

# **UNDT/2023/009, RECHDAN**

## **UNAT Held or UNDT Pronouncements**

*Whether the contested decision is lawful*

Whether the Administration properly exercised its discretion in not granting the Applicant telecommuting arrangements

The Organization's duty of care towards staff during the COVID-19 pandemic

Since March 2020, when WHO declared COVID-19 as a global pandemic, the Organization has ensured that all necessary measures are in place to support the safety and health of all UN personnel when carrying out the functions and responsibilities entrusted to them.

The nature of the Applicant's functions may require her on-site presence, as evidenced by the fact that the person carrying out her functions came once a week to the office from 23 January 2021 to 26 March 2021.

However, this does not necessarily suggest that the Applicant is not entitled to an alternate working arrangement allowing her to work remotely from her duty station. In the Tribunal's view, the rules upon which UNHCR based its decision are flexible enough to accommodate the Applicant's specific needs. Indeed, under the 2021 Administrative Guidelines, staff whose on-site presence is required should be designated on a voluntary basis to the extent possible, and the Administration may request staff members to temporarily carry out different functions than the ones normally assigned to them.

Reasonable accommodation for compelling personal circumstances

The Administration refused to accommodate the Applicant's needs solely on the vague ground of "operational requirement", as claimed by the Respondent, without developing said "requirement". In doing so, it failed to properly consider the Applicant's compelling personal circumstances. While arguing that the tasks expected from the Applicant cannot be carried out remotely, the Administration did not consider whether it is possible to adjust her duties under sec. 6 of the 2021 Administrative Guidelines. Also, the Administration did not properly weigh and balance all relevant factors including whether the requested accommodations would have represented "a disproportionate or undue burden on the workplace".

Moreover, the Administration exercised its discretion in contravention of the rule that "flexible working arrangements in the context of workplace accommodation on medical grounds are not voluntary agreements", which is codified in UNHCR/AI/2022/09 (Administrative Instruction on Sick Leave).

#### Workplace accommodation for pregnant women

UNHCR allows for workplace accommodation for pregnant staff members under sec. 5(b) of UNHCR/AI/2018/2. However, it does not explicitly address the Applicant's specific circumstances, i.e., a high-risk pregnancy, and travel restrictions caused by the COVID-19 pandemic not allowing her to return to her duty station immediately following the end of her two-year SLWOP, where the public health care infrastructure had been under strain during the relevant time.

The fact that there is a *lacuna* in the legal framework cannot play to the detriment of staff members. Under such circumstances, the Administration should have applied the most favourable provision available in the Staff Regulations and Rules to the Applicant's case (see, e.g., *Barbulescu* UNDT/2022/090, para. 41; Administrative Tribunal of the International Labour Organization Judgment No. 4250, *In re K.* (2020), para. 8).

Considering that the Applicant is a locally recruited staff member, the Administration should have applied sec. 14 of UNHCR/AI/2018/2, which is the most favourable provision, *mutatis mutandis*, to the Applicant's case. Accordingly, the manager should have granted the Applicant telecommuting arrangement, to the extent possible, through accommodating the staff member with official duties.

Instead, the Administration gave the Applicant more difficult options such as resignation and the extension of her SLWOP until 31 December 2021. This undoubtedly constitutes discriminatory treatment towards a pregnant woman on account of sex (see, e.g., ILOAT Judgment No. 3861, In *L. G.* (No. 2) (2017), para. 7).

Accordingly, the Administration failed to properly exercise its discretion in not granting the Applicant telecommuting arrangements for around two months. As such, the Organization failed to fulfil its duty of care towards the Applicant under staff regulation 1.2(c).

#### Whether the Applicant is entitled to SLWFP before maternity leave and subsequent maternity leave

Even assuming *arguendo* that the decision not to grant the Applicant telecommuting arrangements for around two months was lawful, the Tribunal finds that the Applicant would have been entitled to SLWFP before maternity leave and subsequent maternity leave.

While sec. 2 of UNHCR/AI/2018/2 explicitly provides that it applies to staff members on “active duty”, in determining the Applicant’s eligibility for maternity entitlements, she could not have been treated as a staff member not on active duty considering all relevant circumstances. Indeed, the evidence on record shows that the Applicant’s SLWOP had come to an end on 22 January 2021, and she explicitly confirmed to UNHCR her willingness to return to work via telecommuting given her high-risk pregnancy and the travel restrictions during the peak of the COVID-19 pandemic. As such, the UNHCR Medical Section recommended that the Applicant undertake telecommuting from 25 January 2021 to 17 March 2021. Nevertheless, the Administration unlawfully rejected the Applicant’s request for telecommuting arrangements.

The Applicant should not be disadvantaged by the Administration’s own wrongdoing. “When responsibility lies with the Administration for the unlawful decision, it must take upon itself the responsibility therefor” (see *Cranfield* 2013-UNAT-367, para. 36).

Therefore, the Tribunal cannot but conclude that UNHCR/AI/2018/2 is applicable to the Applicant.

Sec. 5(b) of UNHCR/AI/2018/2 provides for the possibility of SLWFP to complement the period of maternity leave. Moreover, the Administration should have applied sec. 14 of UNHCR/AI/2018/2, *mutatis mutandis*, to the Applicant's case, which requires the responsible Officer in the Field to authorize SLWFP in the absence of possible assignment via telecommuting arrangement, until the staff member starts the maternity leave.

Nevertheless, despite the recommendation of the UNHCR Medical Section, the Administration rejected the Applicant's request for SLWFP.

The Tribunal fails to understand how a reasonable decision-maker could have ignored the Applicant's compelling personal circumstances, including the fact that she could not return to her duty station given her high-risk pregnancy and the travel restrictions caused by the COVID-19 pandemic.

Consequently, the decision not to grant the Applicant's request for SLWFP until the start of her maternity leave is unlawful.

Similarly, there is no merit in the Respondent's submission that the Applicant is not entitled to maternity leave.

"[A] staff member's right to maternity leave during service is a fundamental human right and cannot be denied, limited, or restricted for any reason" (see *Barbulescu*, para. 41).

Considering that even a staff member who becomes a mother whilst on SLWOP is entitled to maternity leave upon returning to pay status under the UNHCR Policy on Special Leave Without Pay (SLWOP), dated 23 July 2010, the Tribunal finds no basis for the Organization to deny or restrict the Applicant's right to maternity leave. Indeed, had the Administration not unlawfully prevented the Applicant from returning on pay status, she would have been entitled to maternity leave.

Accordingly, the contested decision is unlawful.

#### *Whether the Applicant is entitled to any remedies*

Having found that the contested decision is unlawful, the Tribunal is of the view that there has been a miscarriage of justice in the present case. As such, the contested decision must be rescinded.

Turning to the Applicant requests that the period between 23 January 2021 and 26 March 2021 be regularized as SLWFP, the evidence on record shows that the Applicant would have started her maternity leave on 18 March 2021 had the Administration complied with its contractual obligations. Accordingly, the Tribunal finds no basis to regularize the period between 18 March 2021 and 26 March 2021 as SLWFP for the Applicant. Nevertheless, considering the circumstances of the case, the Tribunal finds it appropriate to regularize the period between 23 January 2021 and 17 March 2021 as SLWFP for the Applicant, and to grant her full maternity benefits retroactively.

## Decision Contested or Judgment/Order Appealed

The Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests the Administration’s decision to deny her telecommuting arrangements or Special Leave with Full Pay (“SLWFP”) and maternity rights, despite the Medical Unit’s affirmation of her high-risk pregnancy as well as the ongoing pandemic.

## Legal Principle(s)

As for any discretionary decision of the Organization, the Tribunal’s scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable, and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see, e.g., *Sanwidi* 2010-UNAT-084, para. 42; *Abusondous* 2018-UNAT-812, para. 12).

It is not the Tribunal's role "to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40).

Nevertheless, the Tribunal may "consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse" (see *Sanwidi*, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down (see *Belkhabbaz* 2018-UNAT-873, para. 80). "When it does that, it does not illegitimately substitute its decision for the decision of the Administration; it merely pronounces on the rationality of the contested decision" (see *Belkhabbaz*, para. 80).

Staff regulation 1.2(c) establishes the general principle of the duty to exercise reasonable care to ensure the safety of staff members (see UN Administrative Tribunal Judgment No. 1204, *Durand* (2005), para. XVII). In the *Grasshoff* case, the Administrative Tribunal of the International Labour Organization ("ILOAT") stated that:

It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. [...] If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment.

The very purpose of remedy is "to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations" (see, e.g., *Applicant* 2015-UNAT-590, para. 61; *Warren* 2010-UNAT-059, para. 10).

## Outcome

Judgment entered for Applicant in full or in part

## Full judgment

[Full judgment](#)

## Applicants/Appellants

RECHDAN

## Entity

UNHCR

## Case Number(s)

UNDT/GVA/2021/058

## Tribunal

UNDT

## Registry

Geneva

## Date of Judgement

21 Feb 2023

## Duty Judge

Judge Bravo

## Language of Judgment

English

## Issuance Type

Judgment

## Categories/Subcategories

Maternity/paternity leave

Benefits and entitlements

## Applicable Law

### Staff Regulations

- Regulation 1.2(c)
- Regulation 6.2

### UN Charter

- Article 1.3

### UNDT Statute

- Article 10.5(a)

### Other UN issuances (guidelines, policies etc.)

- The Administrative Guidelines for Offices on the Novel Coronavirus (COVID-19) pandemic, dated 19 January 2021

### Staff Rules

- Rule 6.3(a)

### Secretary-General's bulletins

- ST/SGB/2019/3

### Laws of other entities (rules, regulations etc.)

- UNHCR/AI/2022/09
- UNHCR/AI/2018/2
- The UNHCR Policy on Special Leave Without Pay (SLWOP)

### Secretary-General's Bulletins

## Related Judgments and Orders

2010-UNAT-084

2018-UNAT-812

2018-UNAT-873

2013-UNAT-367

2015-UNAT-590

2010-UNAT-059