SEVENTY-SEVENTH SESSION

In re GRANT

Judgment 1339

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Donald Marcus Grant against the World Health Organization (WHO) on 17 August 1993 the WHO's reply of 17 December 1993, the complainant's rejoinder of 21 January 1994 and the Organization's surrejoinder of 18 February 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 760 and 1230;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. WHO Staff Rules 760.1 and .2 read as follows:

"760.1 Staff members appointed for periods of one year or more shall be entitled to maternity leave with full salary and allowances.

760.2 Any such staff member, on presentation of a certificate from a duly recognized medical practitioner stating that her confinement will probably take place within six weeks, shall be allowed to absent herself from her duties until her confinement. At the request of the staff member and on medical advice, the Director-General may permit the maternity leave to commence less than six weeks but not less than two weeks before the expected date of confinement. Maternity leave shall extend for a period of 16 weeks from the time it is granted, except that in no case shall it terminate less than ten weeks after the actual date of confinement."

The complainant, a British subject, is employed by the WHO in Geneva as a scientist at grade P.5.

On 21 July 1992 he and his wife, who is employed at the Office of the United Nations High Commissioner for Refugees (UNHCR), also in Geneva, sent a memorandum both to the Chief of Contract Administration in the Division of Personnel of the WHO and to the Director of Human Resources Management of the UNHCR. They said that their first child was to be born in September 1992 and applied for permission to share between them the sixteen weeks' leave prescribed in WHO Staff Rule 760 and in a similar rule in the United Nations.

By a memorandum of 23 July the Chief of the Personnel Administration Section of the UNHCR told the complainant's wife that though she was entitled to sixteen weeks' maternity leave the grant of paternity leave was a matter for the WHO to determine.

In a memorandum of 28 July the Chief of Contract Administration of the WHO informed the complainant that he was rejecting the application because the rules did not prescribe the grant of paternity leave.

In a memorandum of 30 July the complainant asked how he might appeal and by a memorandum of 18 August the Chief of Contract Administration referred him to Staff Rule 1230 ("Boards of Appeal").

In a memorandum of 27 August 1992 to the secretary of the headquarters Board of Appeal he gave notice of appeal under Rule 1230.1.2 on the grounds of "incomplete consideration of the facts". On 4 September he submitted a formal statement of appeal.

His wife gave birth to a daughter on 11 September.

In its report of 23 February 1993 the Board noted that the Administration had properly applied Rule 760 but recommended reviewing it because of its "discriminatory" nature.

In a letter of 20 May 1993 the Director-General rejected his appeal on the grounds that the WHO had applied Rule 760 "as it stands" and the Board had exceeded its competence by declaring the text discriminatory. That is the

impugned decision.

B. The complainant submits that the WHO discriminated against him on the grounds of sex. Since the purpose of Rule 760 is not only to allow the mother to prepare for and recover from childbirth but also to permit "bonding" between parent and child, the father too should be entitled to a share of leave. The Organization's policy on adoption leave, which staff of either sex may take, bears that out.

He believes that the WHO should take the lead in the common system of the United Nations by letting parents who both work in the system to share a single leave entitlement. The International Committee of the Red Cross, another organisation in Geneva, though one outside the common system, already provides for the sharing of "maternity leave".

His acceptance of the Staff Regulations and Staff Rules does not bar him from challenging a provision he regards as "gender-specific". As it is being applied Rule 760 discriminates against the father by limiting his share of "parenting responsibilities".

The rule may damage the mother's career prospects because her employer may be inclined to give preference to another staff member who is not entitled to maternity leave.

He seeks the quashing of the Director-General's decision of 20 May 1993 and the conversion into "parental leave" of fifteen days' annual leave which he took in November and December 1992 to spend more time with his daughter.

C. In its reply the WHO contends that the complaint is devoid of merit.

It is not the purpose of the appeal procedure to enable staff to seek changes in the rules: the complainant should have tried other procedures or turned to the Staff Association if he wanted the introduction of paternity leave. The rules on maternity leave being the same throughout the United Nations common system, the WHO may not change them on its own.

In any event the UNHCR had ruled out the sharing of his wife's maternity leave even before the WHO turned his application down. So it would have been more appropriate for her to appeal to her own employer.

The WHO denies that the grant of paid maternity leave is discriminatory: it affords a woman protection for reasons "inherent in her physical nature". The needs of an adoptive parent - which may include travel and stays in the country of adoption - are quite different from those imposed by confinement. Rule 760 provides for maternity leave, not - as the complainant mistakenly puts it - for "gender-specific" parental leave.

His suggestion that maternity leave may hamper the mother's career prospects merely shows how important it is to strengthen her right to such leave.

D. In his rejoinder the complainant enlarges on his earlier pleas. He says that it was the WHO that advised him to lodge an appeal and it was therefore to blame if he took the wrong course. He would have been satisfied with some ad hoc arrangement. It was the Board of Appeal that called for review of Rule 760.

As "parenthood" includes motherhood, maternity leave is "gender-specific" parental leave. The WHO's refusal to let parents share leave offends against several international instruments on human rights, including the Charter of the United Nations.

E. The WHO contends that it did not mislead the complainant: he himself preferred litigation to constructive dialogue. There is no provision for parental leave in the United Nations system. The United Nations Convention on the elimination of all forms of discrimination against women - one of the instruments he relies on - actually says in Article 4(2) that "adoption ... of special measures ... aimed at protecting maternity shall not be considered discriminatory".

CONSIDERATIONS:

1. The complainant is a staff member of the WHO at grade P.5 and his wife a staff member of the Office of the United Nations High Commissioner for Refugees (UNHCR) at grade P.3. The rules of both organisations prescribe

sixteen weeks' maternity leave. The complainant's wife was expecting to give birth in September 1992. On 21 July 1992 they applied to both the organisations for the grant of "parental" leave, the sixteen weeks' leave to be made available to them as a couple and shared as agreed between themselves and with their employers.

2. In a memorandum of 23 July the Chief of the Personnel Administration Section of the UNHCR answered the complainant's wife that she was entitled to the sixteen weeks' maternity leave under the staff rules and that the entitlement of her husband to paternity leave was a matter for the WHO to decide.

3. In a memorandum of 28 July to the complainant the Chief of Contract Administration of the WHO referred to Staff Rule 760, which provides for the sixteen weeks' maternity leave for a staff member appointed for a period of one year or more, said he regretted that there were "no provisions for paternity leave", and refused the complainant's application.

4. The complainant appealed to the WHO's headquarters Board of Appeal. In its report dated 23 February 1993 the Board held that the Administration had correctly applied Rule 760 as it stood, but that it was "discriminatory against male staff members, bearing in mind the objectives of WHO and the UN family and the discrepancy with conditions applying to adoption leave"; so the rule was "inherently flawed" and "the Administration should review it in view of its discriminatory nature".

5. By a letter dated 20 May 1993 the Director-General of the WHO informed the complainant that he accepted "the finding that the Administration had applied the Staff Rule as it stands to you" and was therefore dismissing the appeal; as for the Board's view that the rule was flawed and should be reviewed, it had gone beyond its mandate. That is the decision now impugned.

6. The complainant's wife gave birth on 11 September 1992. Having been refused "parental leave", he took fifteen days' annual leave "in order to be able to spend time with my newborn daughter". He wants the Tribunal to set aside the Director-General's decision and retroactively convert the fifteen days' annual leave to parental leave. He has four main pleas:

(a) The grant of leave only to the mother is discriminatory because bonding is as important between father and child as between mother and child.

(b) Adoption leave makes no distinction on the grounds of sex.

(c) What he wants is not an increase in parental leave but only that the present entitlement be shared between the parents when both are employed by organisations that belong to the United Nations common system. The International Committee of the Red Cross allows the sharing of leave if both spouses are its employees.

(d) The fact that only the mother is entitled to leave under the rules creates a risk of discrimination against her in that she may be passed over in her career if she takes her full entitlement.

7. The grant of maternity leave is not a form of discrimination against men but mere recognition of the needs specific to a woman when she gives birth. There are both physical and psychological reasons why a woman should be relieved of work before and after the birth. The nature of the father's involvement being quite different, like is not being compared with like.

8. Legislation in some countries does provide for the grant of paternity leave. It is true it may be seen as beneficial: it allows sharing of the practical burdens of child care; it may serve to alter social attitudes by dispelling the idea that child care is the sole responsibility of the mother; and it is psychologically useful in that it enables the father to become more closely involved in the child's early development. But parental leave is something to be negotiated and agreed with the employer: it may not be claimed as of right. The WHO's rules provide for the grant of maternity leave, not of paternity or parental leave, and until the latter is agreed upon or prescribed the right to it does not exist.

9. The comparison that the complainant draws with the grant of leave on the adoption of a child is mistaken. The requirements of adoption being different from those of confinement, arrangements pertaining to adoption need not be specifically directed at the woman. There is no discrimination in favour of adoptive and against natural parents since the circumstances are not the same.

10. Parental leave, which is not the same as maternity leave, is not prescribed in the WHO and the fact that the International Committee of the Red Cross may grant it is immaterial.

11. The arguments the complainant founds on the risk of discrimination against women in employment are also irrelevant: he may plead his own case, not that of others.

12. The Organization contends that his case is misdirected on the grounds that on taking up employment he accepted its Staff Regulations and Rules and he ought to have made use of other means, such as staff union action, of putting forward his views and securing the introduction of paternity leave. The contention is mistaken. An official's acceptance of the Regulations and Rules does not preclude his arguing that some provision of them is discriminatory as it affects him. If the Organization's argument were sustained no staff member would be free to challenge a rule. The comlainant is entitled to found his case on the plea of discrimination even though in the event it proves unsuccessful.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tirbunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner