UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2023-UNAT-1392

Monica Ioana Barbulescu

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Before:	Judge Kanwaldeep Sandhu, Presiding Judge Nassib G. Ziadé Judge Katharine Mary Savage
Case No.:	2022-1757
Date of Decision:	27 October 2023
Date of Publication:	30 November 2023
Registrar:	Juliet E. Johnson

Counsel for Respondent/Applicant:	Dorota Banaszewska, OSLA
Counsel for Appellant/Respondent:	Amanda Stoltz

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. Before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), Ms. Monica Ioana Barbulescu, a staff member of the Department of Management Strategy, Policy and Compliance (DMSPC), contested the Administration's decision not to grant her 14 weeks of maternity leave or, alternatively, special leave with full pay (SLWFP) following the birth of her daughter via surrogacy on 27 February 2021 (the contested decision).

2. By Judgment No. UNDT/2022/090 (impugned Judgment), the UNDT granted the application, rescinded the contested decision, and directed the Administration to grant Ms. Barbulescu 14 weeks of maternity leave or, in the alternative, SLWFP following the birth of her daughter.

3. The Secretary-General appeals. For the reasons set out below, we partially grant the appeal.

Facts and Procedure

4. Ms. Barbulescu joined the Organization on 1 August 1999. She serves on a permanent appointment with the United Nations Secretariat.

5. In 2019, Ms. Barbulescu was diagnosed with a medical condition that makes her unable to carry a child to term and, thus, she and her husband decided to become parents via surrogacy.

6. In January 2021, Ms. Barbulescu reached out to the Administration to request in advance maternity leave for the period of time after the birth of her biological daughter who was due in April 2021. On 22 February 2021, she informed the Administration that due to a medical condition developed by the gestational carrier, her daughter would be delivered earlier than expected.

7. On 25 February 2021, a Human Resources Officer, Department of Operational Support (DOS), informed her that surrogacy cases were handled through SLWFP in the form of eight weeks of adoption leave, in accordance with Section 3 of Administrative Instruction ST/AI/2005/2/Amend.2 (Family leave, maternity leave and paternity leave).

8. On 25 February 2021 and 26 February 2021, Ms. Barbulescu wrote to the Human Resources Officer, DOS, and to the Chief, Headquarters Clients Support Service (HCSS), respectively, requesting an "exception to the rule" and that her situation involving surrogacy be treated "closer" to maternity leave as opposed to adoption.

9. On 27 February 2021, Ms. Barbulescu's daughter was born via surrogacy.

10. On 31 March 2021, the Human Resources Officer, DOS informed Ms. Barbulescu that the Assistant Secretary-General for Human Resources (ASG/OHR), after carefully reviewing the matter, decided that the eight weeks of SLWFP would continue to be applied in her case as doing otherwise "would result in inequality of treatment of other staff members who were placed on similar type of leave and facing similar circumstances".

11. On 23 April 2021, Ms. Barbulescu requested management evaluation of the contested decision.

12. On 25 June 2021, the Under-Secretary-General for DMSPC (USG/DMSPC) upheld the contested decision.

13. On 23 September 2021, Ms. Barbulescu filed an application with the UNDT challenging the contested decision. On 25 October 2021, the Secretary-General filed his reply.

14. By Order No. 66 (NY/2022) of 19 July 2022, the UNDT instructed the Secretary-General to provide an interpretation of Staff Rule 6.3(a), in particular its chapeau, in accordance with Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT).

15. On 2 August 2022, the Secretary-General filed his submissions pursuant to Order No. 66 (NY/2022). On 16 August 2022, Ms. Barbulescu filed her comments on the Secretary-General's submissions.

16. On 28 September 2022, the UNDT issued Judgment No. UNDT/2022/090 granting Ms. Barbulescu's application.

17. The UNDT noted that while the Staff Regulations and Rules are not a treaty, Article 31.1 of the VCLT sets forth generally accepted rules for interpreting an international document, which refer to interpretation according to the "ordinary meaning" of "the terms in their context

and in the light of its object and purpose".[1] The UNDT held that a staff member who becomes a mother through surrogacy is entitled to maternity leave under Staff Rule 6.3 based on the ordinary meaning of "maternity" and "maternity leave" and based on the purpose and object of maternity leave.

