UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/029
Judgment No.: UNDT/2020/039
Date: 10 March 2020
Original: English

Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

NICHOLAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Mohamed Abdou, OSLA

Counsel for Respondent:
Cornelius Fischer, UNOG

Introduction

1. By application filed on 29 March 2018, the Applicant, a Senior Legal Officer in the International Trade Law Division, Office of Legal Affairs, serving at the United Nations Office at Vienna ("UNOV"), challenges the decision not to pay boarding and travel related expenses for her two dependent children under the education grant scheme from January 2018.

Facts

2. The Applicant serves in Vienna, therefore outside her home country, where there is no adequate university-level education within commuting distance that her dependent children can attend. Indeed, her sons have been educated in English, and in an international education system that does not meet the requirements for admission to an Austrian university.

3. At the time of the Applicant's application, one of her sons, T., was in his second year at the University of Bath in the United Kingdom and was receiving boarding and travel related benefits since the 2016-2017 academic year.

4. Equally at that time, the younger son of the Applicant, C., was on the verge of commencing university in September 2018 in the United Kingdom and was in need of boarding assistance and travel related benefits starting with the 2018-2019 school year.

5. On 23 December 2015, the General Assembly adopted resolution 70/244 (United Nations common system: report of the International Civil Service Commission), which introduced, among other things, a revised education grant scheme as of the school year in progress on 1 January 2018 that excluded boarding assistance for children pursuing tertiary education.

6. By emails of 21 April and 8 June 2017, the Chief, Human Resources Management Service ("HRMS"), UNOV, informed UNOV staff members of the revised education grant scheme and the details of its implementation.

7. By email of 12 July 2017 to the Chief, HRMS, UNOV, the Applicant requested exceptional consideration of payment of boarding and travel expenses for her children, under para. 29 of resolution 70/244.

8. By email of 20 September 2017, the Chief, HRMS, UNOV informed the Applicant that her request for an exceptional payment could not be granted as boarding assistance for children pursuing tertiary education was not authorized by the education grant scheme, as provided in para. 29 of resolution 70/244.

9. On 18 November 2017, the Applicant requested management evaluation of the decision. Her request was rejected on 2 January 2018 on the ground that it was not receivable *ratione materiae*.

10. On 29 March 2018, the Applicant lodged the present application with the Tribunal. The Respondent filed his reply on 7 May 2018.

11. On 1 October 2019, the case was reassigned to the undersigned Judge.

12. By Order No. 104 (GVA/2019) of 26 November 2019, the parties were asked if they agreed with a judgment being rendered on the papers.

13. On 29 November 2019, the parties responded agreeing to the case being decided on the papers. Additionally, the Applicant requested an extension of time of the deadline to file her closing submission initially set to 6 December 2019. By Order No. 107 (GVA/2019) of 2 December 2019, the parties were allowed an extension of time to file closing submissions, which they did on 13 December 2019.

Consideration

Receivability

14. The Respondent contends that the Applicant seeks to challenge a regulatory decision of the General Assembly, which is not subject to judicial review and which left no room for discretion to the Secretary-General concerning its application. Consequently, the Respondent argues that the application is not receivable as the contested decision does not constitute an administrative decision subject to the Tribunal's review under art. 2.1 of its Statute.

15. The Applicant disagrees with the Respondent's argument and maintains that she is challenging an administrative decision within the meaning of art. 2.1 of the Tribunal's Statute.

16. Article 2.1 of the Tribunal's Statute provides in its relevant part that:

> The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:
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> (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance[.]

17. In *Lloret Alcañiz et al.* 2018-UNAT-840, the Appeals Tribunal specifically addressed the issue of receivability of applications contesting, directly or indirectly, regulatory decisions of the General Assembly. Like in the present case, the applicants in *Lloret Aclaniz et al.* argued that they were not challenging the decision of the General Assembly to introduce a new Unified Salary Scale but rather the implementation of this new scale by the Secretary-General in their individual cases, who failed to take into account their acquired rights. The applications were found to be receivable but reviewable only on limited grounds of "legality". The Appeals Tribunal's judgment, which is crucial for the determination of the present application, reads as follows on the issue of receivability (references omitted):

> 59. The jurisdiction of the UNDT is limited by Article 2(1) of the UNDT Statute to hearing appeals against "administrative decisions". This Tribunal has consistently held that where the General Assembly takes regulatory decisions, which leave no scope for the Secretary-General to exercise discretion, the Secretary-General's decision to execute such regulatory decisions, depending on the circumstances, may not constitute administrative decisions subject to judicial review. Discretionary powers are characterized by the element of choice that they confer on their holders. An administrator has discretion whenever the effective limits of his or her power leave him or her free to make a choice among possible courses of action and inaction. Only in cases where the implementation of the regulatory decision involves an exercise

of discretion by the Administration−including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria−is it subject to judicial review.

60. The Secretary-General maintains that his implementation of the General Assembly Resolutions introducing the Unified Salary Scale falls into this category of non-reviewable decisions. The Resolutions regarding the specific amounts to be paid to staff members were unambiguous and left no room for interpretation or any exercise of discretion by the Secretary-General. Consequently, he submits, the Respondents are in fact challenging the regulatory decisions themselves and not the implementation by the Secretary General. The Respondents contend in effect that the ambiguity arising from the normative conflict of the different resolutions brings into doubt the scope of application of the Unified Salary Scale and thus the legality of its implementation by the Secretary-General.

61. An administrative decision is a unilateral decision of an administrative nature taken by the administration involving the exercise of a power or the performance of a function in terms of a statutory instrument, which adversely affects the rights of another and produces direct legal consequences. A decision of an administrative nature is distinguished from other governmental action of a regulatory, legislative or executive nature.

62. Deciding what is and what is not a decision of an administrative nature may be difficult and must be done on a case-by-case basis and will depend on the circumstances, taking into account the variety and different contexts of decision-making in the Organization. The nature of the decision, the legal framework under which the decision was made, and the consequences of the decision are key determinants of whether the decision in question is an administrative decision. What matters is not so much the functionary who takes the decision as the nature of the function performed or the power exercised. The question is whether the task itself is administrative or not.

63. The Judges of the Appeals Tribunal differ on whether the UNDT had jurisdiction to receive the application. A minority of the Judges (Judges Knierim, Lussick and Thomas-Felix) accept the submission of the Secretary-General that the UNDT erred and exceeded its jurisdiction by accepting the Respondents' applications as receivable. In their opinion, there was no administrative decision affecting the terms of appointment or contracts of employment of the Respondents, as required by Article 2(1) of the UNDT Statute. The majority of Judges (Judge Murphy, Presiding and Judges Raikos and Halfeld), however, hold that the Secretary-General's implementation of the Resolutions involved an administrative decision with an adverse impact.

> 64. In the view of the minority of Judges, the Secretary-General was not vested with any discretionary authority with respect to the implementation of the General Assembly resolutions and thus the actions of the Secretary-General in implementing them were not administrative decisions affecting the contracts of employment or terms of appointment of the Respondents. In their opinion, the Respondents' arguments presume a scope of discretion that the General Assembly did not grant the Secretary-General. The General Assembly's decisions regarding the specific amounts of salary and allowances to be paid to staff members are unambiguous and leave no room for interpretation or variation by the Secretary-General. The minority of Judges therefore hold that the claim that the Unified Salary Scale violated the Respondents' acquired rights is indeed a challenge to the validity of the General Assembly's legislative or regulatory power, and not to any discretion exercised by the Secretary-General. The instruments affecting the contracts of employment and terms of appointment were the regulatory resolutions of the General Assembly which are legislative in nature. It follows that the jurisdictional pre-conditions for judicial review by the UNDT were not fulfilled, and thus the applications ought to have been dismissed as not receivable. These Judges therefore would uphold the appeal of the Secretary-General on this basis.
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> 65. The majority of Judges accept that the Secretary-General had little or no choice in the implementation of the General Assembly resolutions. The power he exercised was a purely mechanical power, more in the nature of a duty. However, such exercises of power are administrative in nature and involve a basic decision to implement a regulatory decision imposing the terms and conditions mandated by it. They are thus administrative decisions that may adversely affect the terms of employment. However, importantly, given that purely mechanical powers entail little choice, they are rarely susceptible to review on the grounds of reasonableness. A review on grounds of reasonableness typically involves examination of the decision-maker's motive, the weighing of competing considerations and the basis for, and effects of, any choice made. An exercise of a purely mechanical power normally does not require the administrator to formulate an independent purpose or basis for action. Nevertheless, purely mechanical powers are still accompanied by implied duties to act according to the minimum standards of lawfulness and good administration: purely mechanical powers are hence reviewable on grounds of legality.

18. Applying these principles to the present case, the Tribunal finds the application receivable.

19. In the instant case, indeed, the Applicant does not challenge the new scheme for education grant introduced by the General Assembly but rather the manner in which it was implemented by the Administration in her specific case and, more specifically, the manner in which the Secretary-General interpreted resolution 70/244, as providing no discretionary power insofar as tertiary education is concerned, which failed to take into account her personal circumstances prior to withdrawing boarding and travel benefits and lacked consideration of retroactive effect and infringement upon her acquired rights.

