



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

KABEEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), contests the decision not to grant him 16 weeks of parental leave in respect of his son, born on 29 December 2022, under new staff rule 6.3.
2. For the reasons stated below, the Tribunal finds that the contested decision is lawful and rejects the application.

Facts

3. On 3 July 2017, the Applicant joined UNODC as a Statistics Assistant at the G-6 level, a position and level in which he is serving to date.
4. On 29 December 2022, the Applicant’s child was born.
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. Effective 1 January 2023, the Organization promulgated new Staff Regulations and Rules (ST/SGB/2023/1), including staff rule 6.3 concerning parental leave.
7. On 3 February 2023, the Applicant submitted through Umoja a request for child allowance together with the birth certificate of his child.
8. On the same day, the Human Resources Management Section (“HRMS”), United Nations Office at Vienna (“UNOV”)/UNODC, approved the request for child allowance in Umoja and recorded the paternity leave quota of 20 working days.
9. On 27 February 2023, the Organization promulgated a new administrative instruction on “Parental leave and family leave”, namely ST/AI/2023/2.

10. On 1 March 2023, the Reproduction and Distribution Unit, UNOV, circulated ST/AI/2023/2 to all UNOV and UNODC staff.

11. On 7 March 2023, the Applicant enquired with his Human Resources Partner (“HRP”) whether he would be eligible for 16 weeks of paternity leave under the new ST/AI/2023/2.

12. On the same day, the HRP informed the Applicant that the new staff rule on parental leave applied in respect of a child born or adopted on or after 1 January 2023 and that it did not apply retroactively. This is the contested decision.

13. By email of 15 March 2023, the Office of Human Resources, Department of Management Strategy, Policy and Compliance (“DMSPC”), informed the Chief, HRMS, UNOV, of a transitional measure approved by the Secretary-General as part of the implementation of the new parental leave framework. The transitional measure involved granting staff members who were on maternity leave on 1 January 2023, 10 weeks of Special Leave With Full Pay (“SLWFP”) in addition to their entitlement of 16 weeks of maternity leave. In the same email, DMSPC explained the rationale behind the implementation of the transitional measure.

14. The Applicant was on paternity leave from 3 to 20 April 2023 and from 19 to 28 June 2023.

15. On 22 April 2023, the Applicant sought management evaluation of the contested decision.

16. By letter dated 6 June 2023, the Applicant was informed of the outcome of his request for management evaluation. The Under-Secretary-General, DMSPC, upheld the contested decision.

17. On 17 August 2023, the Applicant filed the instant application.

18. On 18 September 2023, the Respondent filed his reply.

19. By Order No. 155 (GVA/2023) of 13 November 2023, the Tribunal directed the Applicant to file a rejoinder by 13 December 2023, and the parties to explore resolving the dispute amicably, instructing them to revert to it in this respect by 20 December 2023.

20. On 24 November 2023, the Applicant filed his rejoinder.

21. On 27 December 2023, the parties informed the Tribunal that they were not able to explore alternative dispute resolution.

22. By Order No. 100 (GVA/2024) of 4 September 2024, the Tribunal instructed the parties to file closing submissions, which they did. The Applicant filed his closing submission on 18 September 2024 and the Respondent did so one day later.

Consideration

Legal Framework

23. Up to 31 December 2022, paternity leave 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

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

(i) The leave shall be granted for a total period of up to four weeks. In the case of internationally recruited staff members serving at a non-family duty station, or in exceptional circumstances as determined by the Secretary-General, leave shall be granted for a total period of up to eight weeks;

(ii) The leave may be taken either continuously or in separate periods during the year following the birth of the child, provided that it is completed during that year and within the duration of the contract;

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

ST/AI/2005/2

Section 10

Paternity leave requests

10.3 The staff member may request paternity leave for a total period of up to four weeks or, in the case of an internationally recruited staff member serving at a nonfamily duty station, up to eight weeks. In exceptional circumstances, such as incapacity or death of the mother, inadequate medical facilities or medical complications encountered at time of pregnancy or after the birth, the staff member may request leave for a total period of up to eight weeks. Decisions regarding the adequacy of medical facilities at the duty station to address the medical condition of the mother or the existence of medical complications shall be made upon the recommendation of the authorized United Nations medical officer at the staff member's duty station.