18. The UNDT further found that Staff Rule 6.3(a) did not unambiguously exclude from maternity leave staff members who have become mothers through surrogacy. In this connection, the UNDT said it would "rule in favour of adopting the interpretation that gives rise to least injustice by applying the internationally recognized principle of interpretation that an ambiguous term of a contract is to be construed against the interests of the party which proposed or drafted the contract or clause".[2] Accordingly, the UNDT found that Ms. Barbulescu was entitled to maternity leave under Staff Rule 6.3(a).

19. The UNDT further held, that even assuming that surrogacy cases do not fall within the scope of Staff Rule 6.3(a), the Administration did not properly exercise its discretion in equating Ms. Barbulescu's leave arising out of her having had a biological baby via surrogacy with adoption leave. The fact that there is a *lacuna* in the legal framework to specifically deal with maternity leave for staff members who become mothers via surrogacy cannot play to the detriment of the staff members. As such, the Administration should have applied Staff Rule 6.3(a) which is the most favourable provision to Ms. Barbulescu's case as opposed to the provision governing adoption leave. The UNDT also found that on the facts, Ms. Barbulescu's situation involving the birth of her biological child via surrogacy is closer to that of a staff member who gives birth to a baby herself as opposed to adoption. The UNDT therefore concluded that the contested decision was unlawful.

20. In the alternative, the UNDT found that the Administration erred in denying an exception under Staff Rule 12.3. The rejection of Ms. Barbulescu's request for an exception was based on the third part of the test under Staff Rule 12.3(b), that the exception would be "prejudicial to the interests of [...] other staff". While the Administration enjoys discretion in determining whether granting the exception would be prejudicial to the interests of other staff members, the UNDT found that the Administration had failed to properly consider relevant factors, and in particular Ms. Barbulescu's personal circumstances. Moreover, the Administration failed to determine "identifiable and sufficiently comparable interests of other

[1] Impugned Judgment, para. 30.
[2] *Ibid.*, para. 34.

staff that might be prejudiced by the exception".[3] The UNDT also noted that Ms. Barbulescu's application concerned undoubtedly exceptional circumstances and the Administration has not yet established an appropriate scheme of social security to deal with such exceptional circumstances. The UNDT therefore found that, in the alternative, the Administration should have exercised its discretion to grant Ms. Barbulescu an exception under Staff Rule 12.3.

21. Accordingly, the UNDT rescinded the contested decision and directed the Administration to grant Ms. Barbulescu 14 weeks of maternity leave or, in the alternative, SLWFP following the birth of her daughter on 27 February 2021.

22. The Secretary-General filed an appeal on 28 November 2022, and Ms. Barbulescu filed her answer on 26 January 2023.

Submissions

The Secretary-General's Appeal

23. The Secretary-General submits that the UNDT erred in law and exceeded its jurisdiction by concluding that Ms. Barbulescu was entitled to maternity leave under Staff Rule 6.3. Both Staff Rule 6.3(a) and Section 6 of ST/AI/2005/2/Amend.2 provide a clear indication that the maternity leave entitlement is conditioned upon the pregnancy of, and childbearing by, the staff member.

24. The Secretary-General contends that the UNDT failed to interpret the applicable legal framework in accordance with the principles and methods elaborated upon by the UNAT and instead sought to impose its own policy preferences. First, the UNDT selectively overlooked conflicting dictionary definitions and failed to provide any reasoned basis for its reliance on one dictionary definition over another, even within the same dictionary. Second, the UNDT's consideration that Staff Rule 6.3(a) does not contain an explicit statement that a staff member needs to physically deliver the baby herself in order to determine that Staff Rule 6.3(a) was not conditioned by childbearing is not supported by any legal analysis. Third, Ms. Barbulescu did not assert, and the UNDT did not award, any entitlement to pre-delivery maternity leave, but only to the maximum post-delivery maternity leave of 14 weeks. Thus, both Ms. Barbulescu and the UNDT have implicitly accepted that she was not entitled to any pre-delivery maternity leave. The fact that

[3] *Ibid.*, para. 54.

the UNDT applied only part of the legal framework and awarded 14 weeks of maternity leave instead of the full entitlement to 16 weeks demonstrates the inapplicability of the maternity leave provisions to Ms. Barbulescu.

25. The Secretary-General avers that contrary to the UNDT's finding that the Administration failed to properly consider relevant factors, specifically Ms. Barbulescu's personal circumstances, the Administration carefully reviewed her request and considered her personal circumstances before deciding that the eight weeks of SLWFP would continue to be applied in her case. In doing so, the UNDT exceeded its jurisdiction and improperly substituted the Secretary-General's discretion with its own.

26. The UNDT further erred in law when it found that the Administration failed to determine "identifiable and sufficiently comparable interests of other staff that might be prejudiced by the exception" and concluded that the exception sought by Ms. Barbulescu could not have been prejudicial to any other staff members "who may have chosen not to request exceptions". In so doing, the UNDT incorrectly summarised and applied the requirements of Staff Rule 12.3. In the present case, the reasons provided by the ASG/OHR were both reasonable and sufficient in the circumstances.

27. The UNDT committed various other errors of law. Contrary to what the UNDT seems to suggest, the Secretary-General is under no obligation to establish a specific entitlement to leave in the case of surrogacy. Nevertheless, and in the context of the lack of explicit approval by the General Assembly, the Administration has adopted a practice of granting staff members who become parents through surrogacy eight weeks of SLWFP, i.e., a period of leave equivalent in duration to adoption. This approach represents a practical, and lawful, solution to a complex issue. Moreover, the UNDT's finding that it would be "fair" to Ms. Barbulescu and any other staff member who becomes a parent through surrogacy that an exception be made which is most favourable to the staff member under the circumstances would amount to a determination that the exclusion of surrogacy from Staff Rule 6.3(a) is unlawful. The UNDT has no authority to overturn the legal framework in this manner. In conclusion, the UNDT erred in law and in fact, resulting in a manifestly unreasonable decision, and improperly constrained the discretion of the Secretary-General to determine when to grant exceptions to the Staff Rules.

28. The Secretary-General submits that the UNDT further erred in finding that even if surrogacy cases did not fall within the scope of application of Staff Rule 6.3(a), the Administration still erred in equating Ms. Barbulescu's leave with adoption leave. First, Staff Rule 6.3 does not require the Secretary-General to provide for "maternity leave" in cases of surrogacy. Second, the fact that surrogacy cases are not explicitly addressed by the legal framework does not entitle the UNDT to award some other more "favourable entitlement". Precisely because surrogacy cases are not explicitly provided for in the Organization's legal framework, it has been the consistent practice of the Secretary-General to exceptionally grant surrogate parents SLWFP, in accordance with his discretion under Staff Rule 5.3. Third, there is no legal basis on which to directly apply international labor or human rights law in the present case. Fourth, the UNDT's finding that the birth of a biological child through surrogacy is "closer to a staff member who gives birth to a baby herself as opposed to adoption" is not supported by any facts or legal analysis, nor does the UNDT attempt to anchor its findings to the applicable legal framework.

29. The Secretary-General requests that the UNAT vacate the impugned Judgment, uphold the contested decision and dismiss the application in its entirety.

Ms. Barbulescu's Answer

30. Ms. Barbulescu contends that the UNDT is not only entitled but obliged to interpret the applicable law, especially in cases like the case at hand, in which the wording of the applicable legal provision is ambiguous. The Dispute Tribunal correctly relied on the well-established case law of the Appeals Tribunal which defines the rules of judicial interpretation and sets the limit therefor and accurately interpreted the applicable provisions governing maternity leave in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose. Accordingly, the Dispute Tribunal correctly defined the issues to be examined before it.

31. Ms. Barbulescu further says that neither Staff Rule 6.3(a) nor Section 6 of ST/AI/2005/2/Amend.2. contains a statement that a staff member needs to physically deliver the baby herself as a requirement for a maternity leave entitlement. Therefore, the UNDT's conclusion that Staff Rule 6.3(a) does not unambiguously exclude from maternity leave staff members who have become mothers through surrogacy is correct.

32. Ms. Barbulescu maintains that the UNDT correctly interpreted the term "maternity leave" in Staff Rule 6.3(a) and acted within its jurisdiction when doing so. Ms. Barbulescu objects to the Secretary-General's contention that the distinction in pre- and post-delivery leave in Staff Rule 6.3(a) and ST/AI/2005/2/Amend.2 shows that staff members who become mothers via surrogacy are not entitled to maternity leave. While this distinction may be relevant for childbearing staff members, it does not preclude the staff members who become mothers in a different way, including via surrogacy, to be entitled to maternity leave. Moreover, there is no merit to the Secretary-General's assertion that Ms. Barbulescu implicitly "accepted" that she was not entitled to the maternity leave because she did not request the pre-delivery leave. Indeed, she did request pre-delivery leave, which was declined.

33. Ms. Barbulescu also submits that the UNDT correctly considered the object and purpose of the relevant legal provisions and acted within its jurisdiction when doing so. The Secretary-General's contention that the UNDT's error is apparent from its "reliance on its own policy views" and from its judicial evaluation of the object and purpose of maternity leave as defined by the Administration in a fact sheet appears already self-contradictory: on the one hand the Secretary-General alleges that UNDT has its "own policy" while on the other, he contends that it is erroneous for the Dispute Tribunal to rely on the fact sheet. Firstly, the Dispute Tribunal correctly defined and applied the scope and standard of its judicial review and, contrary to the Secretary-General's contention, did not usurp any policy making powers. Secondly, whereas the fact sheet published by the Administration is not a legally binding document, it defines, for the purposes of the staff members, the object and purpose of maternity leave. Yet, the Secretary-General insists that the UNDT erred when assessing that Ms. Barbulescu needed time to prepare for the arrival of her new baby. Ms. Barbulescu emphasizes again that her daughter was born prematurely, and she needed to take family emergency leave to be able to take care of her newly born baby.

34. Ms. Barbulescu maintains that the UNDT correctly interpreted and applied the doctrine of *contra proferentem*. Firstly, the wording of Staff Rule 6.3(a), as correctly held by the UNDT, leaves an interpretative space due to its ambiguity. Contrary to his assertions that the wording of the legal provisions on maternity leave is clear, the Secretary-General must be well aware of this ambiguity, since he himself discusses contextual, historic, and teleological aspects of the latter in his appeal. Yet, if the wording was clear and unambiguous, referring to the context or object and purpose would not be necessary. Finally, whereas the UNDT mentioned the VCLT, the UNDT relied on the

well-established case law and interpreted the applicable legal framework in accordance with the principles and methods elaborated upon by the United Nations Tribunals.

35. The UNDT correctly held that the Administration failed to properly consider relevant factors, in particular Ms. Barbulescu's personal circumstances, in its determination of her request for an exception. While the Secretary-General insists that the Administration considered Ms. Barbulescu's circumstances when granting her eight weeks of SLWFP, even at this stage of the case, he ignores the fact that Ms. Barbulescu's daughter was born prematurely and was medically fragile. The Secretary-General has failed to provide even a minimum justification as to what staff specifically would be prejudiced by the decision to grant 14 weeks of leave to Ms. Barbulescu so that she could take care of her prematurely born and medically fragile baby. The contention that the granting of an exception would prejudice the staff who become parents through an adoption is groundless and inaccurate. As to the contention that the UNDT erred when it failed to respect a long-standing practice of granting eight weeks of leave to staff who become parents via surrogacy, he fails to explain why this practice should be deemed lawful in the light of the applicable legal provisions and why the surrogacy cases should be equaled with adoption cases, considering the obvious differences between them.

36. The Dispute Tribunal's assessment of the administrative practice that equaled adoption cases with surrogacy can hardly be seen as a presentation of the UNDT's "own views" or an "overturning of the legal framework". The Dispute Tribunal correctly exercised its jurisdiction when interpreting the applicable legal provisions and assessing the administrative practice that resulted in the contested decision for what it was, i.e. an incorrect, discriminatory, and unfair exercise of administrative discretion. Finally, as regards the Secretary-General's contention that the UNDT erred when holding that the Administration should have applied the most favourable provision in Ms. Barbulescu's circumstances and its contention that the fairness standard is not the one that should be applied when an exception is granted, Ms. Barbulescu submits that both the Dispute Tribunal's findings and the applied legal standards are correct. The latter follows already from an obligation of the Administration to treat its staff fairly, justly and transparently, which regrettably was not the case here.

