



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CASTELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant is a Policy and Best Practices Officer at the P-4 level. He is employed with the United Nations Interim Force in Lebanon (UNIFIL) on a continuous appointment. He filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 25 April 2017 contesting the decisions not to pay an education grant and reimbursement for mother tongue tuition expenses in respect of his son (the contested decisions).

2. The Respondent filed a reply to the application on 2 June 2017 in which he made arguments on the receivability of the application and the merits of the applicant's claims.

3. The Tribunal found the application receivable in Judgment No. UNDT/2017/069.

4. By Order No. 150 (NBI/2017), the Tribunal informed the parties of its decision not to hold a hearing and provided them with the opportunity to provide additional evidence. The parties provided the supplemental evidence on 21 September 2017.

Relevant factual background

5. The Applicant serves on a continuous appointment as a Policy and Best Practices Officer with UNIFIL at the P-4 level in Naqoura, Lebanon. He has two dependent children, a daughter born in August 2007 and a son born in August 2011.

6. At the beginning of the 2015-2016 school year, the Applicant's daughter was eight years old and his son was four years old. They both attended the same school in Beirut.

7. The Applicant submitted an education grant claim for both of his children for the 2015-2016 school year to the UNIFIL Human Resources Management Section (HRMS) on 23 June 2016.

8. On 28 June 2016, UNIFIL HRMS informed the Applicant that the claim in respect of his son was denied because the child was below the age of five during the 2015-2016 school year. In the same communication, UNIFIL HRMS informed the Applicant that claims for children younger than five are only accepted where the location mandates school attendance at an earlier age.

9. On 29 June 2016, the Applicant sent UNIFIL HRMS an unofficial translation of a Lebanese government decree, Decree 5046. The Decree stated that the commencement of kindergarten level education can be three years, but it did not mention a mandatory commencement age of enrollment. On the same day, UNIFIL HRMS informed the Applicant that the issue of the lower minimum eligibility age was being referred to the Field Personnel Division (FPD), Department of Field Support (DFS), at United Nations Headquarters for review.

10. On 7 July 2016, the education grant claim for the Applicant's daughter was approved.

11. On 17 August 2016, the Applicant requested reimbursement of mother tongue tuition fees for both his children.

12. After consultation with the Office of Human Resources Management (OHRM), FPD/DFS advised UNIFIL HRMS that ST/AI/2011/4/Amend. 1 authorizes a lower minimum eligibility age for education grant if the laws at a specific location **mandate** an earlier start of formal education (emphasis in original). However, the decree submitted by the Applicant did not state or declare that the Ministry of Education **mandated** all children in Lebanon to start school at the age of three (emphasis in original). Rather, the decree recommended that the length of the curriculum of early childhood education be extended for an additional year, from age three, since early childhood education was beneficial.

13. On 26 August 2016, UNIFIL HRMS informed the Applicant that the claim for an education grant in respect of his son was denied. The reason adduced was that the claim did not fall within the exception for a lower enrollment age and that the age for compulsory school attendance in Lebanon was six years of age.

14. On 27 September 2016, UNIFIL HRMS informed the Applicant the reimbursement for mother tongue tuition expenses had been processed for his daughter but denied for his son for the 2015-2016 school year. The reason provided was that this expense was a component of the education grant to which the Applicant was not entitled due to his son's age.

15. On 17 October 2016, the Applicant requested management evaluation of the contested decisions.

16. On 26 October 2016, UNIFIL sent a *note verbale* to the Lebanese Ministry of Foreign Affairs and Emigrants seeking clarification concerning the mandatory age of formal education as well as the start and end of the Lebanese school year.

17. On 19 December 2016, the Lebanese Ministry of Foreign Affairs and Emigrants responded with a letter from the Ministry of Education and Higher Education stating the compulsory school start age was six years of age and the school year in Lebanon starts at the beginning of the month of September and ends in the last week of the month of June.

