

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K.
v.
ILO

129th Session

Judgment No. 4250

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. K. against the International Labour Organization (ILO) on 18 May 2018 and corrected on 20 June, the ILO's reply of 21 September, the complainant's rejoinder of 16 November and the ILO's surrejoinder of 13 December 2018;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decision not to grant him the requested paid parental leave upon the birth of his child by surrogacy.

The complainant is a staff member of the International Labour Office, the secretariat of the ILO. In October 2015 he informed the Human Resources Development Department (HRD) that he had decided to have a child through surrogacy. An exchange of communications ensued concerning the type of leave he would take. He requested to be granted "family leave" based on the childcare component of the maternity leave benefit as he would be the primary care provider of the child.

In an email of 28 January 2016 HRD replied that adoption leave, in accordance with Article 8.7 of the Staff Regulations, might be the most adequate mechanism through which the Administration would be able to provide him with a period of parental leave. HRD explained that the maternity leave provisions under Article 8.7 pertained only to staff members who physically carried a pregnancy and gave birth. This leave provision was specifically designed to accommodate the health impact of that process on the mother in addition to the post-natal bonding with and care of the child. HRD added that it would be helpful if he could provide some clarification as to the legal process that would be followed prior to and after the birth.

On 24 March 2016 the complainant lodged a grievance with HRD alleging that he was denied family leave equal to the post-natal childcare and bonding component of maternity leave. The email of 28 January from HRD incorrectly stated that his request was for family leave equivalent to that of maternity leave. He added that he would not qualify for paternity leave under the Staff Regulations as he was not the biological father, and that he would be able to apply for adoption leave only after a significant lapse of time, as his name would appear on the birth certificate after significant legal intervention prior to, and after the birth of his child. He asked to be granted paid family leave that was comparable to the paid childcare component of the leave granted to female colleagues excluding the part relating to medical recovery. In his view, he should be granted a minimum of twelve weeks' leave.

In June 2016 the complainant sent a copy of his daughter's birth certificate to HRD. At the beginning of July he was informed that his daughter could be recognised as his own as of the date of birth (24 May 2016) and that he was granted four weeks of paternity leave in accordance with Article 8.7 of the Staff Regulations. He was asked to confirm the legal process he would follow, in particular if he intended to follow a process of adoption, so that the Office could determine whether he should be granted adoption leave instead of paternity leave. The complainant replied a few days later that he had petitioned the national court to declare him the legal parent of his daughter, thus "adopting her".

Having not received a reply to his grievance, he referred the matter to the Joint Advisory Appeals Board (JAAB) on 22 July 2016. He contended that he had been denied “family leave equal to the postnatal child care and bonding component of the maternity leave granted under article 8.7 of the [S]taff [R]egulations”. On 30 September 2016, after having been informed in late July that he was granted eight weeks of adoption leave from 24 May until 18 July 2016 and then annual leave and special leave without salary, he filed further submissions with the JAAB. He requested to be granted four additional weeks of leave with full salary under Article 7.7 of the Staff Regulations on special leave, which would allow him to have twelve weeks of paid parental leave as he had initially requested.

In its report of 2 February 2018 the JAAB recommended that the Director-General should find the grievance receivable but unfounded. It also recommended that the complainant be awarded 2,500 Swiss francs for the delays in reviewing his case, and that the parental leave policy be reviewed.

By a letter of 19 February 2018 the complainant was informed that the Director-General had decided to endorse the JAAB’s recommendation. He noted the legal vacuum that his specific situation had brought to light but was satisfied that the Administration had made every effort to accommodate his particular situation while keeping with the spirit of applicable rules. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, and to grant him four additional weeks of leave with full salary. Subsidiarily, in the event the Tribunal considers that granting such leave is not appropriate, he claims commensurate financial compensation. In addition, he seeks compensation for the moral damage suffered and 3,000 Swiss francs in costs.

The ILO asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant impugns the Director-General's decision of 19 February 2018 in which he endorsed the JAAB's conclusion that the complainant's challenge to the Administration's decision to award him eight weeks of paid adoption leave rather than 12 weeks of paid parental leave was unfounded.

2. The complaint stems from the denial of the complainant's request to HRD to grant him twelve weeks of paid family leave to care for and bond with his new-born child. In his view, twelve weeks of paid leave would be comparable to the childcare component of the leave granted to female colleagues.

3. In large measure, the complainant's submissions are directed at the alleged discriminatory nature of Article 8.7 of the Staff Regulations. In summary, the complainant contends that the parental leave policy in Article 8.7 "discriminates against ILO officials and [...] reproduces the very same stereotypes the ILO is working, and mandated, to combat". The complainant notes that Article 8.7 of the Staff Regulations only provides for paid parental leave entitlements in three situations, namely, maternity leave, paternity leave and adoption leave. Thus, the complainant takes the position that as Article 8.7 fails to recognize "family status, family responsibilities, sexual orientation, gender identity, disability, and/or gender" it is discriminatory. The Tribunal observes that the complainant is basically advocating for a change in the rules and does not make any specific claim in that respect. Accordingly these statements, which are of a general nature serve unclear purposes, and the Tribunal cannot address them.

4. However, as stated in Article II, paragraph 1, of the Statute, the Tribunal is competent to hear complaints alleging the non-observance of the terms of appointment of officials and of the provisions of staff regulations. The complainant submits that the Organization discriminated against him on the basis of his gender, his sexual orientation, his family status and his family responsibilities. First, the complainant submits

that the decision to grant him eight weeks of paid leave rather than the requested 12 weeks was an inappropriate use of the adoption leave in Article 8.7(3) of the Staff Regulations. Second, he submits that the Organization should have considered all other available provisions in the Staff Regulations so as to grant him a reasonable period of paid leave to care for his new-born child that would have contributed to the prevention of the discriminatory treatment of his situation. The complainant points out that the Administration could have extended his paid leave for another four weeks under Article 7.7. Third, the complainant claims that as a result of being denied the 12 weeks of paid family leave, he and his family suffered an unfair financial burden due to the fact that he had to take special leave without salary after the eight weeks of paid adoption leave. He also claims that he suffered a moral prejudice for being discriminated against in employment and for having to “relentlessly seek a solution which would be in all parties’ interests”.

5. Underpinning the complainant’s claim of discrimination against him is his contention that his situation did not come within the conditions of entitlement for any of the three forms of paid parental leaves recognized in Article 8.7 of the Staff Regulations. He notes that he was not entitled to maternity leave as he is not a woman and cannot become pregnant; he was not entitled to paternity leave because he is not the biological father of his daughter; and he was not entitled to adoption leave because his name appeared on his daughter’s birth certificate from the day of her birth and thus, he could not adopt his own child. This contention is unfounded. Article 8.7(2)(a) states that “[u]pon presentation of his child’s birth certificate, a male official shall be entitled to paternity leave with full salary and allowances for a total period of up to four weeks”. Contrary to the complainant’s assertion, this provision is not limited to a biological father. The provision is clear and unambiguous that the only conditions that must be met for a staff member to be entitled to paternity leave is to be recognized as a parent in the child’s birth certificate and to be of male gender. In June 2016 the complainant sent a copy of his daughter’s birth certificate to HRD in which the complainant is identified as one of his daughter’s parents. It was on this basis that HRD confirmed to the complainant on 7 July 2016 that he

would be granted four weeks' paternity leave in keeping with the provisions of Article 8.7(2) of the Staff Regulations.

6. In HRD's 7 July email, the complainant was also asked to indicate whether there was any further legal process, such as adoption, to be followed so that the Administration could determine whether he could be entitled to adoption leave. In his response of 11 July, the complainant pointed out he had petitioned the court to declare him the legal parent of his daughter, even though he was not her biological father, "thus adopting her". The complainant added that during discussions with HRD, he was informed that his daughter's case would be treated the same as in his son's case and he would be granted eight weeks' adoption leave.

7. It is recalled that on 22 July 2016, the complainant lodged a grievance with the JAAB in which he alleged that he was denied family leave equal to the postnatal childcare and bonding component of the maternity leave in Article 8.7 of the Staff Regulations. Subsequently, on 27 July 2016, HRD informed the complainant that he would be granted eight weeks' paid adoption leave. In his further submissions to the JAAB after being informed that he had been granted eight weeks of paid adoption leave, the complainant asked to be granted four additional weeks with full salary under Article 7.7 of the Staff Regulations "to ensure [that he is] treated fairly and equally and in accordance with [his] initial request for a total of 12 weeks of paid parental leave". Considering the content of the complainant's 11 July response to HRD and based on his further submissions, it could be inferred that the complainant did not take issue with the decision to grant him the adoption leave at that point.

8. For this reason, it is somewhat puzzling that in the present complaint, the complainant now submits that the inappropriate use of the adoption leave provision amounts to discrimination against him. This submission is unfounded. Having regard to the complainant's particular situation as a primary care giver, the Administration sought to accommodate his situation with a longer period of paid leave than that provided in the paternity leave provision. Based on a broad interpretation

of the complainant's situation that he was not a biological parent of his daughter, the Administration assimilated his relationship with his daughter as one of adoption. As the ILO notes, this was the most favourable decision available in the Staff Regulations.

9. Turning to the complainant's argument that the Administration could have extended his paid leave for an additional four weeks, Article 7.7(a) of the Staff Regulations, in relevant part, states that "[s]pecial leave, with full or partial salary or without salary, may be granted by the Director-General to an official for advanced study or research in the interest of the Organization, or for other exceptional or urgent reasons". As the JAAB correctly observed in its report, "the arrival of a new-born in the family of a staff member, either through birth or adoption, is not exceptional and in any case was clearly foreseen".

10. Lastly, given that the complainant was granted the eight weeks' paid adoption leave in accordance with the relevant parental leave provision in the Staff Regulations, the complainant's claims that he and his family suffered an unfair financial burden and he suffered a moral prejudice for being discriminated against in employment and for having to seek a solution in all parties' interests are unfounded.

11. In conclusion, as the complainant has not shown that he was deprived of any right or entitlement pertaining to the terms and conditions of his employment or the Staff Regulations, his complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