37. Ms. Barbulescu requests the UNAT to dismiss the appeal in its entirety.

Considerations

38. The main issue in the appeal is whether the Dispute Tribunal erred in granting Ms. Barbulescu maternity leave pursuant to Staff Rule 6.3 or, in the alternative, SLWFP for a requested period of 14 weeks following the birth of her daughter from a surrogate.

I. Did the UNDT err in law and exceed its jurisdiction by concluding that Ms. Barbulescu was entitled to maternity leave under Staff Rule 6.3?

39. Staff Regulation 6.2 provides that "t[h]e Secretary-General shall establish a scheme of social security for the staff, including provisions for health protection, sick leave, maternity and paternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations".

40. Former Staff Rule 6.3 (ST/SGB/2017/1)[4] in force at the time of the contested decision provided the following for "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:
> (i) The pre-delivery leave shall commence no earlier than six weeks and no later than two weeks prior to the anticipated date of birth upon production of a certificate from a duly qualified medical practitioner or midwife indicating the anticipated date of birth;
> (ii) The post-delivery leave shall extend for a period equivalent to the difference between 16 weeks and the actual period of pre-delivery leave, subject to a minimum of 10 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:
> (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;

[4] The title of Staff Rule 6.3 as revised (ST/SGB/2023/1) has been changed to just "Parental leave".

(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.

41. Further guidelines were provided in ST/AI/2005/2/Amend.2 (Family Leave, maternity leave and paternity leave) which was in force at the time but has since been abolished:

Section 6
Pre-delivery leave
6.1 Upon submission by the staff member of a certificate from a licensed medical practitioner or midwife indicating the expected date of delivery, the executive or local personnel office shall normally grant pre-delivery leave for a period of six weeks. Any questions or doubts as to the validity of the medical certificate shall be referred to the Medical Director or designated medical officer.
6.2 A shorter period may be granted at the request of the staff member, on the basis of a certification from a licensed medical practitioner or midwife, which must be approved by the Medical Director or designated medical officer, indicating that the staff member is fit to continue to work. Such a shorter period shall normally not be for less than two weeks.
6.3 A staff member who meets the requirements for a shorter period of pre-delivery leave under section 6.2 above may, at her request, be permitted to work part-time between the sixth and second week preceding the expected date of delivery. In such cases, the half days of absence shall be charged to the staff member's maternity leave entitlement.

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.

42. In the impugned Judgment, even though Staff Rule 6.3(a) did not expressly provide for maternity leave for staff members becoming mothers via surrogacy, the Dispute Tribunal interpreted Staff Rule 6.3(a) in a manner that entitled Ms. Barbulescu who had a child by surrogacy to maternity leave. The Secretary-General says the Dispute Tribunal exceeded its jurisdiction and erred in law in doing so.

42. In its analysis, the Dispute Tribunal reviewed the ordinary dictionary definition of "maternity" and "maternity leave". It noted that, from a legal point of view, the ordinary meaning of "maternity" and "maternity leave" does not suggest that a woman needs to physically deliver a baby to be entitled to maternity leave. It further noted that the text of Staff Rule 6.3(a) itself does not specify that a staff member's right to maternity leave is conditioned by childbearing. The UNDT concluded that as such, a staff member who becomes a mother through surrogacy is also entitled to maternity leave. Relying on an HR fact sheet, the UNDT found this interpretation to also be in line with the purpose and object of the maternity leave provisions.

43. The Appeals Tribunal has previously held that in interpreting a legislative provision, "the principle should be that the words of a legislative provision are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation, and the intention of the legislature", i.e., the General Assembly.[5]

44. Therefore, the first step of interpretation of rules or regulations consists of reviewing, in literal terms, the language used in the respective rule or regulation. If it is "plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation. Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected."[6]

45. In the present case, the Dispute Tribunal relied on Cambridge Dictionary online definitions of "maternity" and "maternity leave" and the text of Staff Rule 6(3)(a). It noted that they do not specify that a "mother" is one that physically delivers the baby herself to be entitled to maternity leave. Therefore, it held that a staff member who becomes a mother through surrogacy is also entitled to maternity leave.

46. This interpretation exercise is flawed. First, it relies on definitions of "maternity" and "maternity leave" from a single source and other definitions are not considered. Second, the fact that Staff Rule 6(3)(a) does not specify that the staff member must physically deliver the

[5] *Reilly v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-975, para. 33.
[6] *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 3.

baby to qualify is not sufficient to interpret the Rule to extend the entitlement to a mother through surrogacy. Conversely, there is nothing in Staff Rule 6(3) that specifies that a mother via surrogacy is entitled to maternity leave. A more plausible interpretation is that the General Assembly, by not specifically including staff members who become mothers via surrogacy, intended that maternity leave be restricted to childbearing mothers.

47. The provision must be read within the scheme of the legislation and other provisions. Staff Rule 6(3) and ST/AI/2005/2/Amend.2 are included in a broader scheme of social security pertaining to the medical health and fitness to work of staff members. For example, Staff Regulation 6.2 states that the Secretary-General shall establish a scheme of social security for the staff, including "provisions for health protection, sick leave, maternity and paternity leave, and reasonable compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations". The maternity leave provisions then contemplate the health of the staff member who physically carries the child. This is further supported by the Staff Rule 6(3) contemplation of maternity leave divided into two stages: pre-delivery which is conditional on the provision of a medical certificate by the childbearing mother, and post-delivery.

48. The Dispute Tribunal relied upon one extract of an HR fact sheet to determine the object and purpose of the maternity leave provisions. Even if one accepted this fact sheet as an interpretative aid, which would only be required in the case of ambiguity of a provision, the fact sheet clearly states that maternity leave is to support staff members as they prepare for and adjust to the "arrival of new children and also to help ensure the health and wellbeing of the mother". This confirms the interpretation of Staff Rule 6(3) that maternity leave is restricted to the health of the staff member, namely pregnant, childbearing mothers.

49. The Dispute Tribunal, however, determined that a commissioning mother also needs her health and wellbeing to be equally ensured as a childbearing mother. However, there was no evidence of this before the Dispute Tribunal, medical or otherwise, to support this finding. Therefore, this finding is made without evidence.

50. We find that the UNDT erred in stating that because it could not conclude that Staff Rule 6.3(a) unambiguously excluded staff members who become parents through surrogacy, it would rule in favour of the staff member due to application of the doctrine of *contra*

preferentem. We find that the legal framework is not ambiguous but clear and therefore, the Dispute Tribunal erred in its interpretation of the Staff Rule.

51. ST/AI/2005/2/Amend.2 (Family Leave, maternity leave, and paternity leave) sets out leave available for staff members. It includes maternity leave ostensibly for childbearing mothers. Section 8.2 speaks to the relationship of maternity leave with other leave including stating that pregnant staff members on fixed-term appointments shall be considered for extension or conversion of their appointment under the same criteria as other staff. The fact that a staff member is or will be on maternity leave shall not be a factor in that consideration.

52. The legal framework also provides for paternity leave for new fathers. It provides adoption leave for adopting parents. Section 3 provides that the Secretary-General may, under Staff Rules 105.2(a)(iii)*b* and 205.3(a)(iii), grant SLWFP to a staff member who adopts a child.

53. In the impugned Judgment, the Dispute Tribunal found there was a *lacuna* in the legal framework to specifically deal with maternity leave for staff members who become mothers via surrogacy and that the Secretary-General failed to fulfil his obligations to establish maternity leave for these mothers. It opined that a staff member's right to maternity leave is a fundamental human right and cannot be denied or restricted for any reason. Therefore, the Dispute Tribunal seems to say that the Administration should have granted the maternity leave to Ms. Barbulescu out of fairness and equity.

54. However, this amounts to the Dispute Tribunal overriding the discretion granted to the Secretary-General. As the Appeals Tribunal has previously stated when reviewing the validity of the Administration's exercise of discretion in administrative matters, as in the present case, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. This means reviewing whether relevant matters have been ignored or 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 amongst the various courses of action open to it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Administration.[7]

[7] *Yolla Kamel Kanbar v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1082, para. 30

55. It is trite law that where the words of the law are clear and there is no ambiguity:[8]

> [T]here is no scope for the Tribunal to innovate or take upon itself the task of amending or altering the statutory provisions. It is well known that in a given case the Tribunal can iron out the fabric, but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there.

56. Unfortunately, this is what the Dispute Tribunal did in this instant case when it enlarged the scope of Staff Rule 6(3) to an extent that it made a policy decision which is in the purview of the Secretary-General.

57. Further, the Dispute Tribunal opined on matters without any evidence, including that gestational surrogacy is significantly different from the adoption process including the medical reasons and psychological impact on the intended mother. It relied on the need for the involvement of the intended parents in all phases of the baby's development in uterus in the surrogacy journey. It also held that Ms. Barbulescu has a biological connection with her baby compared to adoptive parents who have more discretion and as such Ms. Barbulescu's situation is closer to a staff member who gives birth herself as opposed to adoption. However, the Dispute Tribunal did not have evidence on which to make these findings, including any medical evidence. Therefore, the Dispute Tribunal erred on making factual findings without evidence.

58. We note that, in 2023, the Secretary-General remedied the *lacuna* in the legal framework regarding leave for staff members who become mothers via surrogacy. It amended its policy and Staff Rule 6.3 by enacting a new provision that gives staff members sixteen weeks of parental leave with full pay in the case of the birth or adoption of a child; with 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. This further supports our conclusion that the remedy for the *lacuna* in the legal framework is not to broaden the interpretation of maternity leave as suggested by the UNDT.

59. Therefore, we find that the Dispute Tribunal exceeded its jurisdiction and erred in law when it interpreted Staff Rule 6(3)(a) as allowing Ms. Barbulescu as a commissioning mother

[8] *Cecile Berthaud v. Secretary-General of the United Nations*, Judgment No. 2022-UNAT-1253, para. 40.

in a surrogacy to be entitled to maternity leave contrary to the clear and unambiguous Staff Regulations and Rules.

II. Did the UNDT err in law and in fact and exceed its jurisdiction when it determined that the Secretary-General was required to grant Ms. Barbulescu an exception to the Staff Rules?

60. In the alternative, the Dispute Tribunal found that the Administration should have exercised its discretion to grant Ms. Barbulescu an exception under Staff Rule 12.3. The Dispute Tribunal held that the Administration's rejection of Ms. Barbulescu' request for an exception to the eight weeks of adoption leave under Section 3 of ST/AI/2005/2, such that her surrogacy situation be treated closer to maternity leave, was unlawful.

61. 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."

62. The Dispute Tribunal correctly noted that for an exception to be granted under Staff Rule 12.3, three conditions must be met, namely the exception: i) must be consistent with the Staff Regulations and other decisions of the General Assembly; ii) be agreed to by the staff member directly affected, and iii) must not be prejudicial to the interests of any other staff members or group of staff members in the opinion of the Secretary-General.

63. The Administration rejected Ms. Barbulescu's request for an exception on the basis that it would be prejudicial to other staff members as it would result in an inequality with those staff members who became parents through adoption.

64. 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 Ms. Barbulescu'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.

65. By failing to consider relevant factors and not providing a rationale for how other staff members could be prejudiced, we find that the Administration ignored relevant matters and the rejection of the request for an exception is unlawful.

66. We find that the Dispute Tribunal did not err in rescinding the decision to not grant the exception pursuant to Staff Rule 12.3 and did not err in granting Ms. Barbulescu 14 weeks SLWFP following the birth of her daughter on 27 February 2021 with the offset of the already granted eight weeks of adoption leave.

Judgment

67. The Secretary-General's appeal is partially granted. Judgment No. UNDT/2022/090 granting 14 weeks of SLWFP is affirmed, with the offset of the already granted eight weeks of adoption leave.

Original and Authoritative Version: English

Decision dated this 27th day of October 2023 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Sandhu, Presiding	Judge Ziadé	Judge Savage

Judgment published and entered into the Register on this 30th day of November 2023 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar