Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

CALDIN and LANGELAAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Tamal Mandal, AS/ALD/OHR, UN Secretariat

Introduction

1. On 14 August 2023, the Applicants, Mr. Caldin, a Reviser, at the P-4 level, with the Department for General Assembly and Conference Management

gives birth. Previously, former staff rule 6.3 granted 16 weeks for maternity leave and four weeks (or eight weeks if serving in a non-family duty station) of paternity leave.

7. On 27 February 2023, the Secretary-General promulgated ST/AI/2023/2 (Parental and family leave) which entered into force as of 1 January 2023.

8. On 8 March 2023, the Assistant Secretary-General for the Office of Human Resources ("ASG/OHR") in the Department of Management Strategy, Policy and Compliance ("DMSPC") informed the Heads of Entities of the Secretariat of the Secretary-General's approval of a transitional measure which aims to facilitate the transition from the previous parental leave scheme to the new one. Specifically, "birthing parents" of children born in 2022, who were still on maternity leave as of 1 January 2023, would be eligible for an additional ten weeks of special leave with full pay ("SLWFP").

Mr. Langelaar's claim

13. On 2 December 2022, Mr. Langelaar's child was born.

14. On 8 March 2023, Mr. Langelaar requested 16 weeks of parental leave under the new parental leave scheme.

15. On 12 March 2023, the Administration rejected Mr. Langelaar's request.

16. On 10 April 2023, Mr. Langelaar submitted a request for management evaluation of the 12 March 2023 decision to deny his request for 16 weeks of parental leave.

17. On 6 May 2023, the USG/DMSPC upheld the 12 March 2023 decision to deny Mr. Langelaar's request for 16 weeks of parental leave.

18. On 14 August 2023, the Applicants jointly filed an application before the Dispute Tribunal.

19. On 1 April 2024, the case was assigned to the undersigned Judge.

20. On 3 April 2024, a case management discussion ("CMD") was held remotely via MS Teams to discuss the case.

21. Pursuant to Order No. 043 (NY/2024) dated 8 April 2024, the parties filed their closing statements on the issue of receivability.

22. In the Respondent's closing submissions on receivability dated 18 April 2024, he informed the Tribunal that he does not challenge the receivability of the Applicants' substantive claims in relation to DGACM's 23 March 2023 decision and UNSOM's 12 March 2023 decision to reject each of their requests to be granted 16 weeks of parental leave under the Organizati

23. By Order No. 074 (NY/2024) dated 27 June 2024, the Tribunal noted the limited nature of the receivability issues at bar and determined that it would proceed to adjudicate the case on the merits. The Tribunal ordered the parties to file their respective closing submissions on the merits.

24. On 10 July 2024, the parties duly filed their closing statements on the merits.

Consideration

Receivability

25. The Respondent challenges the receivability of parts of the application on two limited grounds: (a) aspects of the application relating to the implementation date of ST/AI/2023/2; and (b) the denial of Mr. Langelaar's request for special leave with full pay ("SLWFP").

26. Regarding the first leg of the challenge, the Respondent submits that the implementation date of the new parental leave scheme falls outside the scope of the Dispute Tribunal's jurisdiction since it constitutes a decision of general application.

27. The Applicants, however, maintain that they do not challenge the implementation date of ST/AI/2023/2 but rather, their arbitrary exclusion from the implementation of the newly promulgated parental leave policy on the basis of their gender. The Applicants maintain that they do "not challenge the parental leave policy but how it is being applied to them by the Administration. As such, the contested decision denying them the benefit of the transitional measures for the policy on the grounds of their gender is a decision taken by the Administration in their individual cases. It has legal consequences on their leave entitlements, and consequently a direct impact on their lives". According to them, the Respondent's arguments over the date of implementation of ST/AI/2023/2 are misplaced. The Applicants argue that the new 2023 policy (ST/AI/2023/2) has been applied retroactively to the parents of some children born in 2022, but not applied to them with the only distinguishing characteristic being their gender.

broadly to all "staff members who are still on maternity leave on 1 January 2023" which is not the same group. The *ad hoc* measure covers staff who went on maternity leave up to 16 weeks before, while it ignores birthing mothers who were not on maternity leave on 1 January 2023. The Respondent has still not clearly identified who benefited from this exception.

