



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

MCMILLAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Jérôme Blanchard, HRLU/UNOG

Introduction

1. The Applicant, a staff member of the Office of the High Commissioner for Human Rights (“OHCHR”), contests the decision finding her not eligible for transitional measures on parental leave in the context of new maternity leave entitlements.

2. For the reasons set forth below, the Tribunal rejects the application in its entirety.

Facts and procedural history

3. From 20 July to 8 November 2022, the Applicant was on maternity leave. Her child was born on 28 July 2022.

4. On 30 December 2022, the United Nations General Assembly adopted resolution 77/256 A-B, *inter alia*, welcoming the establishment of a new parental leave framework, and requesting the Secretary-General to implement it in the Secretariat of the United Nations within existing resources, on an exceptional basis, for the year 2023.

5. On 1 January 2023, the Organization promulgated new Staff Regulations and Rules (ST/SGB/2023/1), which included Staff Rules effective as of 1 January 2023. Staff rule 6.3 concerned Parental leave.

6. On 27 February 2023, the Organization promulgated a new administrative instruction on Parental leave and family leave, namely ST/AI/2023/2.

7. On 8 March 2023, the Assistant-Secretary-General for Human Resources (“ASG/OHR”), Department of Management Strategy, Policy and Compliance (“DMSPC”), informed the Heads of Entities of the Secretariat that the Secretary-General had approved “a transitional measure [for staff members becoming parents by giving birth] in relation to the establishment of the new parental leave provisions reflected in staff rule 6.3”.

8. By email dated 29 March 2023, the Applicant was informed that the eligibility for transitional measures on parental leave only extended to staff members who were on maternity leave on 1 January 2023. As the Applicant's maternity leave had ended on 8 November 2022, she was not considered eligible.
9. On 18 May 2023, the Applicant requested management evaluation of the contested decision, which the Under-Secretary-General, DMSPC, upheld by letter dated 14 June 2023.
10. On 11 September 2023, the Applicant filed the instant application.
11. On 9 October 2023, the Respondent filed his reply.
12. By Order No. 166 (GVA/2023) of 11 December 2023, the Tribunal instructed the Applicant to file a rejoinder, and the parties to explore resolving the dispute amicably, directing them to revert to it in this respect by 19 January 2024.
13. On 12 January 2024, the Applicant filed her rejoinder.
14. On 19 January 2024, the parties filed a joint submission in response to Order No. 166 (GVA/2023) informing the Tribunal that the case could not be resolved amicably.
15. By Order No. 75 (GVA/2024), the Tribunal instructed the parties to file closing submissions, which they did on 12 July 2024.

Consideration

Legal Framework

16. Following the General Assembly's approval of resolution 77/256 A-B on, *inter alia*, a new parental leave framework, the Organization revised its staff rule on parental leave effective 1 January 2023 through ST/SGB/2023/1 ("2023 Staff Rules"). The former rules on maternity, paternity, and adoption leave were replaced in ST/SGB/2023/1 by staff rule 6.3, as follows:

Rule 6.3

Parental leave

(a) Under conditions established by the Secretary-General, staff members shall be granted:

(i) Sixteen weeks of parental leave with full pay in the case of the birth or adoption of a child;

(ii) An additional period of 10 weeks of prenatal and postnatal leave with full pay for the parent who gives birth, bringing the total duration of their parental leave to 26 weeks;

(b) Staff members may avail of the 16 weeks of parental leave mentioned in paragraph (a) (i) above any time within a year following the date of their child's birth or adoption, provided that it is completed during that year.

(c) Parental leave in the case of the birth or adoption of a child under paragraph (a) (i) above may not be granted more than once in any 12-month period to be counted from the date of birth or adoption of the child. This paragraph (c) shall not apply to a parent who gives birth.

(d) Sick leave shall not normally be granted for maternity cases during the prenatal and postnatal leave mentioned in paragraph (a) (ii) above, except where serious complications arise.

(e) Annual leave shall accrue during periods of parental leave.

