weeks of [SLWFP] equivalent in duration to adoption leave in line with the provisions of staff rule 5.3(iii)(a) that staff members are granted special leave with full pay in the case of an adoption of a child".

9. On 18 September 2022, the Applicant's second child was born via gestational surrogacy.

10. On 27 October 2023, the Appeals Tribunal issued Judgment No. 2023-UNAT-1392 in which it partly upheld Judgment No. UNDT/2022/090 and affirmed the Dispute Tribunal in granting the Applicant 14 weeks of SLWFP as an exception to the staff rules under staff rule 12.3(b).

Consideration

Scope of the case

11. The Appeals Tribunal has consistently held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". The Appeals Tribunal further held that when defining the issues of a case, "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as affirmed in *Cardwell* 2018-UNAT-876, para. 23.

12. In the present case, the Tribunal defines the overall issues of the present case as follows:

a. Was the Applicant entitled to post-delivery maternity leave under former staff rule 6.3 and ST/AI/2005/2 Amend.2, which was in force at the relevant time but has since been abolished?

b. If not, did the Applicant have a right to SLWFP of 14 weeks after the birth of her second child on an exceptional basis in accordance with staff rule 12.3(b)?

Did the Applicant have the right to post-delivery maternity leave under former staff rule 6.3 and ST/AI/2005/2 Amend.2?

13. In Judgment No. 2023-UNAT-1392, the Appeals Tribunal held that, as a matter of law, a mother to a child delivered via gestational surrogacy does not have a right to maternity leave under former staff rule 6.3 and ST/AI/2005/2 Amend.2. These legal provisions were also applicable to the Applicant in the present case, and under the legal doctrine of *stare decisis*, the Dispute Tribunal must follow the jurisprudence of the Appeals Tribunal (see, for instance, the Appeals Tribunal in *Igbinedion* 2014-UNAT-410, as affirmed in, for instance, *Hepworth* 2015-UNAT-503, para. 40, and *Gehr* 2016-UNAT-613, para. 14).

14. Accordingly, the Tribunal finds that the Applicant is not entitled to post-delivery maternity leave under former staff rule 6.3 and ST/AI/2005/2 Amend.2.

Did the Applicant have a right to SLWFP of 14 weeks after the birth of her second child in accordance with staff rule 12.3(b)?

Receivability of this alternative claim

15. The Respondent's submissions may be summarized as follows (references to footnotes omitted):

a. The Applicant's "alternative claim that 'the Administration failed to exercise their discretion to grant her 14 weeks of maternity leave or of special leave with full pay (SLWFP) to take care of her newly born child pursuant to Staff Rule 12.3' is not receivable".

b. The Applicant "fails to meet her burden of proof to identify an administrative decision in non-compliance with the terms of her appointment or contract of employment" because she "provides no evidence she requested, and was denied, an exception under ST/SGB/2018/1 Staff Rule 12.3(b) regarding the birth of her second child".

c. As the Applicant "never asked for an exception", she "cannot provide this evidence because there was no administrative decision to deny the Applicant an exception under Staff Rule 12.3(b) regarding the birth of her second child".

d. "Without evidence of an administrative decision denying the Applicant an exception under ST/SGB/2018/1's Staff Rule 12.3(b) regarding the birth of her second child, the Dispute Tribunal does not have jurisdiction to review the Applicant's alternative claim".

e. The Dispute Tribunal "does not have authority to adjudicate a claim absent an administrative decision".

f. An "express request for an exception under ST/SGB/2018/1's Staff Rule 12.3(b), detailing the personal circumstances that merit the exception, is a requirement to establishing an administrative decision granting or denying the request". The Applicant's "assertion that no specific request from a staff member is required for the exercise of discretion to grant an exception is not sustainable". A "request that has not been made does not exist and cannot be accepted or rejected".

