UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2020-UNAT-1045

Caroline Wendy Nicholas

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Martha Halfeld Judge Kanwaldeep Sandhu
Case No.:	2020-1391
Date:	30 October 2020
Registrar:	Weicheng Lin

Counsel for Appellant:	Mohamed Abdou, OSLA
Counsel for Respondent:	Francisca Lagos Pola

JUDGE GRAEME COLGAN, PRESIDING.

1. Caroline Nicholas appeals against Judgment No. UNDT/2020/039 issued by the United Nations Dispute Tribunal (UNDT or the Dispute Tribunal) dated 10 March 2020 and finding in favour of the Respondent (The Secretary-General or the Organisation). Ms. Nicholas is a Senior Legal Officer with the International Trade Law Division of the Office of Legal Affairs of the United Nations at Vienna, Austria (UNOV). Her claims before the UNDT concerned her entitlement to education grants (and in particular for assistance with university travel and boarding expenses) in respect of her two dependent sons. Assistance was refused by the Organisation, and management evaluation was declined, because it said that the contested refusal did not constitute an administrative decision amenable to management evaluation.

2. Ms. Nicholas brought a challenge to these decisions to the UNDT. It its Judgment, the Dispute Tribunal found Ms. Nicholas's claims receivable and there is no challenge to this conclusion by the Secretary-General. However, the UNDT found against Ms. Nicholas on the merits of her claims, essentially because her circumstances (including those of her dependent children) fell outside the recently-modified eligibility criteria for such assistance. The UNDT also rejected her alternative case that she was entitled to rely on previously acquired rights to such assistance.

3. For reasons set out below, we dismiss the appeal.

Facts and Procedure

4. The appeal turns on a revision to the United Nations Staff Regulation 3.2 which took effect in 2018. That in turn was the result of the United Nations General Assembly (GA) Resolution 70/244 titled "United Nations common system: report of the International Civil Service Commission" adopted by the General Assembly on 23 December 2015. It was applicable as from the European/United Kingdom scholastic or academic year 2018/2019 and succeeded an earlier policy which had, in Ms. Nicholas's case, allowed financial assistance for the education-associated costs of dependent children including those attending tertiary (university) educational institutions.

5. Although the GA Resolution was passed in 2015, there is no indication when it or the changes to the Staff Regulations it directed be made by the Secretary-General came to the attention of staff in general or Ms. Nicholas in particular. However, as the UNDT found, in both April and June 2017, the UNOV staff, of which Ms. Nicholas was a member, were advised by the Human Resources Management Service of these changes and the details of their implementation.

6. In July 2017, Ms. Nicholas applied, in reliance on paragraph 29 of Resolution 27/244, on exceptional grounds for consideration of her request that boarding and travel allowances be reimbursed in respect of her two dependent sons. In September 2017, this request was declined on the basis that paragraph 29 did not permit such reimbursements. The Appellant's request for management evaluation of this decision was refused in January 2018.

7. During the 2017-2018 academic year, Ms. Nicholas's elder son, T, was in his second year at a university in the United Kingdom. He had been entitled to, and had received, boarding and travel related benefits during the previous academic year at the same university. Her younger son, C, was to commence at a UK university in the 2018-2019 academic year and she sought travel related and boarding assistance for him also.

8. The following is a summary of the parts of the UNDT's Judgment relevant to the issues now on appeal. The UNDT considered that the previous education grant scheme comprised three identifiable categories of assistance: tuition costs assistance; boarding costs assistance; and travel costs assistance. It held that Resolution 70/244 reduced the previous assistance with tuition expenses and changed the method of their calculation from a percentage reimbursement rate to a sliding scale method of calculation. These tuition costs benefits were not the subject of Ms. Nicholas's claims. It held that the Resolution eliminated the other two previous categories which were the subject of her appeal. The Dispute Tribunal also interpreted Resolution 70/244 as excluding any provision for boarding assistance for tertiary (university) level education of dependent children of UN staff. It held that the discretionary authority contained in paragraph 29 of the Resolution, upon which Ms. Nicholas relied, related only to exceptional circumstances affecting the boarding of children attending primary and secondary level schools.

9. The UNDT held that the Secretary-General interpreted correctly paragraph 29 of the Resolution and in particular that it did not allow for the exercise of an exempting discretion as had been sought by Ms. Nicholas. Nor did the Resolution, and consequent Staff Regulation changes, provide for a transitional delay or 'grandfathering' in any cases, for example, in respect of children in the course of an educational programme for which their parents had previously received benefits.

10. The UNDT found that the Respondent did not breach Ms. Nicholas's rights under Staff Regulation 3.2 affecting her children's re-assimilation in their home country or otherwise disrupt their education. As to the Appellant's argument that the implementation of the Resolution had an adverse retroactive effect on the education of her elder son, the UNDT concluded that the new provisions were clearly intended to apply for the future and could not have had, and did not have, retrospective effect in the sense of depriving Ms. Nicholas of the financial assistance already received.