17. Subsequently, the Secretary-General established the conditions for granting parental leave by issuing ST/AI/2023/2 ("Parental leave and family leave"), which entered into force as of 1 January 2023 and provides the following:

1.1 Parental leave with full pay shall be granted under staff rule 6.3, subject to the provisions of the present instruction.

1.2 The present instruction governs the administration of parental leave in respect of a child born or adopted on or after 1 January 2023, provided that the staff member was in service at the time of the birth or adoption.

10.2 The provisions of administrative instruction ST/AI/2005/2 ("Family leave, maternity leave and paternity leave") shall apply to those staff members who were eligible to 16 weeks of maternity leave, 4 or 8 weeks of paternity leave or 8 weeks of adoption leave, on or before 31 December 2022.

18. Until 31 December 2022, the matter was regulated by the Staff Regulations and Rules issued under ST/SGB/2018/1/Rev.2 (“2018 Staff Rules”) and by administrative instruction ST/AI/2005/2 (“Family leave, maternity leave and paternity leave”), which provided the following in their relevant parts:

ST/SGB/2018/1/Rev.2

Rule 6.3

Maternity and paternity leave

(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[.]

ST/AI/2005/2

Section 4

Special leave without pay

4.1 Special leave without pay for a period of up to two years may be granted as parental leave under staff rule 105.2 (a) (iii) b to a staff member who is the mother or the father of a newly born or adopted child, provided the staff member has a permanent appointment, or has completed three years of continuous service on a fixed-term appointment and is expected by the Secretary-General to continue in service for at least six months beyond the date of return from the proposed parental leave.

4.4 Requests for parental leave as special leave without pay under this section should normally be submitted to the executive or local personnel office, through the supervisor, at least one month before the commencement of the proposed leave.

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.

19. On 8 March 2023, the ASG/OHR, DMSPC informed the Heads of Entities of the Secretariat of the Secretary-General’s approval of a transitional measure on the establishment of the new parental leave policy.

20. The transitional measure that the Secretary-General introduced in relation to the new parental leave scheme is the granting of 10 weeks of special leave with full pay (“SLWFP”) in addition to the existing entitlement under the previous scheme, of 16 weeks of maternity leave.

21. The Secretary-General established the following eligibility criteria for the transitional measure:

- a. Staff members must have been on maternity leave on 1 January 2023;
- b. The approved transitional measure does not include staff members who completed their maternity leave before 1 January 2023, nor staff members who were on paternity or adoption leave before or on 1 January 2023; and
- c. The 10 weeks of special leave with full pay must be utilized within one year from the birth of the child and may be taken continuously or in units of minimum one full day during the one-year period.

Scope of judicial review

22. The Tribunal recalls that in conducting a judicial review of the validity of the Secretary-General’s exercise of discretion it reviews whether the decision was lawful and rational (*Sanwidi* 2010-UNAT-084, paras. 38-42), and will not substitute its views for those of the Administration but will evaluate whether that decision was irrational or arbitrary (*Gisage* 2019-UNAT-973, paras. 37-40; *Millan* 2023-UNAT-1330, paras. 107-110).

23. It is well-established that it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst various available courses of action (*Sanwidi*, para. 40; *Belkhabbaz* 2018-UNAT-873, para. 66).

24. The Tribunal further recalls that it is bound by the law of the Organization and not mandated to legislate on its behalf.

25. Having examined the evidence on record, the Tribunal identifies the following issues for determination:

- a. Whether the Applicant is entitled to the transitional measure;
- b. Whether the transitional measure is arbitrary; and
- c. Whether ST/AI/2023/2 is inconsistent with staff rule 6.3

Whether the Applicant is entitled to the transitional measure

26. The Applicant was on maternity leave from 20 July 2022 to 8 November 2022 under the provisions of the 2018 Staff Rules and ST/AI/2005/2. She was entitled to and took 16 weeks of maternity leave.

27. Between 9 November 2022 and 6 January 2023, the Applicant used her accrued Annual Leave (“AL”) to extend her period at home following the birth of her child.