g. Judgment No. 2023-UNAT-1392 "supports this position" because the Appeals Tribunal held that, "upon the Applicant's request for an exception regarding her first child, the Administration should have considered her special circumstances, and granted her request [and] specified that should other staff members want the same benefit, they 'could also request exceptions based on their personal circumstances'". The Appeals Tribunal "did not hold that the Administration had a duty to grant exceptions to individual staff members who have not met the minimal burden of asking for an exception and detailing the personal circumstances justifying their request".

h. The Applicant's "2021 request for an exception regarding her first child did not obviate her obligation to request an exception regarding her second child". To "the extent the Applicant argues that the denial of her request for an exception regarding her first child was a 'continuous wrong' which rendered it unnecessary for her to request an exception regarding her second child, this argument has been rejected by the Appeals Tribunal" in *Argyrou* 2019-UNAT-969.

i. "Acceptance of the Applicant's argument that no specific request from a staff member is required for the exercise or non-exercise of discretion to grant an exception, and that the Administration may be held liable when it has not *sua sponte* granted a staff member an exception, would create an administratively impossible duty for the Organization to continuously review and speculate as to the unexpressed desires and circumstances of each of its 36,800 staff members for the purposes of granting exceptions to the Staff Rules".

j. The Applicant's assertion that a request for exception to the staff rules was made is "not supported by the evidence". In 2022, the Applicant "asked

for maternity to leave under ST/SGB/2018/1's Staff Rule 6.3(a), but she did not ask for an exception under ST/SGB/2018/1's Staff Rule 12.3(b)". The Applicant's 2022 "statement 'My request is the same as in 2021, that postdelivery maternity leave is granted to me based on the following rule [ST/SGB/2018/1, Staff Rule 6.3(a)], since surrogacy is not specifically covered by a [United Nations] policy' was not a request for an exception regarding her second child".

k. This point is "underscored by comparing the Applicant's 2021 communication regarding maternity leave with her 2022 communication regarding maternity leave". The Applicant's "2021 communication explicitly stated: 'I am asking for an exception to the rule to accommodate my situation,' and detailed personal circumstances related to the birth of her first child which she alleged merited granting her an exception". Among other things, "the Applicant based her 2021 request for an exception on the fact that the surrogate was hospitalized for serious pregnancy related conditions and that the baby was born seven weeks prematurely".

l. The Applicant's "2022 communication was different" as it "did not state 'I am asking for an exception,' (or any similar wording), and it detailed no personal circumstances related to the birth of the Applicant's second child which merited granting her an exception". In 2022, the Applicant "only stated that she desired maternity leave under ST/SGB/2018/1 Staff Rule 6.3(a)".

m. There "was no 'implied negative decision' denying the Applicant an exception under ST/SGB/2018/1, Staff Rule 12.3(b) regarding the birth of her second child". The Appeals Tribunal has defined an "implied decision," as one "which stems from the Administration's silence in response to a staff member's complaint or request", referring to *Terragnolo* 2015-UNAT-566, para. 34. "Without a request, there can be no 'implied negative decision'".

16. The Applicant objects against the Respondent's claim on non-receivability, arguing that the Tribunal indeed has jurisdiction in the matter.

17. The Tribunal notes that in expectancy of the birth of the Applicant's *second* child via gestational surrogacy, in her 18 July 2022 request, she stated that, "My request is the same as in 2021, that post-delivery maternity leave is granted to me based on the following rule, since surrogacy is not specifically covered by a [United Nations] policy". She then quoted former staff rule 6.3 and further stated, "Please let me know if you would like to discuss further and I can provide additional details".

18. In 2021, in follow-up to the Applicant's 26 February 2021 request for post-delivery maternity leave for her *first* child, the Administration initially advised the Applicant that "maternity leave for surrogacy is not covered by the current policy [on maternity leave], it has been covered as special leave with full pay" for which reason she could only be granted 8 weeks of leave. In a subsequent email of 31 March 2021, the Administration decided that the Applicant's request did not justify an exception to the staff rules, which is staff rule 12.3(b), even if not stated explicitly in the email:

> We have referred your question to Policy Advice and the Assistant Secretary-General for Human Resources ["ASG/OHR"]. Only the ASG/OHR can approve an exception to a staff rule. Having carefully reviewed your circumstances and all underlying implications, the 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.