18. On 2 February 2017, the Applicant received the management evaluation outcome upholding the contested decisions.

Submissions

Applicant's submissions

19. The Applicant's case on his education grant claim is as follows:

- a. His son was four years old at the beginning of the 2015/2016 school year for which he requested education grant and mother tongue tuition expenses. When he submitted the said requests, he relied firstly on section 2(a) of ST/AI/2011/4/Amend. 1 (Education grant and special education grant for children with a disability), which provides in part: "Exceptionally, a lower minimum eligibility age for receipt of the education grant could be accepted if laws at a specific location mandated an earlier start of formal education." He relied also on the Lebanese Government Decree 5046, which

mandates an earlier start of formal education in Lebanon (i.e. three years of age or older).

b. Pursuant to the Lebanese Government Decree 5046, children aged 3 or older attend kindergarten and since kindergarten is part of “formal education”, which is characterized by a classroom-based education provided by a professional teacher, the exception mentioned in section 2(a) is applicable.

c. UNIFIL HRMS narrowly interpreted the word “mandated” in section 2(a) of ST/AI/2011/4/Amend.1 and erroneously rejected Decree 5046 because it did not specifically use the word “mandate”. The Decree however expresses the same concept even though it uses different expressions and/or words.

d. None of the evidence provided by UNIFIL HRMS in its response of 26 August 2016 qualifies as law contrary to ST/AI/2011/4/Amend. 1. However, one of these documents supported his argument that Lebanese children enter primary school at the age of 3 or 4.

e. ST/AI/2011/4/Amend. 1 refers to “formal education” whereas the letter from the Lebanese Ministry of Education and Higher Education refers to “compulsory education”. Formal education and compulsory education are two distinct aspects of an educational system and should not be used interchangeably as the response from MEU seems to indicate.

f. Formal education differs from primary education in that primary education is part of formal education, while formal education is a broader concept that includes other types of formal classes such as kindergarten and secondary school. ST/AI/2011/4/Amend. 1 was not intended to limit education grant to primary school just because it refers to “formal education”; the AI clearly indicates that a five-year-old child attending kindergarten is indeed in formal education; and if UNIFIL HRMS’ substitution of “formal education” with “compulsory education” is accepted, then education grant would not be payable in respect of university

expenses given that typically university education is not compulsory in most jurisdictions.

g. The principal period referred to in MEU's response is the one covering "primary school". However, primary education is part of formal education, while formal education is a broader concept that includes other types of formal classes such as kindergarten and secondary school. By referring to "formal education" instead of "primary school", the intent of ST/AI/2011/4/Amend. 1 was not to limit the payment of education grant for primary school. Thus, age rather than type of institution attended should characterize the meaning of formal education. Hence MEU erred in its determination that since education grant starts at the primary level, his claim for preschool education is not covered by the Organization.

h. UNIFIL's request to the Ministry of Foreign Affairs and Emigrants for clarification was sent after UNIFIL had communicated the contested decisions to him and after he had submitted his management evaluation request. Thus, he was unable to include his views on the Ministry's response in his management evaluation request.

20. The Applicant's case on his claim for tuition in mother tongue reimbursement is as follows:

a. He has met the three requirements set out in section 3.4 of ST/AI/2011/4/Amend. 1.

b. UNIFIL HRMS erroneously relied on advice received from colleagues at FPD and OHRM when these colleagues either had little knowledge of his case or did not have the necessary authority to decide.

c. Should the Tribunal decide that an education grant is payable under the exception of ST/AI/2011/4/Amend. 1, then payment for mother tongue reimbursement should also be inferred. Age should not be deemed as a factor for the payment of mother-tongue reimbursement because section 3.4 does not make it a requirement.