11. The UNDT noted that Staff Regulation 12.1 allows amendments to, and supplementation of, those Staff Regulations and Rules "without prejudice to the acquired rights of staff members" but concluded that the Appellant did not have such acquired rights. The Dispute Tribunal noted, but doubted, Ms. Nicholas's evidence that when she had accepted the Respondent's offer of a permanent contract, a key motivating factor for her was the availability of the then-existing education grants' scheme.

12. As to the jurisprudence of acquired rights protecting staff against retrospective application of new law, the Dispute Tribunal held that this protection was of benefits accrued for services already rendered or, in other words, that a right was considered to have been "acquired" only if it was "a vested right". That was contrasted with a situation in which, for example, a promise to pay prospective benefits, including future salary, may in some circumstances constitute a contractual right but is not an acquired right until such time as the services for which the promise has been made have been performed or earned. Additionally, the UNDT limited the nature of the rights protected by an acquired rights regime to only include the "fundamental and essential conditions of the work relationship".[1] In reliance on the International Labor Organization Administrative Tribunal's (ILOAT) employment jurisprudence, the Dispute Tribunal held that, to amount to a breach of an acquired right, an

[1] Impugned Judgment, para. 47.

alteration to terms and conditions of employment must "adversely [affect] the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on".[2] As already noted, the UNDT considered that it "seem[ed] difficult to accept [Ms. Nicholas's] assertion that, when accepting the offer of a permanent contract in the far [sic] 2010, she was motivated essentially by the then existing provision of the education grant (in projection to the moment in which her son would have started university courses many years later)".[3]

13. Nevertheless, the Dispute Tribunal considered that a right to boarding assistance for tertiary education was not a fundamental right of Ms. Nicholas's work relationship, especially considering its assistive nature and that it was extraneous to the core of her working relationship with the Respondent, being an exchange of work for salary.

14. Finally, the UNDT addressed Ms. Nicholas's argument that the discontinuation of the financial assistance resulted in a disparate impact on staff for two different reasons. The first, she said, was that its effect was discriminatory in terms of "income effect", because staff with dependents needing boarding assistance were those for whom the changes to the education grant scheme would have the most serious impact. It treated them, as a group, less favourably than those employees without dependents and other staff with dependents of different ages. The second discriminatory effect was said to have been that the removal of all boarding expenses' reimbursement for tertiary education created different outcomes for staff at different duty stations.

15. The UNDT addressed the first argument of unlawful discrimination by concluding that Ms. Nicholas's situation did not differ from that of any other staff member with dependent children who decided to provide for their tertiary education away from the staff member's duty station. The Dispute Tribunal addressed the second discrimination argument by concluding that although Resolution 70/244 foresaw that in exceptional cases field location restrictions might be waived, this did not authorise the Secretary-General to disregard the limitation of the provision to primary and secondary level education.

[2] *Ibid.*, para. 50.
[3] *Ibid.*, para. 51.

16. In summary, the UNDT held that the non-eligibility of staff to boarding assistance for children attending tertiary level educational institutions stemmed directly from a resolution of the General Assembly and the Secretary-General did not have authority to create exceptions to this.

17. For all of the foregoing reasons, Ms. Nicholas's claims were dismissed by the UNDT.

Submissions

The Appellant's Grounds of Appeal

18. First, the Appellant says that the UNDT erred in assessing the nature of the benefits including by reaching contradictory findings about them. Although the UNDT initially treated each of the education grant components (tuition, boarding and travel expenses) as separate and constituting separate entitlements, it subsequently reached an inconsistent (and erroneous) conclusion that all three benefits were a single benefit which Ms. Nicholas was still receiving, albeit at a lesser level. This led to further erroneous conclusions by the Dispute Tribunal about the impact of the changes on Ms. Nicholas and the disruption to her children's education, and about the requirements for child re-assimilation under Regulation 3.2.

19. Next, the Appellant says that the UNDT erred in concluding that the Administration had no discretion about the implementation of these changes in the absence of transitional arrangements. Resolution 70/244 allows a decision-maker to authorise payment of the boarding expenses incurred by the Appellant as a staff member at a category H duty station.

20. There is no specific exclusion of benefits for tertiary education, particularly for those already receiving such benefits as the Appellant was. The new scheme did not override all exiting rights in all circumstances.

21. The UNDT failed to take account, or sufficient account, of the context in which the new rules on educational benefits were promulgated, which included a need for flexible implementation. There was consensus (illustrated in the ICSC Report) to not limit discretion

to grant exemptions in particular circumstances.[4] The Secretary-General therefore retains a discretion to grant boarding assistance to staff members already in receipt of such a benefit.