d. The Applicants are arguing that if there is a transitional arrangement, it should be applied in a gender-neutral manner, consistent with the General Assembly's intention.

e. The discretionary authority of the Respondent is not unfettered. 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*, 2010-UNAT-084, para. 40). If the Administration acts irrationally or unreasonably in reaching its decision, the Tribunal is obliged to strike it down. "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* 2018-UNAT-873, para. 80).

f. In *Natta* UNDT/2016/033, at para. 42 (not appealed), the Tribunal noted:

> It is not the Tribunal's role to examine whether a policy adopted by the Administration is well-founded or appropriate. This does not mean, however, that the Tribunal may not entertain challenges to the legality of the policy in respect of non-compliance with a higher norm ... For example, a promotion policy setting out a discriminatory criterion would lead to an unlawful decision even if it were correctly applied. Whereas there is no doubt that the Tribunal has no authority "to amend any regulation or rule of the Organization" (*Mebtouche* 2010-UNAT-045, para. 11), a decision may be rescinded if it is taken pursuant to a policy which does not comply with a higher norm. In this context, the Tribunal may also "point out what it considers to be a deficiency" in a policy and "recommend a

> reform or revision" (*Mebtouche* 2010-UNAT-045, para. 11; see also *Nguyen-Kropp and Postica* UNDT/2015/110).

g. The Respondent's rationalization of the contested decision addresses none of these fundamental points, underscoring the arbitrariness of the underlying decision.

e. Further, sec. 10.2 of ST/AI/2023/2 clearly states that ST/AI/2005/2 (Family leave, maternity leave and paternity leave) applies to staff members eligible for "4 or 8 weeks of paternity leave […] on or before 31 December 2022". Under this section, the Administration correctly determined that Mr. Caldin and Mr. Langelaar have the right to four weeks and eight weeks of paternity leave, respectively, under sec. 10.3 of ST/AI/2005/2.

f. Finally, the transitional measure approved by the Secretary-General that specifically provided "birthing parents" of children born in 2022, who were still on maternity leave as of 1 January 2023, an additional 10 weeks of SLWFP does not apply to the Applicants as they are "non-birthing parents".

g. Mr. Langelaar has no legal right to eight weeks of SLWFP. UNSOM lawfully denied Mr. Langelaar's request for eight weeks of SLWFP. Staff rule 5.5 governs special leave which is normally without pay. In exc 57004C>3005200515>0003>8

considered that Mr. Langelaar had the option to telecommute from outside his duty station for eight weeks under a flexible working arrangement, an option he availed previously.

i. Based on these considerations, UNSOM concluded that granting SLWFP on an exceptional basis was not in the interest of the Organization. Mr. Lang

l. The Applicants, whose children were born before the new parental leave framework entered into force (i.e., before 1 January 2023), have no legal right to the increased duration of parental leave provided for in provisional staff rule 6.3 and ST/AI/2023/2, which only applies prospectively. Contrary to the Applicants' argument, neither the effective date of 1 January 2023 nor applying the new parental leave scheme prospectively discriminates against, or arbitrarily excludes, any specific group of staff members.

m. The transitional measure is not discriminatory. It stems from provisional staff rule 6.3(a)(ii), which provides an additional 10 weeks of prenatal and postnatal leave for a "parent who gives birth". The reasoning for the additional 10 weeks of leave is "[to provide for the] specific pre- and postdelivery needs of birth mothers […] in line with the WHO recommendation to provide six months of leave to allow for breastfeeding and bonding with the child". This additional period of leave does not apply to staff members without the medical needs associated with pregnancy, delivery or breastfeeding, thus maintaining the focus on the "parent who gives birth".

n. The differential treatment of "birthing and non-birthing parents" serves a legitimate policy objective. The Applicants' argument that "the transitional measure … is designed to meet the medical needs associated with childbirth … has no basis in fact and appears to be an afterthought" is misplaced. The ASG/OHR communicated that the transitional measure is "[i]n line with WHO's recommendation of six months minimum of breastfeeding". In turn, the International Civil Service Commission ("ICSC") in its Report for 2022 (A/77/30) dated 12 August 2023 noted the requirement to "[p]rotect the physical and mental health needs of birth mothers during and after pregnancy by granting a specific period of leave that is allocated for that purpose" and agreed that "an additional period of 10 weeks should be provided to birth mothers to meet their specific pre- and post-delivery needs, in line with the

WHO reco

made by the Secretary-General or the official with delegated authority amongst the various courses of action open to them (see *Sanwidi*, para. 40, and *Belkhabbaz* 2018-UNAT-873, para. 66)).

Whether the transitional measures are discriminatory

43. The Applicants contend that the transitional measures are discriminatory in that they apply to staff members who were on maternity leave on 1 January 2023, which creates a gender distinction. They maintain that the same application of the new policy should be available equally to parents of both genders.

44. The Respondent, on the other hand, asserts that under the revised staff rule 6.3 and ST/AI/2023/2, neither Applicant has a legal right to 16 weeks of parental leave under the new parental leave policy, since neither of their children was born or adopted on or after 1 January 2023. Further, that the transitional measure in issue allowed an additional 10 weeks of special

47. The Tribunal notes that staff rule 6.3 of ST/SGB/2023/1 does not provide for special leave with full pay, but rather provides for *parental leave with full pay* (staff rule. 6.3(a)(i)) and *prenatal and postnatal leave with full pay* (staff rule 6.3(a)(ii)).

48. The tone of the 8 March 2023 communications by t/ Tm4(by)-124(t/ Tm4(by)-124(t/ Tm4(by)-

the differentiation and the purpose it is designed to achieve" (see *Canova* 2022-UNAT-1252, para. 39, and also *Krioutchkov* 2022-UNAT-1248, para. 32).

52. In this case, the differential treatment of parents who give birth to a child and parents who do not give birth to a child serves a legitimate policy objective. There is a clear rational connection between the differentiation and the purpose of the policy, which is to address health matters related to giving birth to a child in line with the WHO's recommendation.

53. The Tribunal finds that since the Applicants did not give birth to their children, they were not entitled to an additional 10-weeks parental leave with full pay. Further, their request for parental leave was rightly rejected in keeping with sec. 1.2 of ST/AI/2023/2. The transitional measures are not discriminatory to the Applicants due to their gender.

Whether the decision to apply the provisional rules only to parents whose children were born or adopted on or after 1 January 2023 is discriminatory and improperly restricts staff rule. 6.3 of ST/SGB/2023/1

54. The Applicants additionally argue that the decision to apply the provisional staff rules only to parents whose children were born or adopted on or after 1 January 2023 constitutes discrimination. This assertion is premised on the argument that rather than provide a cutoff date for the application of the parental leave measures, each of General Assembly resolution 77/256 A-B, the ICSC recommendation, and staff rule 6.3 of ST/SGB/2023/1 provide that *all parents* with children under 1 year of age are entitled to 16 weeks of leave. The Applicants maintain that the cutoff date of 1 January 2023 leaves some parents out of the application of the parental leave measures contrary to the clear intention of the General Assembly.

55. The Tribunal finds no merit in this line of argument. That the ICSC only made a recommendation is not disputed. The recommendation could be accepted, rejected or modified as seems to have been the case. The General Assembly only 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". Nothing in General Assembly resolution 77/256 A-B requires that parental leave measures should be applied to *all parents* as the Applicants suggest.

56. The Tribunal notes that 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. The issuance of ST/AI/2023/2, which sets the cutoff date for the application of the parental leave measures, is therefore in line with the General Assembly resolution and with staff rule 6.3(a) of ST/SGB/2023/1. Staff rule 6.3 of ST/SGB/2023/1 and the relevant parts of ST/AI/2023/2, moreover, relate to a different aspect of the parental leave measures. While ST/SGB/2023/1 articulates the policy, ST/AI/2023/2 guides the implementation of the policy, none restricting, contradicting or being inconsistent with the other. The invocation of the principle of hierarchy of norms is therefore not warranted.

58. Based on the foregoing, the Tribunal finds that the decision to apply the provisional rules only to parents whose children were born or adopted on or after 1 January 2023 is neither discriminatory, nor does it improperly restrict staff rule 6.3 of ST/SGB/2023/1.

Whether the decision to deny Mr. Langelaar's request for SLWFP was lawful

59. Mr. Langelaar asserts that the decision to deny his request for SLWFP was unlawful. He, however, does not substantiate his claim beyond stating that his request