21. The Applicant submits that the language contained in the 26 August 2016 email was so ambiguous that he could only infer that a decision had been taken. Additionally, the identity of the person who took the decision is unclear from the email. This contravenes ST/SGB/2005/7 (Designation of staff members performing significant functions in the management of financial, human and physical resources) and *Calvani* UNDT/2009/092, which held that “an administrative decision is unlawful if the author of the decision cannot be clearly identified.” In this respect, he requests that the Tribunal determine “whether the decisions made by UNIFIL HR were properly served as administrative decisions and if not, to determine which elements are required by the Administration when serving a decision.”

22. The Applicant also requests the Tribunal to determine whether “a staff member has a right to read and review new documentation that the Administration provides to MEU, whether MEU fully discharged its role as an objective evaluator, and whether standards applied in [his] case put [him] at a disadvantage.”

23. The Applicant seeks the following remedies:

- a. Payment of the education grant and mother-tongue tuition claims for his son for the 2015-2016 school year;
- b. Compensation for an unlawful decision that breached his rights and for procedural error;
- c. Compensation for stress and delay.

Respondent's submissions

24. The Respondent's case in relation to the education grant claim is as follows:

- a. The decision to deny the education grant claim was lawful because the Applicant was not entitled to this grant for his son. His son did not meet the requirements of section 2(a) of ST/AI/2011/4/Amend. 1 during the 2015-2016 school year. His son was four years old when the school year

began in September 2015 and he did not turn five until after the school year had ended in June 2016.

b. The Applicant's education grant claim did not fall under the exception of section 2 of ST/AI/2011/4/Amend. 1. The exception allows for a minimum eligibility age younger than five years if laws at a specific location mandate this but the Applicant failed to demonstrate that the Lebanese government mandates a compulsory enrolment in primary school earlier than age five.

c. Decree 5046 does not support the Applicant's contention that Lebanese law mandates compulsory enrolment in primary school earlier than age five. This decree merely extends the period during which a child may attend kindergarten from two years to three years if parents opt to enrol their children in kindergarten prior to age six. On the contrary, the Lebanese Ministry of Education's response of 19 December 2016 confirmed that the compulsory age of school enrolment in Lebanon is six years.

25. The Respondent further submits that the Administration lawfully denied the Applicant's claim for mother tongue tuition because this is not an entitlement which is separate from the education grant. Rather, it is one of the enumerated expenses that are reimbursed as part of the education grant entitlement. Thus, if a staff member is not eligible for education grant, he/she cannot be eligible for mother tongue tuition reimbursement. The education grant requirements must be fully satisfied first.

Issues

26. The Tribunal will examine the issues under the following headings:

a. Was the Applicant entitled to education grant for his son for the 2015/2016 school year? Was the Applicant entitled to mother tongue reimbursement for his son for the said 2015/2016 school year?

b. Were the decisions to deny the Applicant's claims for education grant and mother tongue reimbursement made in contravention of ST/SGB/2005/7 and the authority of *Calvani*?

c. Does a staff member have a right to read and review new documentation provided to the Management Evaluation Unit (MEU) by the Respondent? Was the Applicant at a disadvantage because he could not review the said new documentation? Did the MEU discharge its role as an objective evaluator?

Considerations

Was the Applicant entitled to education grant for his son for the 2015/2016 school year? Was the Applicant entitled to mother tongue reimbursement for his said son in the same 2015/2016 school year?

27. Eligibility for education grant is defined in staff rule 3.9 and section 1.1 of ST/AI/2011/4. Section 1.1 states: "Staff members who are regarded as international recruits under staff rule 4.5 and who hold a fixed-term, continuing or permanent appointment shall be eligible for the education grant in accordance with the provisions of staff rule 3.9 and the present instruction."

