



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

THOMAS-MCPHEE

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 United Nations High Commissioner for Human Rights (“OHCHR”), contests the decision finding her not eligible for the transitional measure 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 background

3. The Applicant gave birth on 5 August 2022. She was on maternity leave from 2 August 2022 to 21 November 2022.
4. From 22 November 2022 to 30 December 2022, the Applicant was on annual leave, followed by special leave without pay (“SLWOP”) until 31 August 2023.
5. 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.
6. 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.
7. On 27 February 2023, the Organization promulgated a new administrative instruction on parental leave and family leave, namely ST/AI/2023/2.
8. 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” (“the transitional measure”). The ASG/OHR, *inter alia*, conveyed that the intent of the measure was 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.

9. On 26 March 2023, the Applicant enquired with Human Resources, OHCHR, whether the transitional measure applied to her case.

10. On 28 March 2023, the Applicant was informed that she was not entitled to 10 weeks of special leave with full pay (“SLWFP”) in addition to 16 weeks of maternity leave. In other words, she was not entitled to the transitional measure. This is the “contested decision”.

11. On 9 May 2023, the Applicant requested management evaluation of the contested decision, which the Under-Secretary-General, DMSPC, upheld by letter dated 22 June 2023.

12. On 19 September 2023, the Applicant filed the instant application.

13. On 16 October 2023, the Respondent filed his reply.

14. By Order No. 169 (GVA/2023) of 18 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 23 January 2024.

15. On 12 January 2024, the Applicant filed her rejoinder.

16. On 19 January 2024, the parties filed a joint motion pursuant to Order No. 169 (GVA/2023) confirming that the case could not be resolved amicably.

17. By Order No. 76 (GVA/2024), the Tribunal instructed the parties to file closing submissions, which they did on 12 July 2024.

Consideration

Legal Framework

18. 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 the 2023 Staff Rules by staff rule 6.3, which reads:

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.

19. 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 in its relevant parts:

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.

20. Until 31 December 2022, the leave entitlement in connection with the birth or adoption of a child 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 provide 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[.]

(iii) The staff member shall receive maternity leave with full pay for the entire duration of her absence under subparagraphs (i) and (ii) above.

(b) Subject to conditions established by the Secretary-General, a staff member shall be entitled to paternity leave in accordance with the following provisions[.]

(iii) The staff member shall receive paternity leave with full pay for the entire duration of his absence.

ST/AI/2005/2

Section 4

Special leave without pay

Parental leave as special leave without pay under staff rule 105.2 for a newly born or adopted child

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.

21. 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 in connection with the establishment of the new parental leave policy.

22. The transitional measure entails the granting of 10 weeks of special leave with full pay ("SLWFP") in addition to the existing entitlement of 16 weeks of maternity leave under the previous scheme. The Secretary-General established the following eligibility criteria for it:

- 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

23. The Tribunal recalls that when judicially reviewing the validity of the Secretary-General's exercise of discretion, it examines 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).

24. 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).

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

26. 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

27. The Applicant's child was born on 5 August 2022. The Applicant was on maternity leave from 2 August 2022 to 21 November 2022. From 22 November 2022 to 30 December 2022, she took annual leave, immediately followed by parental leave as SLWOP until 31 August 2023.

28. The Applicant's parental leave as SLWOP was taken pursuant to sec. 4.1 of ST/AI/2005/2. This provision allows staff members who are parents to a newly born or adopted child to take SLWOP for a period of up to two years, which is granted "as parental leave".

29. The Applicant argues that "the plain meaning of section 4 is that such SLWOP is parental leave". In this sense, she claims that she should have been considered as still being on maternity leave for the purpose of the transitional measure.

30. The Tribunal disagrees with the Applicant's claim that her parental leave as SLWOP equals maternity leave.

31. Under the previous scheme (2018 Staff Rules), staff members were entitled to either maternity or paternity leave following the birth of their child. ST/AI/2005/2 provided for parental leave as SLWOP. Under this scheme, maternity leave, paternity leave and parental leave as SLWOP are different entitlements.

32. The Tribunal notes that the title of staff rule 6.3 changed from "Maternity and paternity leave" (2018 Staff Rules) to "Parental leave" (2023 Staff Rules). Under the new scheme (staff rule 6.3 of the 2023 Staff Rules), parental leave encompasses the entitlements previously known as maternity and paternity leave.

33. Parental leave as SLWOP under ST/AI/2005/2 is not to be confused with maternity leave under staff rule 6.3 of the 2018 Staff Rules, or with parental leave under staff rule 6.3 of the 2023 Staff Rules.

34. The first entitlement is meant to grant SLWOP (maximum of two years) as parental leave to new parents who qualify for it. The second entitlement (maternity leave) granted leave with full pay (16 weeks) to the birthing parent. The current parental leave grants leave with full pay (16 weeks) to new parents in cases of birth or adoption of a child, plus an additional period of leave with full pay (10 weeks) to the birthing parent as prenatal and postnatal leave.

35. The Tribunal recalls that SLWOP is a benefit that can be taken under several different grounds. As per staff rule 5.5(a)(i), it can be granted, *inter alia*, for advanced study or research in the interest of the United Nations, in cases of extended illness, for childcare or for other important reasons. It can also be granted for pension purposes as per staff rule 5.5(c).

36. Parental leave as SLWOP is an entitlement that exists, in addition to maternity and paternity leave, to extend a staff member's absence from work for childcare reasons regardless of whether the entitlement to maternity or paternity leave had been exercised. It further aims to specify the reason behind the granting of SLWOP, and to protect the employment of staff members who take unpaid time off to spend more time with their newborn or recently adopted child. It was not meant to provide more time on maternity leave to those who request such leave.

37. The Tribunal acknowledges that the use of the expression "parental leave" under both schemes, albeit with different meanings, can lead to confusion. This, however, is no basis to change the obvious meaning and intent behind the respective provisions.

38. The Applicant exercised her entitlement to maternity leave and exhausted it before 1 January 2023. On 1 January 2023, the Applicant was on parental leave as SLWOP. That the Applicant's intention behind her request for the latter was to extend her absence from work following the birth of her child is understandable.

39. The fact that sec. 4.1 of ST/AI/2005/2 qualifies the Applicant's leave as "parental" and that, under the new scheme, parental leave has a broader scope, does not transform the Applicant's parental leave as SLWOP into maternity leave.

40. It follows that the analogy on which the Applicant grounds her eligibility claim to the transitional measure is unsustainable from a legal standpoint. As explained above, maternity leave and parental leave as SLWOP are two completely different benefits: one being with pay and the other not at all.

41. With respect to the Applicant's argument vis-à-vis the guidelines of the World Health Organization ("WHO") on breastfeeding, the Tribunal clarifies that such recommendation carries no legal weight capable of creating obligations on the Organization or entitlements in favour of staff members. The only provisions capable of that are the ones approved/issued by the Secretary-General that become part of the Organization's legal framework.

42. Therefore, the Applicant is not entitled to the transitional measure.

Whether the transitional measure is arbitrary

43. The Applicant claims that the transitional measure is arbitrary because had her child been born a little under two months later, the Organization would have applied the WHO guidelines on breastfeeding and granted her an additional 10 weeks of parental leave. Yet, the Organization declined to exercise some flexibility.

44. The Tribunal recalls that the transitional measure was not introduced to implement the WHO guidelines on breastfeeding. While the guidelines may have been one of several considerations leading to the General Assembly's decision to direct a change in the parental leave scheme, it is clear that the Secretary-General introduced the transitional measure to facilitate the transition from the old leave scheme to the new one.

45. In this sense, the claim that the transitional measure was arbitrary because it went against the *raison d'être* of the WHO guidelines on breastfeeding is unsustainable.

46. As this Tribunal found in *McMillan* UNDT/2024/070, para. 42, the transitional measure was a fair, reasonable and rational solution. Under it, all birthing parents that were still on maternity leave when the new scheme 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. As determined in *McMillan*:

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. [...] 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.

47. Therefore, the Applicant has failed to demonstrate any arbitrariness in the implementation of the transitional measure.

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

48. 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.

49. The Tribunal recalls its finding in *McMillan*, para. 47, that while it agrees that the hierarchy of laws must always be respected, it disagrees with the claim that ST/AI/2023/2 exceeded its bounds vis-à-vis staff rule 6.3 in ST/SGB/2023/1.

50. As the Applicant argued, current staff rule 6.3 indicates that staff members who give birth to a child are entitled to 10 weeks of prenatal and postnatal leave and 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”.

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

52. The non-retroactive application of a law, which prohibits its application to events that occurred before the law was introduced, is a general principle of law. 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 (see *McMillan*, para. 50).

53. 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 (see *McMillan*, para. 51).

54. In the case at hand, ST/AI/2023/2 administered the implementation of the new parental leave framework approved by the General Assembly, which was 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 in the Staff Regulations and Staff Rules (see *McMillan*, para. 52).

55. 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 Applicant suggests” (emphasis in the original).

56. In *Cadin and Langelaar*, the Tribunal further noted the following:

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.

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

Conclusion

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

(Signed)

Judge Sun Xiangzhuang

Dated this 23rd day of October 2024

Entered in the Register on this 23rd day of October 2024

(Signed)

René M. Vargas M., Registrar, Geneva