

2023-UNAT-1392, Monica Ioana Barbulescu

UNAT Held or UNDT Pronouncements

The Secretary-General filed an appeal.

The Appeals Tribunal found that the UNDT exceeded its jurisdiction and erred in law when it interpreted Staff Rule 6(3)(a) as allowing Ms. Barbulescu as a commissioning mother in a surrogacy to be entitled to maternity leave contrary to the clear and unambiguous Staff Regulations and Rules. The UNDT 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. Further, the Dispute Tribunal erred in making factual findings without evidence.

The Appeals Tribunal however held that the UNDT did not err when it found, in the alternative, that the Administration had failed to exercise its discretion on Ms. Barbulescu's request for an exception judiciously. By failing to consider relevant factors and not providing a rationale for how other staff members could be prejudiced, the UNAT found that the Administration ignored relevant matters and thus the rejection of the request for an exception was unlawful. The UNAT concluded that the UNDT 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 with the offset of the already granted eight weeks of adoption leave.

Decision Contested or Judgment/Order Appealed

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. Even assuming that surrogacy cases did not fall within the scope of

Staff Rule 6.3(a), the UNDT held that 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 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 was 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.

In the alternative, the UNDT found that the Administration should have exercised its discretion to grant Ms. Barbulescu an exception under Staff Rule 12.3.

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.

Legal Principle(s)

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. 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. 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.

When reviewing the validity of the Administration's exercise of discretion in administrative matters, 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.

For an exception to be granted under Staff Rule 12.3, the exception must be consistent with the Staff Regulations and other decisions of the General Assembly, be agreed to by the staff member directly affected, and it must not be prejudicial to the interests of any other staff members or group of staff members in the opinion of the Secretary-General.

Outcome

Appeal granted in part

Outcome Extra Text

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

Full judgment

[Full judgment](#)

Applicants/Appellants

Monica Ioana Barbulescu

Entity

UN Secretariat/DM

Case Number(s)

2022-1757

Tribunal

UNAT

Registry

New York

Date of Judgement

30 Nov 2023

President Judge

Judge Sandhu

Judge Ziadé

Judge Savage

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

TEST -Rename- Benefits and entitlements-45

Maternity/paternity leave

Special leave (with or without pay)

Applicable Law

Administrative Instructions

- ST/AI/2005/2/Amend.2

Agreements, conventions, treaties (etc.)

- Vienna Convention on the Law of Treaties

Former Staff Rules

- Rule 105.2(a)(iii)b
- Rule 205.3(a)(iii)

Staff Regulations

- Regulation 6.2

Staff Rules

- Rule 12.3

Related Judgments and Orders

2019-UNAT-975

2012-UNAT-225

2021-UNAT-1082

2022-UNAT-1253