28. Section 2(a) of ST/AI/2011/4/Amend. 1 sets the conditions of entitlement as follows:

The child is in full-time attendance at an educational institution at the primary level or above while the staff member is in the service of the United Nations. Education shall be deemed 'primary' for the purposes of this instruction when the child is five years of age or older at the beginning of the school year, or when the child reaches age five within three months of the beginning of the school year. Exceptionally, a lower minimum eligibility age for receipt of the education grant could be accepted if laws at a specific location mandated an earlier start of formal education

29. The foregoing provision does not leave anyone in any doubt that the intentment of the lawmaker is that the eligibility of international staff members for education grant in respect of their school-going children was to be determined by

the conditions that: (a) the child must be in full-time attendance at school; and (b) the school attendance shall be at the primary level or above.

30. It is further explained in the provision that primary level education is recognized as such by the Organization when the school-going child is five years or older at the beginning of the school year or if the said child reaches five years within three months of the beginning of the said school year.

31. It also provides that in exceptional situations such as when the laws at a staff member's work location where he resides with his family mandate that a child's school attendance shall start earlier than the age of five years; the affected staff member would be entitled to education grant for the child. In providing for the entitlement of education grant in such exceptional situation, the expression 'formal education' was used.

32. It was the Applicant's case that the exceptional situation applied to him. His argument was that the Lebanese Government's Decree 5046 provided that it is compulsory that children attend kindergarten classes once they are three years old. He argued also that since kindergarten classes are part of formal education because they are taught by professional teachers and have a curriculum, he is entitled to education grant for his four-year old son in kindergarten.

33. He argued further that UNIFIL HRMS had interpreted the word "mandated" in section 2(a) of ST/AI/2011/4/Amend.1 rather narrowly and had therefore erroneously rejected the application of Decree 5046 which expresses the same concept although it does not use the word "mandate."

34. The Tribunal has carefully examined the provisions of the Decree 5046 issued by the Government of Lebanon in September 2010. In its article one, the said decree sought to amend certain previous decrees by enumerating the various levels of general pre-university education and the duration of each of these levels.

35. Under article one of that decree, the kindergarten level consisted of three classes and in the first class, the minimum age for admission was that the child had attained three years of age or would attain that age by 31 December of the year in which he/she is admitted. Under its article two, it was provided that another decree

would be issued showing the curriculum and educational activities of the kindergarten classes.

36. In view of the Applicant's position that he was entitled to education grant for his four-year-old son because, according to him, the laws in Lebanon made it compulsory for children to attend kindergarten when they are three years old; UNIFIL needed to be satisfied that kindergarten education was compulsory or mandatory under the laws of the Republic of Lebanon.

37. This was necessary because in normal circumstances, the staff member's education grant entitlement began only when the child for whom it is sought had attained five years or would attain it within three months of the beginning of the relevant school year and had started primary school.

38. On 26 October 2016, UNIFIL sent a *note verbale* to the Republic of Lebanon's Ministry of Foreign Affairs and Emigrants seeking information and clarification regarding the country's mandatory age for formal education thus:

The United Nations Interim Force in Lebanon (UNIFIL) presents its compliments to the Ministry of Foreign Affairs and Emigrants of the Republic of Lebanon and has the honour to request the Ministry for information related to the School System in Lebanon.

The Department of Management at the United Nations Headquarters in New York has, in order to ascertain entitlements of International Staff members of the United Nations Interim Force in Lebanon (UNIFIL), requested this office to obtain a statement from the Ministry of Education, indicating the mandatory age of formal education, and the start and end of the typical school year in Lebanon.

The United Nations Interim Force in Lebanon avails itself of this opportunity to renew to the Ministry of Foreign Affairs the assurances of its highest consideration.

39. The response from the Ministry of Foreign Affairs and Emigrants to UNIFIL's *note verbale* states in relevant part:

In reference to your letter stated in the abovementioned reference concerning the request sent by the United Nations Interim Force in Lebanon (UNIFIL) to obtain information about the Lebanese school regulations in relation to the compulsory official age limit of

education and the date of the starting and ending of the scholastic year,

The Directorate General of Education hereby declares the following:

- The decree number //11930// dated 23/05/2014 has set the age limit to enter the kindergarten to children who completed three years of age before and by the thirty first of January of the scholastic year to which the child should be associated with in that period (see attached a copy of the decree number 11930/2014).
- The compulsory education includes the principal education period consisting of the first year of the primary cycle till the ninth grade; the first year is attended by children who have completed six years of age by the thirty first of January of the scholastic year to which the student is associated with.
- The scholastic year starts at the beginning of the month of September and ends in the last week of the month of June.