19. Subsequently, in Judgment Nos. UNDT/2022/090 and 2023-UNAT-1392, respectively, both the Dispute Tribunal and the Appeals Tribunal decided to review the 31 March 2021 decision in relation to (a) former staff rule 6.3 and ST/AI/2005/2 Amend.2, and (b) staff rule 12.3(b). Both Tribunals held that the Applicant had a right to an exception under the staff rules and to be granted 14 weeks of SWLFP.

20. Unlike what is argued by the Respondent, the Tribunal finds that by the Applicant's explicit and direct reference to her previous case from 2021, which the Administration decided with reference to staff rule 12.3(b), she also, at least implicitly, requested an exception to the staff rules under staff rule 12.3(b) in her 18 July 2022 request. This request regarding her *second* child followed the Administration's previous decision regarding her *first* child and Judgment No. UNDT/2022/090 by the Dispute Tribunal, and it was reasonable for her to expect that the second request would be handled in the same manner. From the second request also follows that she recognizes that surrogacy is not specifically covered by any United Nations policy, also referring to former staff rule 6.3. Even if the Applicant made no specific reference to staff rule 12.3(b), the Administration should therefore have understood that the Applicant was likely also intending to request an exception to the staff rules and 14 weeks of SLWFP.

21. Had the Administration had any doubts regarding the extent of the Applicant's request, which was indeed phrased in a not very clear manner, it could simply have reached out to the Applicant, who, in her 18 July 2022 request, stated that she was available for providing further information if necessary. In this regard, the Tribunal notes that when submitting the request regarding the second child, the Applicant was not represented by any Counsel, and the Appeals Tribunal has recognized that self-represented applicants should be given certain latitude, leeway, and/or generosity when interpreting their claims (see, for instance, *Ghusoub* 2019-UNAT-905, *Abdellaoui* 2019-UNAT-928, and *El Shaer 2019-UNAT-942*).

22. That the issue was indeed before the Administration follows—without any reservation—from the Applicant's request for management evaluation of 27 October 2022. Therein, under the heading "Administrative decision to be evaluated", her Counsel specifically stated that "the Administration failed to exercise their discretion to grant her 14 weeks of maternity leave or of special leave with full pay to take care of her newly born daughter pursuant to Staff Rule 12.3", in alternative to granting her

request under former staff rule 6.3 and ST/AI/2005/2 Amend.2. The question was therefore, in accordance staff rule 11.2(a), explicitly before the Administration when it reviewed her management evaluation request in the present case, and no uncertainty whatsoever thereabout was any longer possible. In the application, the Applicant, however, submits that she "has not received a management evaluation", which the Respondent does not contest in his submissions to the Tribunal. The Administration therefore cannot blame anyone but itself for not pronouncing itself on the Applicant's request for an exception under staff rule 12.3(b).

23. Consequently, the Tribunal finds that the issue of whether the Applicant has a right to SLWFP of 14 weeks after the birth of her second child in accordance with staff rule 12.3(b) is receivable, because the Applicant had indeed brought it forward to the Administration's review.

Were the requirements for granting an exception under staff rule 12.3(b) fulfilled in the present case?

24. The Applicant, in essence, submits that all three conditions for granting her an exception pursuant to staff rule 12.3(b) are fulfilled and that she should therefore be granted 14 weeks of SLWFP.