28. While recognizing that the former rules did not recognize annual leave as an extension of maternity leave, the Applicant argues that said provisions did recognize that an absence following maternity leave represents an extension of the maternity leave. This, she claims, is based on sec. 4.1 of ST/AI/2005/2, which recognized “parental leave as special leave without pay”.

29. The provision in question allowed staff members wishing to extend their time on parental leave to request placement on special leave without pay (“SLWOP”). This, the Applicant alleges, would be considered an “extension of parental leave”.

30. The Applicant, thus, requests the application of the transitional measure to her situation. She claims that by taking annual leave following the exhaustion of her maternity leave entitlements, she was also “extending her period on parental leave”. She then should have been considered still on maternity leave on 1 January 2023 for the purpose of the transitional measure.

31. Furthermore, the Applicant argues that the purpose of the new policy on parental leave is precisely to allow birthing parents more time with the child, as recommended by the World Health Organization (“WHO”) in its guidelines for breastfeeding. Since she took annual leave precisely to be in conformity with such recommendations, she should have been entitled to the transitional measure.

32. Section 10.1 of ST/AI/2023/2 clearly provides that the new rules on parental leave entered into force effective 1 January 2023. Equally clear is sec. 10.2 of ST/AI/2023/2, which excludes “staff members who were eligible to 16 weeks of maternity leave” from the entitlements under the new policy on parental leave.

33. Thus, from the outset, the applicable legal framework does not allow for any wider interpretation.

34. The transitional measure that the Secretary-General approved involves granting an additional 10 weeks of SLWFP to staff members who were already on maternity leave on 1 January 2023. This measure was created to facilitate the transition from the previous parental leave scheme to the new one, and to enable equity and fairness in the treatment of staff members who became parents by giving birth.

35. The Applicant, however, had exhausted her maternity leave entitlements and was instead on annual leave on 1 January 2023. That she chose to use her accrued annual leave to spend more time with her child is understandable, but that does not convert her annual leave into any other entitlement other than the one it exactly is.

36. The Tribunal finds no merit in the Applicant’s argument that she should be considered as still on maternity leave during her annual leave because the reason for taking the latter was precisely the one behind the new policy.

37. While it is true that the Applicant took annual leave immediately after the end of her maternity leave, that does not result in said leave being considered an extension of her maternity leave. This argument is unsupported by both law and evidence.

38. Furthermore, the Tribunal recalls that sec. 4 of ST/AI/2005/2 had a specific provision for “Parental leave as special leave without pay under staff rule 105.2 for a newly born or adopted child”. Through it, SLWOP could be granted, *inter alia*, “as parental leave” to a staff member who is the mother or father of a newly born or adopted child. Requests for parental leave as SLWOP should normally be submitted at least one month before the commencement of the proposed leave.

39. The Applicant, however, never requested SLWOP. Instead, as established above, she used her annual leave entitlement. Thus, the claim that her annual leave should be considered “parental leave” is unsustainable.

40. Therefore, the Applicant has failed to demonstrate that she should have been considered eligible for the transitional measure. As the birthing parent of a child born in 2022 whose maternity leave entitlement ended well before the entry into force of staff rule 6.3 and ST/AI/2023/2, which set a cutoff date of 1 January 2023, the Applicant was indeed not eligible for the transitional measure.

Whether the transitional measure is arbitrary

41. The Applicant claims that the decision to limit eligibility for the transitional measure was arbitrary. Had her child been born two months later, the Organization would have applied the recommendation of WHO and she would have been entitled to the additional 10 weeks of parental leave. Yet, the Organization declined to allow some flexibility and based on a pure technicality, denied the Applicant access to the greater entitlement.

42. The Tribunal finds that the transitional measure in discussion was a fair, reasonable and rational solution. Under it, all birthing parents that were still on maternity leave when the new policy entered into force were entitled to the same 26 weeks in total as the ones who gave birth after the entry into force of the new parental leave scheme.

43. Transitional measures are required when a new policy changes previous law and/or entitlements. A transitional scheme requires a cutoff point and its establishment is a reasonable exercise of administrative discretion.

44. In this case, the Tribunal finds that the choice of 1 January 2023 was lawful, reasonable and fair. Also, it was consistent with the date the new parental leave entitlement came into existence through the issuance of ST/SGB/2023/1, as well as with para. B.I.2 of resolution 77/256 A-B requesting the implementation of the new parental framework for 2023 on an exceptional basis.

45. The Tribunal further finds that the Applicant has failed to demonstrate that the implementation of the transitional measure was flawed or arbitrary.

Whether ST/AI/2023/2 is inconsistent with staff rule 6.3

46. The Applicant claims that ST/AI/2023/2 is inconsistent with staff rule 6.3 because it limits the parental leave benefit to parents of children born or adopted after 1 January 2023, a restriction that the 2023 Staff Rules did not anticipate. This alleged inconsistency would amount to a violation of the hierarchy of laws.

47. While the Tribunal agrees that the hierarchy of laws must always be respected, it disagrees with the Applicant that ST/AI/2023/2 exceeded its bounds vis-à-vis staff rule 6.3 and ST/SGB/2023/1.

48. Indeed, as the Applicant argued, staff rule 6.3 indicates that staff members who give birth to a child receive 10 weeks pre and postnatal leave, and are entitled to 16 weeks of parental leave. The 10-week period must be taken before and after the birth of the child, and the 16-week entitlement can be taken “at any time within a year following the date of the child’s birth provided that it is completed during that year”.

49. The Tribunal recalls, however, that the 2023 Staff Rules, which contain staff rule 6.3, were only published on 1 January 2023.

50. It is a general principle of law the non-retroactive application of law, which prohibits its application to events that occurred before the law was introduced. While the Tribunal acknowledges that the principle of non-retroactive application of law is not absolute, exceptions are either stipulated in the law itself or justified on exceptional circumstances. Neither are present here.

51. It is also generally accepted within the legal framework of the United Nations that administrative instructions regulate the implementation of new law established by the Secretary-General through its bulletins.

52. In the case at hand, ST/AI/2023/2 administered the implementation of the new parental leave entitlement approved by the General Assembly and converted into law in the 2023 Staff Rules. Under this scheme, ST/AI/2023/2 established that the new rule on parental leave would affect staff members who gave birth or adopted a child on or after 1 January 2023, which is precisely the date when the new parental leave entitlement was introduced to the Staff Rules and Regulations.

53. As determined in *Cadin and Langelaar* UNDT/2024/053, para. 55, the regulation is also consistent with the intention of the General Assembly, who “welcomed the establishment of the new parental leave framework and requested the Secretary-General to implement the framework in the Secretariat of the United Nations within existing resources, on an exceptional basis, for the year 2023”. Nothing in resolution 77/256 A-B requires that parental leave measures be applied to all parents as the Applicants suggests.

54. *Cadin and Langelaar* further noted:

56. [...] the General Assembly resolution in fact gives wide discretion to the Secretary-General to determine the modalities of implementation of the measures. It was on this basis that the Secretary-General promulgated staff rule 6.3(a)(i) of ST/SGB/2023/1, which provides “[u]nder conditions established by the Secretary-General, staff members shall be granted: (i) [s]ixteen weeks of parental leave with full pay in the case of the birth or adoption of a child”.

57. The Secretary-General’s determination of the limited category of staff members to whom the parental leave measures would apply is within his mandate under staff rule 6.3(a) of ST/SGB/2023/1.

55. Consequently, the Tribunal finds that ST/AI/2023/2 did not violate the hierarchy of laws when it regulated the implementation of staff rule 6.3.

56. The limitations set by ST/AI/2023/2 are consistent with staff rule 6.3 and with the General Assembly resolution that welcomed the new parental leave framework into the Organization. The invocation of the principle of hierarchy of laws is therefore not warranted.

Conclusion

57. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Sun Xiangzhuang

Dated this 2nd day of October 2024

Entered in the Register on this 2nd day of October 2024

(Signed)

René M. Vargas M., Registrar, Geneva