Merit

20. It has to be preliminary noted that the education grant comprises three severable elements: a basket of admissible expenses related to tuition, boarding expenses and education grant travel.

21. Resolution 70/244 reduced the basket of admissible expenses (tuition and related expenses), replacing the percentage reimbursement rate by a sliding scale.

22. On the other hand, the resolution removed the other two elements of the education grant, namely boarding expenses and education grant travel.

23. The changes to tuition and related expenses are not challenged by the Applicant, who instead challenges the decision not to pay boarding and travel related expenses for her two dependent children under the education grant scheme.

24. With respect to boarding expenses in particular, the Resolution provided in paragraph 29 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[.]

25. Following the adoption of the resolution, boarding expenses are no longer covered for tertiary education. The resolution is clear on this point and the discretionary authority conferred by the General Assembly to the executive heads

only relates to exceptional granting of boarding assistance to children attending primary and secondary level schools.

26. The Applicant alleges that the Organization breached her right under staff regulation 3.2 concerning her children reassimilation in their home country or otherwise disrupted her children's education.

27. Staff regulation 3.2 provided in its relevant part, before its amendment on 1 January 2018, that:

> (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;
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> (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[.]

28. These provisions were modified by resolution 70/244 as of 1 January 2018, resulting in the following:

> (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;
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> (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[.]

29. Staff regulation 12.1 provides that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members".

30. Given that regulatory framework, according to the general principle of law concerning the enactment of a new discipline, should there be an irreconcilable conflict between two enactments, the later enactment will take precedence over the earlier enactment and be held to have impliedly repealed the earlier enactment to the extent of the inconsistency (*lex posterior derogat priori*).

31. According to the Appeals Tribunal ruling in *Lloret Alcañiz et al.*, the role of the Dispute Tribunal in reviewing challenges against the implementation of a regulatory decision of the General Assembly is limited to examining "whether the Secretary-General's exercise of power was illegal" (see para. 68). The Applicant's situation is similar to the one in *Lloret Alcañiz et al.* where the Applicant also argues that the implementation of a regulatory decision impairs her existing rights under the Staff Regulations and Rules or her acquired rights. The Dispute Tribunal's role is limited to examining whether there is a normative conflict (see paras. 69-78 of *Lloret Alañiz et al.*) and does not include a review on the ground of reasonableness of the decision (see para. 65 of *Lloret Alañiz et al*.).

32. In the instant case, the Organization applied correctly the new statutory regulation.

33. The Applicant claims that the Organization breached her right under staff regulation 3.2 concerning her children's reassimilation in their home country or otherwise disrupted her children's education. In particular, the Applicant highlights the need for the Organization to minimize any disruptive consequences resulting from a change in the implementation of the education grant and alleges that the Organization failed to exercise due care and consider the potential negative consequences when implementing the new scheme. It also failed to put in place transitional measures to mitigate the impact of recent amendments.

34. Firstly, it has to be noted that the Applicant is still in receipt of assistance for the education of her children, although to a lesser extent.

35. Secondly, it is not provided in the rules a discretionary power of the Administration to wave the effects of the reform, providing for instance transitional measures, especially considering that the assistance is claimed with reference to the tertiary level of education, which is not a mandatory part of a child's education.

36. The Tribunal finds on this point that the Secretary-General did not err in its interpretation of para. 29 of resolution 70/244 when he found that he had no discretion to grant the Applicant exceptional payment of boarding and travel expenses.

37. Resolution 70/244 did not consider providing transitional measures for boarding expenses, nor allowed the Organization to take steps to mitigate the effects on the benefits provided in the past according to the former regulatory framework.

38. In other terms, the Organization did not breach the Applicant's right under staff regulation 3.2 concerning her children's reassimilation in their home country or otherwise disrupted her children's education.

39. The Applicant further claims that the implementation of the new education scheme has a retroactive effect.

40. The problem cannot be raised with reference to the assistance claimed for the younger son of the Applicant, who has not started yet the university, but in abstract only with reference to the elder son of the Applicant, who is already attending the tertiary education and at the time of the application was on the verge of starting his third year of University.

41. Although so limited, the complaint is not founded, as it is clear that the new provisions are applied only for the future, with reference to the assistance related to the next years and have no retrospective effect.

42. Staff Regulation 12.1 allows amendment and supplementation of staff regulations and rules "without prejudice to the acquired rights of staff members".

43. The Applicant claims also that the implementation of the new education scheme infringed her acquired rights. She specifies that when accepting the offer of a permanent contract, the key motivator was the existence of the education grant.