40. It is clear from the response that compulsory or mandatory education in Lebanon starts from the primary school level, not kindergarten as claimed by the Applicant. Additionally, the age for a child to start primary education was six years or if the child was to attain that age by the end of January of the relevant academic year.

41. The Tribunal accordingly finds no merit in the Applicant's claim that under the education laws of Lebanon, it was mandatory or compulsory for his child to attend kindergarten classes or that he was entitled to education grant for his four-year old son because kindergarten is part of formal education.

42. The Tribunal agrees entirely with the submissions of the Respondent that the Applicant's education grant claim for his four-year old son did not fall under the exception of section 2 of ST/AI/2011/4 Amend 1.

43. As to the question of whether the Applicant was entitled to reimbursement for private tuition in the mother tongue for his said son, it is pertinent to have recourse to the relevant legislation.

44. In section 3 of ST/AI/2011/4, admissible and non-admissible educational expenses are set out in details. Private tuition in the mother tongue is an admissible educational expense under section 3.4 which provides:

3.4 Expenses for private tuition in the mother tongue of the staff member may be admissible when the following conditions are met:

(a) Private tuition is given by a qualified teacher certified in the language of instruction who is not a member of the staff member's family;

(b) The staff member serves in a country whose language is different from his or her mother tongue;

(c) The child attends a local school in which the instruction is given in a different language from the staff member's mother tongue.

45. The Respondent submitted that mother tongue tuition reimbursement is not an entitlement separate from the education grant. It is only one of the enumerated expenses that are reimbursed as part of the education grant. It follows that a staff member who is not eligible to receive education grant for a child may not receive reimbursement for mother tongue tuition or any other educational expenses that are reimbursable under the education grant. The requirements for entitlement to the education grant must first be fully satisfied.

46. In other words, since the Applicant was not entitled to an education grant for his four-year old son because the child had neither attained the age of primary education as set by the organization nor had he started primary education. He was not entitled to any reimbursement for private mother tongue tuition in respect of the same child. The claim for mother tongue tuition in respect of the same child was therefore rightfully denied.

47. The Tribunal agrees with the Respondent's submission regarding mother tongue tuition reimbursement. To the extent that the entitlement for private tuition in the mother tongue of the staff member is part and parcel of the education grant and not separate from it, the staff member can only be entitled to it where the child in respect of whom he makes the claim is one for whom he is entitled to an education grant.

Were the decisions to deny the Applicant education grant and mother tongue reimbursements in respect of his four-year old son made in contravention of ST/SGB/2005/7 and the Tribunal's jurisprudence as espoused in Calvani?

48. The Applicant had argued also that it is unclear as to who took the decision that he was not entitled to education grant or mother tongue reimbursement claims for his four-year old son and whether that person was vested with the necessary authority to make the decisions. He referred to ST/SGB/2005/7 (Designation of staff members performing significant functions in the management of financial, human and physical resources).

49. He additionally called attention to its paragraph 6 and continued that only a selected number of staff can take critical personnel responsibilities and that knowing the official who took the decision is essential. He referred also to the judgment in the case of *Calvani* and where it was held at paragraph 26 of the said judgment that “an administrative decision is unlawful if the author of the decision cannot be clearly identified.”

50. Regarding the Applicant’s claim that the author/s of the decisions to deny him education grant and mother tongue tuition reimbursements in respect of his under-age son was/were unknown and may not have had the authority to make the decisions, the Tribunal is of the view that the Applicant is merely engaging in speculation. In his pleadings, he stated that he did not know the name and title of the official who made the decisions, but named two staff members of UNIFIL HRMS as those who communicated the decisions to him.