25. The Respondent's submissions may be summarized as follows (references to footnotes omitted):

> a. The Secretary-General has "delegated the authority to make exceptions to the staff rules where no discretionary authority exists to the Under-Secretary-General, Department of Management Strategy, Policy and Compliance, who has sub-delegated that authority to" the ASG/OHR.
>
> b. With reference to *Suarez Liste* 2023-UNAT-1358, quoting *Sanwidi* 2010-UNAT-084, the "judicial review of exercise of discretion to grant an

exception is limited as '[i]n reviewing the validity of the Administration's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate, whether relevant matters have been ignored and irrelevant matters considered, and whether the decision is absurd or perverse'". It is "not the role of the Dispute Tribunal to consider the 'correctness' of the choice made by the Administration nor substitute its own decision for that of the Administration".

c. The Tribunals "must defer to reasonable exercises of managerial discretion necessary to run, manage and run the Organization". In *Hastings* 2011-UNAT-109, the Appeals Tribunal "remarked on the deference that should be afforded to the exercise of discretionary authority to grant an exception: that if 'the Administration had allowed that exceptions could be made, but in its discretion decided not to make an exception in this instance, we doubt a case could be made against that decision'" (para. 4).

d. In "assessing a staff member's request for an exception, the ASG/OHR first reviews the staff member's explanation of the circumstances that allegedly justify the granting of an exception". This "assessment is based on information and evidence from the staff member in their request, and not based on assumptions".

e. The Administration "does not grant blanket exceptions (or rejections)", and if "a staff member has previously been granted or denied a request for an exception, the ASG/OHR does not assume that the personal circumstances on which a second or third request is based are the same as the ones in the first request". Each "potential exception to the Staff Rules involving an individual staff member is reviewed case by case and considered on its own merit".

f. "That the Appeals Tribunal found, in Judgment [No.] 2023-UNAT-1392, that the Applicant's circumstances in 2021 merited an exception does not automatically mean that the Applicant merited an exception in 2022". It "cannot be assumed that the circumstances surrounding the birth of the Applicant's second child were the same as those surrounding the birth of her first child". In 2022, the Applicant "provided no details regarding her personal circumstances or the circumstances of the birth of her second child such that the Administration could be found liable for not having considered all the relevant facts, or otherwise not having reasonably exercised its discretion", and that "the Applicant was becoming a parent to her second child via surrogacy was not enough to merit exception".

g. "Absent extraordinary circumstances, the principles of fairness, legal certainty, and efficiency require the consistent application of the staff rules". The Applicant, "as a staff member who became a parent without giving birth, received gender-neutral equal treatment to similarly situated staff members". The Applicant's "disagreement with the fact that the Organization makes a regulatory/policy distinction between staff members who become parents by giving birth, and those who do not, is inapposite, and is not cause for a finding of liability".

h. The Applicant is "incorrect to assert that 'during the period of litigation the maternity leave entitlement of parents from surrogacy has been augmented'". The Staff Regulations and Staff Rules continue "to distinguish between staff members who become parents by giving birth, and those who do not". The new staff rule 6.3 creates "a unified parental leave entitlement for all staff members becoming parents (16 weeks) and an additional entitlement for staff members who give birth (an additional 10 weeks of pre-and-post-delivery leave)". The "leave period has been harmonized and augmented for all staff members under the new parental leave framework

> (from 4 or 8 to 16 weeks for paternity and adoption leave and from 16 weeks to 26 weeks for maternity leave)", but "keeps the distinctions and features that existed under the previous maternity, paternity and adoption leave framework regarding a staff member who physically gives birth and the corresponding pre-and-post-delivery leave". Under "the new framework, all staff members who become parents without giving birth have the right to the same leave period, regardless of their gender".

26. The Tribunal notes that staff rule 12.3(b) provides that "[e]xceptions 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".

27. As the Respondent correctly points out, the Appeals Tribunal held in *Hastings* that a staff member has a right to have a request for an exception to the staff rules under staff rules 12.3(b) considered but not necessarily to have it granted. In this regard, as also follows from staff rule 12.3(b), the Administration has a certain level of discretion in considering a request for an exception to the staff rules, and "[w]hen judging the validity of the Secretary-General's exercise of discretion it is not the role of [the Dispute Tribunal] to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him", "[n]or is it the role of [the Dispute Tribunal] to substitute its own decision for that of the Secretary-General" (see the Appeals Tribunal in *Benchebbak* 2014-UNAT-438, para. 19, also quoting its seminal judgment in *Sanwidi*).

28. In *Wilson* 2016-UNAT-676 (para. 47), the Appeals Tribunal outlined the "three elements" of staff rule 12.3(b) as: "(a) Such an exception must be consistent with the Staff Regulations and other decisions of the General Assembly; (b) Such an

exception must be agreed to by the staff member directly affected; and (c) Such an exception, in the opinion of the Secretary-General, must not be prejudicial to the interests of any other staff member or group of staff members".

29. Concerning the Applicant's first child, the Appeals Tribunal upheld in Judgment No. 2023-UNAT-1392, para. 64, the Dispute Tribunal's finding in Judgment No. UNDT/2022/090 that the Applicant should be granted an exception to the staff rules under staff rule 12.3(b) and be granted 14 weeks of SLWFP. Specifically, the Appeals Tribunal stated that,

> … We find the Dispute Tribunal did not err when it held that the Administration failed to exercise its discretion on this request judiciously. In rejecting her request, the Administration failed to properly consider [the Applicant's] personal circumstances involving the birth of a biological child via surrogacy and the complications that resulted. For example, her situation is not equal to situations of staff members who become parents through adoption, perhaps with older children. The individual circumstances of applicants are relevant considerations and must be taken into account in reviewing the request for exceptions. Further, other than receiving additional weeks of benefits, the Administration failed to properly set out the prejudice to other staff members who become parents through adoption. Other staff members could also request exceptions based on their personal circumstances.

30. In the present case, in the contested decision of 30 August 2022, the Tribunal notes that the Administration did not address the issue of an exception to the staff rules under staff rule 12.3(b) concerning the Applicant's second child, despite having done so when rejecting her similar request concerning her first child in 2021. The Applicant then specifically raised the question of an exception in her 27 October 2022 request for management evaluation of the contested 30 August 2022 decision, but the Administration decided not to respond thereto for which reason the contested decision remained unchanged.

31. The Tribunal finds that by failing to respond to the Applicant's request for an exception to the staff rules under staff rule 12.3(b) in the present case, the Administration therefore failed to fulfill its duty to consider the request under *Hasting* and exercise its discretion as per *Benchebbak*.

32. At most, on behalf of the Administration, the argument for not granting the exception would be the same as with regard to her first child in the 31 March 2021 decision. Then, the Applicant's request was solely rejected with reference to the alleged "in inequality of treatment of other staff members", which would concern the third element in accordance with *Wilson*. The first and second elements were not considered by the Administration and, by default, therefore stand as conceded.

33. In the present case, the background for considering third element is exactly the same as in 2021, and the Appeals Tribunal explicitly rejected the Administration's decision in Judgment No. 2023-UNAT-1392. Under the doctrine of *stare decisis*, the Dispute Tribunal is bound by this Judgment.

34. In addition, in the contested 30 August 2022 decision, the Administration did not distinguish the circumstances surrounding the birth of the first child from those of her second child in any possible manner relevant to the first and second elements of *Wilson*. This is so even if, also referring to Judgment No. 2023-UNAT-1392, the second gestational surrogate mother may possibly not have suffered the same complications as the first gestational surrogate mother. By failing to make any such distinctions and thereby provide a lawful reason(s) for rejecting the Applicant's request for an exception to the staff rules under staff rule 12.3(b), the Administration also failed to exercise its discretion in accordance with *Benchebbak* regarding the second and third elements of *Wilson*.

35. In conclusion, the Tribunal therefore has no other choice than to reject the Respondent's submissions in their entirety and, in accordance with staff rule 12.3(b)

and the cited jurisprudence of the Appeals Tribunal, the application therefore succeeds.

Conclusion

36. The application is granted, and the Applicant is to be granted 14 weeks of SLWFP under staff rule 12.3(b).

(Signed)

Judge Joelle Adda

Dated this 29th day of July 2024

Entered in the Register on this 29th day of July 2024

(Signed)

Isaac Endeley, Registrar, New York