44. On this point, it has to be noted that the Organization's decision not to grant the Applicant boarding and travel related expenses is also in compliance with the Appeals Tribunal's case law, which followed a restricted concept of acquired rights.

45. The Appeals Tribunal, indeed, assimilated the notion of acquired rights with the protection against retroactive application of the law which, therefore, would also be limited to protect staff members against modification of benefits accrued for services already rendered. In other words, a right should be considered

"acquired" only if it is a vested right. For instance, a staff member acquires a vested right to a salary for services already rendered; on the contrary, promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the *quid pro quo* for the promise has been performed or earned.

46. The Appeals Tribunal concluded as follows on the possibility of the General Assembly to modify staff members' benefits and entitlements:

> 94. In the context of the United Nations system, the salary entitlements of staff members are therefore statutory in nature and may be unilaterally amended by the General Assembly. Staff members do not have a right, acquired or otherwise, to the continued application of the Staff Regulations and Rules−concerning the system of computation of their salaries−in force at the time they accepted employment for the entirety of their service. The fact that the unilateral variation of a validly concluded contract may cause individual loss poses no legal obstacle to the exercise of regulatory power.

47. On this matter, it is worth recalling that in long term relationships, like in the work relationship, the concept of acquired rights may have a different meaning in relation to the fact that the rights concern the past or the future of the relationship. In the first case, the concept of acquired rights covers rights resulting from a service made, which are not touchable. In the second case, the concept covers also rights resulting from work done in the future to some extent; however, this definition does not exclude any possibility of modification for the future but offers only a minimal protection of these rights against arbitrariness and the legitimate expectations of public officials. In other terms, the protection of acquired rights, as an essential aspect of the principle of non-retroactivity, concerns -for the future- only the fundamental and essential conditions of the work relationship.

48. The Applicant follows this well-accepted approach in respect of acquired rights, which distinguishes between "fundamental or essential and non-fundamental or non-essential conditions of employment" with only the former giving rise to acquired rights.

49. The Applicant recalls that this approach, for example, was taken by the World Bank Administrative Tribunal in its decision No. 1, *De Merode et al.* (1981) (see para. 42), asserting that

> certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to limits and conditions.

50. The Applicant also points out that in its Judgment No. 2682 (2008), the Administrative Tribunal of the International Labour Organization has likewise held that in order for there to be a breach of an acquired right, the alteration being challenged 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".

51. In this connection, it seems difficult to accept the Applicant's assertion that, when accepting the offer of a permanent contract in the far 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).

52. In any case, the right to the boarding assistance for tertiary education cannot be identified as a fundamental right of the Applicant's work relationship, especially considering its assistive nature and its extraneousness to the central core of the work relationship, that is the exchange of salary and work.

53. Finally, the Applicant claims that suppression of the assistance in issue has a disparate impact on staff members for two different reasons: firstly, the effect is discriminatory in terms of income effect, because staff with dependents in need of boarding assistance are those for whom the changes to the education grant scheme would have the most serious impact, being they treated, as a group, less favourably than those without dependents and some other staff with dependents in different age; secondly, because the removal of boarding expenses for tertiary education finds exceptions with reference to the duty station.

54. On the first aspect, it has to be noted that the Applicant's arguments are directed against resolution 70/244 and that her situation does not differ from any other staff member with dependent children who decided to pursue their tertiary education away from the staff member's duty station.

55. On the second aspect, while the wording of resolution 70/244 foresees that in exceptional cases the condition of field location can be waived, it does not authorize the Secretary-General to disregard the condition of schooling at the primary and secondary level. The discretionary authority conferred by the General Assembly to the executive heads only relates to the exceptional granting of boarding assistance to children attending primary and secondary level schools. Indeed, the discretionary authority conferred by the General Assembly to the executive heads does not relate to the exceptional granting of boarding assistance with regards to children who are boarding to attend a tertiary level educational institution.

56. The non-eligibility to boarding assistance for children attending a tertiary level educational institution therefore stems directly from a General Assembly resolution, and the Secretary-General does not have the authority to make exceptions to the General Assembly's decision. Therefore, the Organization correctly considered that it had no authority to grant exceptions to the decisions of the General Assembly to pay boarding assistance and travel expenses for the Applicant's children's education at the tertiary level.

57. In conclusion, also on this point the Applicant's claims are not founded, considering the clear provisions in resolution 70/244 and the lack of a remedy to the situation challenged.

Conclusion

58. In the light of the foregoing, the Tribunal DECIDES:

The application is dismissed.

(*Signed*)
Judge Francesco BUFFA
Dated this 10th day of March 2020

Entered in the Register on this 10th day of March 2020

(*Signed*)

René M. Vargas M., Registrar, Geneva