22. Next, the Appellant says that the UNDT misconstrued the notion of "acquired rights". The education benefits at issue in this case are paid at the end of a scholastic year as a reimbursement of expenses actually incurred. This requires that notions of acquired rights be interpreted and applied in the context of education benefits. This includes an assumption that decisions about children's education will be made by parents in reliance on the continued provision of these benefits and that the benefits will endure for the durations of the children's education. In these circumstances, the UNDT was not able to rely safely on ILOAT jurisprudence about acquired rights in maintenance of salaries paid to staff for the work performed by them.

23. The Appellant says that she relied to her detriment (as it transpired) upon the terms of the education grants as they were when she took up her relevant post. She relies on the Judgement of this Tribunal in *Wang* for the supportive proposition that education benefits maybe an important consideration in taking up a UN position or moving to a new duty station and that such staff should not be expected to be affected detrimentally by a change to these benefits.[5]

24. The Appellant submits that there was retroactive application of the new rules in that boarding and travel benefits were discontinued for her son T during the course of his academic year, that is with effect from January 2018. She relies on the statements of this Tribunal in the *Lloret Alcañiz et al.* Judgement that "staff members [should not be] deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled".[6] This is because the eligibility for boarding and travel benefits is assessed at the commencement of a child's education at the approved educational institution. The Appellant says that the Organization's withdrawal of boarding and travel assistance is premised on the assumption that adequate local education is available at headquarters duty stations. That was not the case for the Appellant and her sons. She says that without the benefit of a complete education grant, she would have sought placement at other duty stations where appropriate

[4] The Appellant here refers to the Report of the International Civil Service Commission (ICSC) for the year 2015, A/70/30, dated 31 August 2015.
[5] *Wang v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-140.
[6] *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 91.

education was available or even that she would have left the Organisation. She says that the removal of boarding assistance frustrates the objectives of the education grant in Staff Regulation 3.2 and the continuity of her sons' education was at risk.

25. Next, the Appellant says that the UNDT erred in finding that education benefits did not constitute an essential term of her employment. The UNDT failed to assess properly the importance of education benefits as part of her conditions of employment. It concluded wrongly that: "it seems difficult to accept the Applicant's assertion that, when accepting the offer of a permanent contract in the [year] 2010, she was motivated essentially by the then existing provision of the education grant".[7] The Appellant says that the UNDT did not consider the ICSC report[8] highlighting the importance of the benefits, especially at the tertiary level, in attracting and retaining staff members. Likewise, the UNDT did not consider the principles underlying education benefits, including the need to ensure re-assimilation in home countries as provided for under Regulation 3.2(a). Nor did the UNDT consider the disruptive effects arising from the discontinuation of these benefits on the children's education. Two of the Appellant's three sons were affected directly by the decision which came into effect on 1 January 2018. Her son T was in his second year of university in the United Kingdom and had been receiving boarding and travel related benefits since the 2016-2017 academic year. Her son C commenced University in September 2018 in the United Kingdom and was subsequently in need of boarding assistance. The Appellant says that she should not be expected to move her sons to a university or school in Austria where she is based and, as an internationally recruited staff member, has a legitimate expectation to receive the Organisation's full support in this regard. She says that the ICSC has previously highlighted the need to minimise any disruptive consequences resulting from a change in the implementation of the education grant.

26. The Appellant says that even under the new scheme, the ICSC has indicated that different arrangements might apply where there are no adequate educational institutions available within commuting distance or where frequent/urgent requirements for the staff member to relocate would disrupt the education of the child. The disruptive effects of the withdrawal of travel and boarding benefits were precisely what triggered her request, but the Administration failed to exercise due care and to consider the potential negative

[7] *Ibid.*, para. 51.
[8] Report of the ICSC for the year 2015, A/7/30, para. 111.

consequences when implementing the new scheme. She says it also failed to put in place transitional measures to mitigate the impact of the recent amendments.

27. Finally, the Appellant notes that Section 2(7) of ST/AI/2018/1[9] recognises the disruptive effects of the abrupt discontinuation of boarding assistance and provides for transitional measures. It would be absurd and discriminatory to exclude the Appellant from the scope of these measures since the purpose is to avoid the disruption to children's education.

28. The Appellant invites this Tribunal to vacate the UNDT Judgement and to rescind the decision not to grant her education benefits in respect of her two dependent children.

The Respondent's Answer

29. The Respondent says first that the UNDT correctly dismissed the application, finding that the Organisation did not have authority to grant an exception to the Appellant. He relies on GA Resolution 70/244 and Staff Regulation 3.2. Paragraphs 29 and 30 of Section III of Resolution 70/244 provide that boarding related expenses should be paid by a lump sum "only to staff serving in field locations whose children are boarding to attend school outside the duty station at the primary or secondary level, that, in exceptional cases, boarding assistance should be granted to staff at category H duty stations under the discretionary authority of executive heads", and that "round trip education grant travel between the staff member's duty station and the location of study should be provided for each academic year for a child of staff in receipt of assistance with boarding expenses".