51. In the same pleadings, the Applicant stated that he submitted his requests for education grant and mother tongue tuition to UNIFIL HRMS. He also stated that UNIFIL HRMS determined that he was not entitled to be reimbursed in respect of any of the two requests. Therefore, it is clear that the Applicant was never in any doubt that the decision to deny his requests was made by UNIFIL HRMS personnel. Is it the Applicant’s allegation that the author/s of the decisions was/were not competent to make the said decisions?

52. The legal principle of the presumption of regularity is part of the law of evidence and presumes that any action taken by administration is legal unless that

presumption is successfully rebutted by evidence.¹ The principle of regularity can be properly applied to the actions of the personnel of the administration of the United Nations in the performance of their official duties unless there is credible evidence to rebut the presumption. The Applicant has not led any such evidence.

53. The Applicant's reference to the judgment in *Calvani* is irrelevant to the instant case. The author of the decisions to refuse the request for education grant is not an issue in this case. The Applicant sent his request to UNIFIL HRMS and got a response from the same unit. He has not led any evidence to show that authority to make the decisions he complained about is vested entirely with a particular individual while another wrongfully exercised the said authority.

54. There is therefore no merit in the Applicant's claim that the denial of his requests for education grant and mother tongue reimbursements in respect of his four-year-old son were made by unauthorized personnel.

Does a staff member have a right to read and review new documentation provided to the Management Evaluation Unit (MEU) by the Respondent? Was the Applicant at a disadvantage because he could not review the said new documentation? Did the MEU discharge its role as an objective evaluator?

55. In his pleadings, the Applicant complained that the MEU used the contents of the *note verbale* sent by UNIFIL to the Lebanese Ministry of Foreign Affairs and Emigrants and the response from that country's Ministry of Education and Higher Education stating that the compulsory age for starting school in Lebanon was six years to make its determination.

56. The Applicant then submitted that the MEU ought to have allowed him to review the documents before using them in management evaluation. On this score, it is his case that the failure of the MEU to seek his views meant that it did not discharge its role as an objective evaluator and that he (Applicant) was placed at a

¹ Rolland 2011-UNAT-122; Landgraf 2014-UNAT-471; Tintukasiri 2015-UNAT-526; Zhao, Zhuang and Xie 2015-UNAT-536; Staedtler 2015-UNAT-547; Lemonnier 2017-UNAT-762; Smith 2017-UNAT-785.

disadvantage because he was not allowed to review the contents of the *note verbale* and the response of the Lebanese authorities.

57. The Respondent for his part did not join issues with the Applicant with regard to these issues.

58. It is pertinent to observe here that the purpose of management evaluation is the impartial and objective evaluation of an administrative decision contested by a staff member with a view to assessing whether the decision was made in accordance with the relevant rules and regulations. If rules and regulations were breached in making the contested decision, appropriate remedies for the concerned staff member ought to be proposed.

59. The exercise of management evaluation is thus designed to provide an opportunity for management to independently review a contested administrative decision and in recommending reliefs where appropriate reduces the need for further dispute and litigation.

60. While a request for management evaluation is a condition for approaching the Tribunal by a staff member, the mandate of the Tribunal does not include considering how management review was carried out. In other words, the Tribunal is mainly concerned with the legality or illegality of appealed administrative decisions, and does not adjudicate on the objectivity or impartiality of the process of management evaluation.

61. In view of the foregoing, this Tribunal cannot decide as to whether the Applicant ought to have been allowed during the management evaluation process to review any documents and whether failure to do so worked to his prejudice or indeed whether the management evaluation unit properly discharged its obligations to the Applicant.

Judgment

62. The Applications fails in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 4th day of April 2018

Entered in the Register on this 4th day of April 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi