UNDT/2022/090, Monica Barbulescu

UNAT Held or UNDT Pronouncements

Whether the Applicant is entitled to maternity leave under staff rule 6.3(a)

While the Staff Regulations and Rules of the United Nations is not a treaty, art. 31.1 of the VCLT sets forth generally accepted rules for interpreting an international document, which refers to interpretation according to the "ordinary meaning" of the terms "in their context and in the light of its object and purpose" (see, e.g., UN Administrative Tribunal Judgment No. 942, *Merani* (1999), para. VII; *Avognon et al.* UNDT/2020/151, para. 50; *Andreeva et al.* UNDT/2020/122, para. 64; *Applicant* UNDT/2021/165, para. 37).

Having interpreted the provisions governing maternity leave in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, the Tribunal is not persuaded by the Respondent's argument that the Applicant does not have a right to maternity leave under staff rule 6.3(a).

Indeed, from a legal point of view, the ordinary meaning of "maternity leave" is "the amount of time that a woman is legally allowed to be absent from work in the weeks before and after she has a baby". The ordinary meaning of "maternity" is "the state of being a mother". Nor does the text of staff rule 6.3(a) itself specify that a staff member needs to physically deliver the baby herself so as to be entitled to maternity leave. It follows that a staff member's right to maternity leave is not conditioned by childbearing. As such, a staff member who becomes a mother through surrogacy is also entitled to maternity leave.

This interpretation is also in line with the purpose and object of the maternity leave which are "[to support] staff members with leave time as they prepare for and adjust to the arrival of new children and also to help ensure the health and well being of the expectant mother." Similar to a childbearing mother, a commissioning mother also needs to prepare for and adjust to the arrival of a new child and her health and well-being should equally be ensured.

Therefore, the Tribunal cannot conclude that staff rule 6.3(a) unambiguously excludes from maternity leave staff members who have become mothers through surrogacy.

In this connection, the Tribunal 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". This principle, also known as *contra proferentem*, has been affirmed by the Tribunal in several cases such as *Tolstopiatov* UNDT/2010/147, para. 66 and *Simmons* UNDT/2012/167, para. 15.

Accordingly, the Applicant is entitled to maternity leave under staff rule 6.3(a).

Whether the Administration properly exercised its discretion in equating the Applicant's surrogacy case with adoption

Having found that the Applicant is entitled to maternity leave under staff rule 6.3(a), the Tribunal finds that the Administration did not properly exercise discretion in equating the Applicant's leave arising out of her having had a biological baby via surrogacy with the adoption leave.

Even assuming, *arguendo*, that the surrogacy cases do not fall within the scope of application of staff rule 6.3(a), the Administration still erred in equating the Applicant's leave with adoption leave. Specifically, the Secretary-General has failed to fulfil his obligation to establish a maternity leave for staff members who become mothers via surrogacy under staff regulation 6.2. 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 in such situation. Also, 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. As such, the Administration should have applied the most favorable provision available in the Staff Regulations and Rules to the Applicant's case (see, e.g., Administrative Tribunal of the International Labour Organization Judgment No. 4250, In *re K.* (2020), para. 8; European Court of Justice Judgment of 18 March 2014, *C.D. v. S.T.* (2014), para. 42).

In this connection, it's first noted that under sec. 3.2 of ST/AI/2005/2/Amend. 2, a staff member who becomes a parent via adoption was entitled to a special leave of eight weeks, which is less favourable than the leave entitlement contained in staff rule 6.3(a).

Second, the gestational surrogacy is significantly different from the adoption process. Also, like the staff members who have physically delivered the baby themselves, the Applicant has a biological connection with her baby and must take care of her from the first days of her life. In contrast, the adoptive parents have lots of discretion in determining whether and when to adopt a child after considering several factors. The adoption usually involves an older child instead of a new-born and, thus, the bonding process and the level of care needed could be very different from the case of surrogacy.

Accordingly, the Applicant's situation involving the birth of her biological child via surrogacy is closer to a staff member who gives birth to a baby herself as opposed to adoption. As such, the Administration should have applied staff rule 6.3 (a) which is the most favourable provision to the Applicant's case as opposed to the provision governing adoption leave.

In light of the above, the Administration should have granted the Applicant 14 weeks of maternity leave following the birth of her daughter on 27 February 2021 pursuant to staff rule 6.3(a). Consequently, the contested decision is unlawful.

In the alternative, whether the Administration properly denied an exception under staff rule 12.3

In the present case, the rejection of the Applicant's request for an exception was based on the third part of the test under staff rule 12.3(b), namely 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 Tribunal is concerned that it has failed to properly consider relevant factors. Specifically, the Administration did not properly consider the Applicant's personal circumstances. As previously found, the Applicant's situation involving the birth of her biological child via surrogacy is closer to a staff member who gives birth to a baby herself as opposed to adoption.

Also, apart from a general assertion that allowing an exception in the Applicant's case would result in inequality of treatment of other staff members who were placed on similar type of leave and faced similar circumstances, the Administration failed to determine "identifiable and sufficiently comparable interests of other staff that might be prejudiced by the exception" (see *Wilson* UNDT/2015/125, para. 42). It is thus difficult to see how granting the Applicant an exception could be prejudicial to the interests of unidentified staff who may have chosen not to request exceptions.

Therefore, the Administration's failure to properly consider relevant factors precluded the proper exercise of discretion and deprived the Applicant of her right to maternity leave. Accordingly, the Administration erred in denying an exception under staff rule 12.3.

Moreover, the present application concerns circumstances that are undoubtedly exceptional and that the Administration has not yet established an appropriate scheme of social security to deal with such exceptional circumstances. It is thus fair to the Applicant and to any other staff member in similar situations that an exception be made which is most favourable to the Applicant under the circumstances. Also, granting the Applicant an exception does no harm to any other staff member and in particular it does no harm to the mother who has adopted a child since that process is totally different from giving birth to a child via surrogacy.

In light of the above, the Tribunal finds that, in the alternative, the Administration should have exercised its discretion to grant the Applicant an exception under staff rule 12.3.

Decision Contested or Judgment/Order Appealed

By application filed on 23 September 2021, the Applicant contests 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 on 27 February 2021.

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). In this regard, the Tribunal recalls that it is not its 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).

For an exception to be granted under staff rule 12.3(b), the following three conditions must be met:

a. Such exception must be consistent with the Staff Regulations and other decisions of the General Assembly;

b. It must be agreed to by the staff member directly affected; and

c. In the opinion of the Secretary-General, the exception must not be prejudicial to the interests of any other staff member or group of staff members (see *Wilson* UNDT/2015/125, para. 25).

Moreover, "[t]he right to request and to be properly considered for an exception is a contractual right of every staff member[.] Under staff rule 12.3(b), any request for an exception to the Staff Rules—and, by extension, to administrative issuances of lesser authority (see *Hastings* UNDT/2009/030)—must be properly considered in order to determine whether the three parts of the test established by staff rule 12.3(b) are satisfied" (see, e.g., *Villamoran* UNDT/2011/126, para. 46; *Wilson* UNDT/2015/125, para. 25).

Outcome

Judgment entered for Applicant in full or in part
Full judgment
Full judgment
Applicants/Appellants
Monica Barbulescu
Entity
UN Secretariat
Case Number(s)
UNDT/NY/2021/041
Tribunal
UNDT
Registry
New York
Date of Judgement
28 Sep 2022
Duty Judge
Judge Belle
Language of Judgment
English
Issuance Type
Judgment
Categories/Subcategories
Maternity/paternity leave
TEST -Rename- Benefits and entitlements-45
Applicable Law
Administrative Instructions

- ST/AI/2005/2

Agreements, conventions, treaties (etc.)

- Vienna Convention on the Law of Treaties

Staff Regulations

- Regulation 6.2

Staff Rules

- Rule 6.3(a)

Related Judgments and Orders
2010-UNAT-084
2018-UNAT-812
2018-UNAT-873
UNDT/2020/151
UNDT/2020/151
UNDT/2020/122
UNDT/2021/165
UNDT/2010/147
UNDT/2012/167
UNDT/2015/125

UNDT/2011/126
UNDT/2009/030