30. In accordance with paragraphs 29 and 30 above, the Secretary-General amended Staff Regulation 3.2, which amendment came into effect on 1 January 2018. The relevant extracts of Regulation 3.2(a) and (b) provide that:

> … travel costs for the child of a staff member in receipt of assistance with boarding expenses and attending school at the primary and secondary levels may also be paid for an outward and return journey once in each scholastic year between the educational institution and the duty station …

[9] Administrative instruction ST/AI/2018/1 titled "Education grant and related benefits" dated 1 January 2018, subsequently superseded by ST/AI/2018/1/Rev.1 dated 6 September 2018.

> … assistance for boarding-related expenses shall be provided to staff members serving in duty stations other than those classified as headquarters duty stations and whose children are boarding to attend school outside the duty station at the primary and secondary levels, at an amount approved by the General Assembly. The Secretary-General may establish conditions under which boarding assistance may exceptionally be granted to staff members serving at headquarters duty stations whose children are boarding to attend school outside the duty station at the primary and secondary levels.

31. The Respondent says that in reviewing the lawfulness of the contested decision, the UNDT considered correctly that the Administration had applied the foregoing framework to determine the Appellant's entitlement to payment for boarding and travel expenses for her two dependent children. It noted in its Judgement that, at the time of her application, one of the Appellant's dependents was in his second year at a university in the United Kingdom and the other dependent was to commence university in the UK in September 2018. Accordingly, the Respondent says that the UNDT determined that the Appellant was requesting payment of boarding and travel expenses for her two dependents attending tertiary level education. Having found that GA Resolution 70/244 and Staff Regulation 3.2 no longer covered boarding and travel expenses for tertiary education and that the Secretary-General's discretionary authority to grant an exception was limited to situations of children attending primary and secondary level schools, the UNDT concluded correctly that the Appellant's requests had been properly declined and that the Administration did not have authority to grant an exception.

32. The Respondent says that the Appellant has failed to demonstrate any error by the UNDT warranting a reversal of its Judgment. In particular, the UNDT did not err in concluding that the Administration lacked discretion to grant an exception from the new rules. That was for several reasons. First, entitlement depends on the staff member serving at a field station location and is only in respect of children attending primary or secondary schooling. The second element just mentioned must apply, even if an exception can otherwise be permitted in relation to headquarters staff. Second, the legal framework excludes completely allowances in respect of children attending other than primary and secondary schooling. The absence of any express language allowing such an extension is significant when there is express reference only to the two levels of schooling. Third, the Respondent submits that the fact that staff at headquarters locations were entitled to boarding and travel allowances before 1 January 2018 regardless of educational level does not

mean that the same interpretation of the new regime should be applied. Fourth, the ICSC 2015 Report, in paragraph 113, shows an intention that boarding and travel assistance for tertiary student dependents should be discontinued. In any event, the legal framework is set out in the GA Resolutions and Staff Regulations and not in the views of the ICSC in its reports. If there is a conflict between the former and the latter, the former must prevail.

33. The Appellant serves at a headquarters location and requests boarding and travel allowances for her two children attending tertiary education in another country. Her request falls outside the applicable criteria and there is no discretion vested in the Administration to allow that request.

34. There is nothing in the Appellant's argument that the UNDT wrongly lumped all three separate allowances into one single benefit. Even if the UNDT did err, it has not been shown by the Appellant that this has resulted in a manifestly unreasonable decision, in terms of Article 2(1)(e) of the Statute of the United Nations Appeals Tribunal.

35. The UNDT addressed correctly the law on acquired rights as that affects the Appellant's case, namely that a right can only be an acquired right if it is a right that has already vested in the claimant. Her claimed rights cannot be categorised as fundamental to her work and working relationship with the Administration, that is, an exchange of work for salary. The UNDT applied appropriately the Judgment of this Tribunal in *Lloret Alcañiz et al.* Promises to pay prospective benefits are not acquired rights; rather, acquired rights are vested rights. A vested right is a right already acquired for services rendered.

36. As to the Appellant's case of unlawful retroactivity of the new regime which she says discontinued boarding and travel assistance in the midst of one of her sons' scholastic year, the Respondent says that the new regime was expressed to be applicable from 1 January 2018 so that any travel or boarding costs incurred after that date were not reimbursable.

37. The Respondent submits that the Appellant's advancement of her acquired rights argument is simply the repetition of the same argument put to, and rejected by, the UNDT and is thus not able to be made again.

38. The payment of these allowances cannot be a fundamental or essential element of the Appellant's employment because she was still receiving an allowance for her son's tuition fees at the time of her request: that is because these benefits were "assistive" and extraneous to the central core of her work and working relationship with the Organisation.

39. The Respondent asks this Tribunal to uphold the UNDT's Judgment and to dismiss Ms. Nicholas's appeal.

Considerations

40. We can and do deal first and briefly with the Respondent's argument summarised at paragraph 37 above, that is, that the Appellant is not permitted to re-run arguments that were unsuccessful below. Such arguments were made at first instance (indeed those are the only ones we are entitled to consider) and were decided against the Appellant. But she says that those decisions were wrong and advances reasons why that was so. Indeed, some of the reasoning behind some of those decisions raises important points of law for decision on largely agreed facts. That is the essence of an appeal and we reject that categorisation of the Appellant's case.

41. We turn to the first limb of the appeal, the contention that the UNDT's identification of the nature of the benefit(s) was contradictory and erroneous. Whatever may have been the pre-2018 arrangements, the changes commencing that year created a benefit comprising different constituents depending on the circumstances of the staff member and his or her dependent children. The UNDT did not err in describing Ms. Nicholas's benefit as being received by her at a lesser level. This was a shorthand description of the fact that she received some reimbursement of her sons' education costs, but of lesser sums than she had previously or would have been entitled to receive had the 2018 changes not been made. This description of the effects of the changes can make no difference to the decision of the UNDT or its reasoning.

42. As to the Appellant's point about the reductions in benefits making her sons' reassimilation more difficult (a consideration under Staff Regulation 3.2), we acknowledge that this may be an unfortunate effect of the changes, but that is only one of a number of considerations that the Organisation has to apply in a balancing exercise in which it has

elected to retain provision for younger dependent children for whom this is an arguably more significant consideration than for tertiary age students. This ground of appeal is unavailing.

43. Next, we address the Appellant's argument that transitional arrangements as recommended by the ICSC Report should have been put in place. The General Assembly, although cognisant of the comprehensive and arguably staff-supportive recommendations of the ICSC Report in this regard, elected not to make temporal transitional arrangements for any gradual implementation of the changes other than to postpone them to the start of the school year in which 1 January 2018 fell. The UNDT did not err in reaching these conclusions.

44. Interpreting Staff Regulation 3.2 (and assuming its alignment with and adherence to GA Resolution 70/244), there is no express exclusion of benefits that had applied previously. It is, however, a clear and necessary implication of the expressed changes that these were to be foregone or altered. Several of the new provisions are inconsistent with their predecessors and would therefore have to prevail.

45. The ICSC Report having been before it, it cannot be said that because the General Assembly did not follow all the Report's recommendations, the changes are invalid. The clear implication is that the General Assembly chose, for the United Nations which was only one of the organisations affected by the Report, to adopt some but not all the recommendations and also implemented other changes to suit its operations.

46. We do not agree that the UNDT erred by finding against the Appellant's argument that the changes had retroactive effect. Staff were on notice of the changes for a significant period before they came into effect and also of how they would do so. The changes did not occur as and from 1 January 2018. They came into effect from the start of the scholastic year in which that date fell which, in many cases including Ms. Nicholas's sons', were several months into that year. The changes did not have retroactive effect in the sense that they deprived the Appellant of something to which she had already become entitled, certainly of something of which she was unaware she would not be entitled.

47. We turn now to what we categorise as the first major argument for the Appellant, that is that the changes contravene her "acquired rights" and so are unlawful in her circumstances. This requires an examination of what amounts to acquired rights, whether the Appellant has these in all the circumstances and, if so, what is the consequence of her deprivation of them.

48. The current leading case in this jurisdiction is *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840. Although on some elements of the Judgment the Appeals Tribunal was divided, on the following the Judges (a full bench) were unanimous. Disputed issues of acquired rights stem from Staff Regulation 12 which itself emanated from UN Resolution 13(I) adopted as long ago as 1946. Staff Regulation 12.1 purports to allow the General Assembly to amend or supplement those Regulations where it does so "without prejudice to the acquired rights of staff members". The point also includes whether, if the GA by resolution allows the Secretary-General to make changes to the Staff Regulations which resolution is sufficiently explicit, this purported prohibition upon reducing acquired rights can be negated or overridden.

49. The Appeals Tribunal approached the question of what it described as "normative conflict" between GA resolutions (and thereby their application in Staff Regulations) by applying rules of statutory interpretation. These include that enactments are not presumed to alter existing law more than necessary; alterations to existing and established provisions can only be effected by a clear expression of such an intention; an enactment must be interpreted in light of the existing law and its provisions must, as far as possible, be reconciled with related precepts of existing statutory instruments; the new provisions must be construed so that they can co-exist with other current related provisions in other instruments (the foregoing is a presumption that is rebuttable, either expressly or necessarily implicitly); and, if there is an irreconcilable conflict between existing or former, and new instruments, the later statutory instrument, or a provision thereof, may be interpreted as repealing an earlier provision only where that intention is explicit or is a necessary inference from the later instrument. It did not err in law in adopting these approaches.

50. So, as the *Lloret Alcañiz* Judgment states at paragraph 82: "Any protection of contractual rights of staff members in earlier resolutions would have to yield, as a matter of general principle and doctrine, to an evident intention by the General Assembly, the sovereign lawmaker in the United Nations system, to amend those rights or to substitute them with others. Any normative conflict would have to be decided in favour of the later resolution".

51. That brings us, therefore, to consider whether there is such a normative conflict in this case. If so, then applying the rules of statutory interpretation, the later provision will trump the earlier one and then the new rules apply to Ms. Nicholas's circumstances.

If not, then we will need to consider whether Ms. Nicholas's position can be saved by an assertion of acquired rights.

52. Although not expressly, we conclude that, so far as eligibility as of right for tertiary level boarding and travel allowances is concerned, there is no conflict between the pre-and post-1 January 2018 Staff Regulations on this issue. Ms. Nicholas was entitled to these allowances previously, whereas it appears that she is now not so entitled and this is the view that the Administration has taken and applied. Otherwise than in exceptional circumstances warranting the exercise of a discretion which important issue we address subsequently, the relevant new Staff Regulations based on the GA Resolution exclude by strong implication an ongoing entitlement as of right to the provision of reimbursements for boarding and travel allowances for dependent children attending tertiary education. So, it follows that, unless she is entitled to, and can, establish exceptional circumstances as a category H post-holder, Ms. Nicholas can only show that the UNDT erred if she is able to assert an acquired right to these particular benefits.

53. Whether Ms. Nicholas has an acquired right to the benefits to which the Administration says she is now not entitled begs the question, what is an acquired right of employment of a UN staff member? Recourse to the *Lloret Alcañiz et al.* Judgment is again instructive. That Judgment concluded that the phrase in general "evades common or exact definition".[10] So, it must be construed in the context of UN employment, but acquired rights are to be distinguished from contractual rights. The former may include the latter but are also a bundle of enhanced employment contractual rights.

54. The Appeals Tribunal in *Lloret Alcañiz et al.* confirms that an acquired right must be a right that has vested. In relation to base salary (not the issue in this case), that was held to be in respect of pay for services already rendered. While promises to pay prospective benefits may constitute contractual promises, they do not become acquired rights until such time as the *quid pro quo* for the promise has been performed or earned. Acquired rights were also described as "an aspect of the doctrine of non-retroactivity", the aim of the doctrine adopted

[10] *Lloret Alcañiz et al. v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-840, para. 86.

by the UN as long ago as 1946 being to "protect individuals from harm to their vested entitlements caused by retrospective statutory instruments".[11]

55. An entitlement to reimbursing allowances for expenses incurred in educating dependent children falls arguably into a different category than regular payments of base salary for work that has been performed. Arrangements have been made, in Ms. Nicholas's case, for her elder son to undertake a university course of study of several years' duration. As her son is her dependent, she expected to pay these costs which included for tuition, boarding and some travel from and to the family's home at a UN location in another country.

56. The benefits flowing to a staff member of the United Nations in return for providing his or her services (work) comprise not merely a base salary but a wider bundle of benefits including salary but also other compensations depending on the circumstances of the staff member and the role held. Those other benefits in the bundle include, by way of example but not exclusively, the right to participate in a generous pension scheme, the employer's contributions to that pension scheme and, where a staff member living away from his or her home country has dependent children of educatable age, assistance with the costs attaching to that education. Together these constitute the remuneration for the particular role accepted and performed. It is axiomatic that a person contemplating a UN staff appointment (or transfer), certainly in a permanent position as Ms. Nicholas is in, will weigh up all the contents of that remuneration bundle as well as numerous other factors about the role and their personal lives, before deciding to accept a particular role. We note again here that the UNDT was at least sceptical of the Appellant's claim that she would not have taken the role she did had she known that her sons' education costs would not be met as they would have been under the pre- 1 January 2018 rules. We are not aware of what, if any, evidence was provided to enable the UNDT to doubt, or even disbelieve, the Appellant but we can accept that a careful staff member making a considered and significant decision in her circumstances may well have made it significantly in reliance on that understanding. While such a consideration need not be the sole or even a predominant factor in electing to take up a role, the effects of doing so on one's children and their education will doubtless be an important factor.

[11] *Ibid.*, para. 91.

57. However, the 2017 publicity among staff of whom Ms. Nicholas was a member about the 2018 changes that was issued by the Organisation had the effect of negating any acquired right to those allowances which it signaled were to be cancelled with effect more than a year later. That conclusion tends to be reinforced by the chronology of relevant events in 2017. Shortly after that publicity was circulated, Ms. Nicholas applied first for consideration of her "exceptional circumstances" in reliance on paragraph 29 of the GA Resolution. That tends to indicate that she had, by then, become aware of the Administration's view of the nature and scope of the changes to the Staff Regulations.

58. In these circumstances, we conclude that the UNDT did not err in deciding that Ms. Nicholas did not have an acquired right in all the previous education benefits she had enjoyed.

59. The final ground pleaded for the Appellant that the UNDT erred in law by concluding that the Respondent had no discretionary power to grant the reimbursements she sought caused us to consider carefully and in detail the lawfulness of the process by which Staff Regulation 3.2 in its post 1 January 2018 form came into being. That the UNDT applied Staff Regulation 3.2 as it is worded is not the end of the matter. That is because new Staff Regulation 3.2(b) did not easily appear to conform to paragraph 29 of GA Resolution 70/244.

60. We accept that the UNDT interpreted and applied correctly Staff Regulation 3.2 as it is now written. The question is, however (and the UNDT did not consider this), whether the Staff Regulation relied on by the UNDT was *intra vires* the Secretary-General. Because this appeal has raised this serious question, we will address it in some detail.

61. Was the relevant provision of GA Resolution 70/244 as unequivocal as it might have been? We have concluded that it was not, at least on its face. Paragraph 29, which triggered the amendments to Staff Regulation 3.2, is as follows:

> *Also decides* that boarding-related expenses should be paid by a lump sum of 5,000 United States dollars, and only to staff serving in field locations whose children are boarding to attend school outside the duty station at the primary or secondary level, and that, in exceptional cases, boarding assistance should be granted to staff at category H duty stations under the discretionary authority of executive heads.

62. Paragraph 29 consists of a long and continuous sentence that appears to deal with two separate concepts. The first concept addresses the reimbursement of up to USD 5,000 of boarding-related expenses incurred by staff "serving in field locations" in respect of children engaged in education at a primary or secondary level.

63. It is the second part of the sentence that invites differing interpretations. This uses the phrase "boarding assistance" which differs from the phrase used earlier in the paragraph "boarding-related expenses". Further, in "exceptional cases", it encourages (by the use of the word "should") such provision for staff at "category H duty stations" "under the discretionary authority of executive heads". It does not define what is "boarding assistance" if that differs from "boarding-related expenses" of USD 5,000 in a lump sum as defined earlier in the sentence. Nor does it give any guidance of the discretionary factors that executive heads should apply under their authorities to determine whether a staff member can establish "exceptional" circumstances.

64. In these circumstances we considered relevant extraneous materials. First was Staff Regulation 3.2, which was intended to be changed, but which in its pre-1 January 2018 form was materially as follows:

> (a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. The grant shall be payable in respect of the child up to the end of the fourth year of post-secondary studies. The amount of the grant per scholastic year for each child shall be 75 per cent of the admissible educational expenses actually incurred, subject to a maximum grant as approved by the General Assembly. Travel costs of the child may also be paid for an outward and return journey once in each scholastic year between the educational institution and the duty station, except that in the case of staff members serving at designated duty stations where schools do not exist that provide schooling in the language or in the cultural tradition desired by staff members for their children, such travel costs may be paid twice in the year in which the staff member is not entitled to home leave. Such travel shall be by a route approved by the Secretary-General but not in an amount exceeding the cost of such a journey between the home country and the duty station;

> (b) The Secretary-General shall also establish terms and conditions under which, at designated duty stations, an additional amount of 100 per cent of boarding costs subject to a maximum amount per year as approved by the General Assembly may be paid in respect of children in school attendance at the primary and secondary levels.

65. Relevant provisions of this allowed Ms. Nicholas to claim not only reimbursement of a proportion of her elder son's tuition fees, but also boarding and travel allowances in respect of his university education which was within the first four years of his post-secondary studies. There is no dispute about her entitlement to do so. Further, her entitlement to travel costs was dependent on her entitlement to a contribution to boarding costs.

66. Next, we considered the comprehensive 2015 ICSC Report which was considered by the General Assembly before it enacted Resolution 70/244. That Report dealt with these issues at Chapter VII. E "Education grant". With the aim, in significant part, of attracting and retaining staff, it recommended retaining tertiary education level benefits within the reimbursement scheme. It recommended retaining such a scheme for reimbursement of tuition fees but suggested that boarding fee support be dealt with under a separate scheme. This would compensate field staff for boarding fees at a flat rate for primary and secondary level children, with organisations having the ability to provide boarding support to staff in H category duty stations under "certain conditions". It proposed that boarding fee support be abolished for tertiary level education but at the same time that remaining support arrangements for tertiary level students be updated and their maximum duration clarified.

67. At Chapter VI. D, the Report dealt with "Acquired rights and transitional measures". Addressing these considerations that might be relevant to reconsideration by the United Nations of its relevant arrangements, the Report emphasised that any changes should not be "arbitrary" and that an organisation's paramount consideration should be the necessity to secure the highest standards of efficiency, competence and integrity: Article 101 of the Charter of the United Nations. The effect of changes should not be "so draconian as to undermine the very functioning and health of the international civil service system". As to "acquired rights" which the Report defined as arising from an employee's contract or service and accrued through service, the Report noted that even if a change to an organisation's rules did not breach acquired rights, an organisation might consider allowing staff members to continue to take advantage, for a period of time, of the benefits to which they had been entitled prior to the amendment. This was termed in the Report a "transitional measure", or

might also be termed "grandfathering". Various ways of defining such transitional arrangements were set out. The phrase "good employer practice" was also referred to in relation to considerations of such transitional arrangements. In relation to transitional arrangements for education grants, the Report counselled against prolonged simultaneous operation of old and new schemes, suggesting that any temporal transition arrangement be concluded no longer than one school year after changes came into effect.

68. Lest there be any confusion about the significance of the ISCS Report, we emphasise that the foregoing is only set out for context in interpreting the General Assembly's changes to the scheme which it directed the Secretary-General to make through amendments to the Staff Regulations. Where the GA's intentions are clear, and in particular, the GA did not intend to follow all the ICSC's recommendations, they must prevail over those recommendations of which the GA took account.

69. Next in this analytical sequence is paragraph 29 of GA Resolution 70/244. For convenience and because it is at the heart of this case, we set it out again. It is:

> *Also decides* that boarding-related expenses should be paid by a lump sum of 5,000 United States dollars, and only to staff serving in field locations whose children are boarding to attend school outside the duty station at the primary or secondary level, and that, in exceptional cases, boarding assistance should be granted to staff at category H duty stations under the discretionary authority of executive heads.

70. Where the General Assembly in its legislative function uses different terminology to describe or define separately defined regimes, it is an indication that it may have intended to provide for two regimes with different benefits available under each. As this was done in paragrah 29, it also lends support to the argument for the Appellant that the GA intended one boarding benefit to be available as of right to some staff, and another sort of benefit to be available in exceptional circumstances to a narrower class of staff. The argument is that "boarding-related expenses" paid in a set lump sum for primary and secondary education was intended for the first category. "Boarding assistance" (not otherwise defined) was to be provided "in exceptional cases" for staff at H duty stations at the discretion of the executive heads but was not, expressly or impliedly, limited to primary and secondary education.

71. Taking account of the previous regime for reimbursement of educational expenses of dependent children and of the ICSC Report which, although not followed in all respects, clearly influenced the General Assembly's passing of Resolution 70/244, we considered whether the GA intended, in the last two lines of paragraph 29 of that Resolution, to allow instead of universal transitional arrangements, for exceptional circumstances to be considered on a case by case basis to alleviate any hardships or anomalies for staff whose situations spanned the pre- and post-2018 regimes.

72. Any question of Ms. Nicholas's access to a discretionary consideration of her claims on exceptional circumstances' grounds was settled, however, by the General Assembly's ratification of the Secretary-General's proposed amendments to, *inter alia*, Staff Regulation 3.2. These were reported to the General Assembly by the Secretary-General on 24 July 2017 under A/72/129/Rev.1. On 24 December 2017, the General Assembly approved the Secretary-General's proposed amendments including to Staff Regulation 3.2 as it now stands. That approval is recorded in document A/RES/72/254. Any equivocality in paragraph 29 of Resolution 70/244 and argument of non-compliance with that in the new Staff Regulation 3.2 cannot be maintained in view of the General Asembly's approval of the new Staff Regulation 3.2, which provides materially:

> (a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. The grant shall be payable in respect of the child up to the end of the school year in which the child completes four years of postsecondary studies or attains a first post-secondary degree, whichever comes first, subject to the upper age limit of 25 years. Admissible expenses actually incurred shall be reimbursed based on a sliding scale, subject to a maximum grant as approved by the General Assembly. Under conditions established by the Secretary-General, travel costs for the child of a staff member in receipt of assistance with boarding expenses and attending school at the primary and secondary levels may also be paid for an outward and return journey once in each scholastic year between the educational institution and the duty station. Such travel shall be by a route approved by the Secretary-General but not in an amount exceeding the cost of such a journey between the home country and the duty station;

> (b) Under conditions established by the Secretary-General, assistance for boarding-related expenses shall be provided to staff members serving in duty stations other than those classified as headquarters duty stations and whose children are boarding to attend school outside the duty station at the primary and secondary levels, at an amount approved by the General Assembly. The Secretary-General may establish conditions under which boarding assistance may exceptionally be granted to staff members serving at headquarters duty stations whose children are boarding to attend school outside the duty station at the primary and secondary levels.

73. The last four lines of (b) set out immediately above address directly and unequivocally the exclusion of any boarding claims for dependent tertiary students in circumstances such as Ms. Nicholas's.

74. None of the Appellant's grounds of appeal succeeds and it must be, and is, dismissed. The UNDT's Judgment is affirmed.

Judgment

75. We dismiss the appeal and affirm the UNDT's Judgment in UNDT/2020/039.

Original and Authoritative Version: English

Dated this 30th day of October 2020.

(Signed)	*(Signed)*	*(Signed)*
Judge Colgan, Presiding Auckland, New Zealand	Judge Halfeld Juiz de Fora, Brazil	Judge Sandhu Vancouver, Canada

Entered in the Register on this 24th day of November 2020 in New York, United States.

(Signed)

Weicheng Lin, Registrar