24. 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 (emphasis added):

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.

25. 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.

10.1 The present administrative instruction shall enter into force on 1 January 2023.

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.

Scope of judicial review

26. 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).

27. 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).

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

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

- a. Whether the Applicant is entitled to parental leave under staff rule 6.3;
- b. Whether ST/AI/2023/2 is inconsistent with staff rule 6.3;
- c. Whether ST/AI/2023/2 is discriminatory; and
- d. Whether the Applicant is entitled to the remedies requested.

Whether the Applicant is entitled to parental leave under staff rule 6.3

30. The Applicant's child was born on 29 December 2022. He requested paternity leave from 3 to 20 April 2023 and from 19 to 28 June 2023.

31. The Applicant claims that the new staff rule 6.3 is applicable to him and that he is entitled to 16 weeks of parental leave. He alleges that he requested leave on 7 March 2023, which is within the required one-year period from his child's birth as per new staff rule 6.3(b), and that this rule does not explicitly limit its application to parents of children born after 1 January 2023.

32. The Applicant argues that the leave entitlement under new staff rule 6.3 is triggered by the leave request date, which shall be made within the first year of the child's birth, not the date of the birth itself. He asserts that the Administration's restrictive reading of the rule goes against the rule's intent to provide equitable parental leave for all staff members.

33. Contrary to the Applicant's argument, the entitlement under new staff rule 6.3 on parental leave is only effective as of 1 January 2023, and its application is subject to the "conditions established by the Secretary-General" as per staff rule 6.3(a). These conditions are set out in ST/AI/2023/2.

34. Section 1.2 of ST/AI/2023/2 provides that said administrative 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. Similarly, sec. 10.1 of ST/AI/2023/2 specifies that the new policy on parental leave entered into force effective 1 January 2023.

35. Equally clear is sec. 10.2 of ST/AI/2023/2, which excludes staff members who were "eligible" to "4 or 8 weeks of paternity leave or 8 weeks of adoption leave, on or before 31 December 2022" from the entitlement under the new policy on parental leave.

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

37. The Applicant's arguments are contradictory as, on the one hand, he claims that new staff rule 6.3 applies to him and, on the other hand, he asserts that ST/AI/2023/2, an administrative instruction promulgated in connection with new staff rule 6.3, does not apply to his case as his child was born before 1 January 2023.

38. The Applicant, whose child was born on 29 December 2022, was entitled to four weeks of paternity leave under the 2018 Staff Rules and ST/AI/2005/2. He exercised this entitlement pursuant to the legal framework applicable to his case.

39. The fact that the Applicant requested paternity leave after 1 January 2023 is irrelevant to the applicability of new staff rule 6.3 and ST/AI/2023/2. Indeed, as determined in *Trossarelli* UNDT-2024-088, para. 38, "the determining factor for the eligibility of the parental leave entitlement is the date of the child's birth for whom parental leave is requested and not the date on which the request was made, or the benefit was granted".

40. Therefore, the Applicant failed to demonstrate that he should have been eligible for the new parental leave benefit. As the parent of a child born on 29 December 2022, that is, two days before the entry into force of new staff rule 6.3 and almost two months before the issuance of ST/AI/2023/2, which set a cut-off date of 1 January 2023, the Applicant was indeed not entitled to 16 weeks of paternity leave.

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

41. The Applicant alleges that creating a 1 January 2023 cut-off date is arbitrary and capricious in light of the plain meaning of new staff rule 6.3(b). He asserts that ST/AI/2023/2 cannot change the meaning of a staff rule, and that the attempt to do so amounts to a violation of the hierarchy of laws as Staff Rules are above Administrative Instructions in the UN legislative system.

42. 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.

43. Indeed, new staff rule 6.3(b) provides that staff members may avail themselves of 16 weeks of parental leave at any time within a year following the date of their child's birth or adoption, provided that said leave is completed during that year.

44. The Tribunal, however, recalls that the 2023 Staff Rules containing new staff rule 6.3 were only published on 1 January 2023.

45. The non-retroactivity principle is a general principle of law that prohibits applying law to an act that occurred before the law was adopted (see *McMillan* UNDT/2024/070, para. 50 and *Trossarelli*, para. 44). 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 in exceptional circumstances. Neither are present here.

46. Therefore, applying the above principle, the Applicant was not eligible for parental leave under new staff rule 6.3 and ST/AI/2023/2 as none of these rules were in force on 29 December 2022 when his child was born.

47. Furthermore, within the legal framework of the United Nations, it is generally accepted that administrative instructions regulate the implementation of new law established by the Secretary-General through his bulletins.

48. As noted in *McMillan*, para. 52, 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 in the Staff Regulations and Rules.

49. 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”.

50. *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.

51. Consequently, the Tribunal finds that ST/AI/2023/2 is consistent with new staff rule 6.3.

Whether ST/AI/2023/2 is discriminatory

52. First, the Applicant claims that the decision to unlawfully limit his ability to use the increased leave period provided for in new staff rule 6.3 discriminates against him because he is a father and because his child was born through surrogacy. He argues that by adopting transitional measures only applicable to a group of staff members, the Administration increased the level of discrimination and failed to address the needs of fathers and mothers of children born in 2022.

53. The Appeals Tribunal held in *Tabari* 2011-UNAT-177, para. 26 that:

The different treatment becomes discriminatory when it affects negatively the rights of certain staff members or categories of them, due to unlawful reasons. But when the approach is general or abstract, by categories, there is no discrimination, if the difference is motivated in the pursuit of general goals and policies and it is not designed to treat individuals or categories of them unequally. Since Aristotle, the principle of equality means equal treatment of equals; it also means unequal treatment of unequals.

54. While the new parental leave policy includes a transitional measure only for staff members who were on maternity leave on 1 January 2023, the Tribunal finds that this is not discriminatory.

55. As DMSPC indicated (see para. 13 above), the transitional measure was approved “to facilitate the transition from the previous maternity leave scheme to the new parental leave scheme, and to enable greater equity and fairness in the treatment of similarly situated staff members (i.e., those becoming parents by giving birth), while also being in line with [the recommendation of the World Health Organization] of six months minimum of breastfeeding”.

56. The fact that the Applicant’s situation does not fall within the scope of the transitional measure does not make it discriminatory against him.

57. Second, the Applicant alleges that, unlike other entities in the UN Common System, Secretariat staff members have been discriminated against because the Administration has not foreseen transitional arrangements to ensure that staff who had children in 2022 benefit from the new parental leave policy.

58. In this respect, the Tribunal has already ruled in *Trossarelli* at para. 55, that the UN Secretariat is not bound by decisions made by other UN entities who are not part of the UN Secretariat concerning how they implement new policies, including whether they adopt transitional measures for other categories of staff. Each entity exercises its discretion when applying policies, and the fact that an entity exercises its discretion differently concerning the adoption of transitional measures does not affect the legality of the decisions made.

Whether the Applicant is entitled to the remedies requested

59. Since the Tribunal finds the contested decision lawful, there is no basis for the remedies pleaded for in the application. Accordingly, the Tribunal rejects the Applicant's request for remedies.

Conclusion

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

(Signed)

Judge Sun Xiangzhuang

Dated this 13th day of November 2024

Entered in the Register on this 13th day of November 2024

(Signed)

René M. Vargas M., Registrar, Geneva