UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2021/002
Judgment No.: UNDT/2021/108
Date: 20 September 2021
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

AWAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Omar Yousef Shehabi, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a Chief in the Transport Unit in the United Nations Secretariat in New York, filed the application in which he contests the decision of Headquarters Clients Support Service ("HQCSS") that certain fees for his child's attendance at a university were inadmissible for computing his education grant in accordance with secs. 3.1 and 3.2 of ST/AI/2018/1/Rev.1 (Education grant and related benefits). The relevant university had labeled these fees as "the campus fee" (except the capital assessment fee component), "the school fee", "the computer fee" and "the new school fee".

2. The Respondent contends that the application is without merit.

3. For the reasons set out below, the application is granted in full.

Facts

4. The Applicant's child is an undergraduate student at a public university in the United States. For the 2019-20 academic year, the Applicant paid USD16,108.15 in total for tuition and various fees, which included a "campus fee" of USD2,694.00, a "school fee" of USD141.30, a "computer fee" of USD342.40, and a "new student fee" of USD275.60. The Tribunal notes that by error the computer fee was not listed in its Order No. 70 (NY/2021) dated 3 August 2021, but this has no bearing on its determination of the present case.

5. On 18 August 2020, the Applicant submitted the official form for education grant for his expenses for the 2019-2020 academic year in which he, *inter alia*, claimed payment for the mentioned fees.

6. On 24 August 2020, HQCSS informed the Applicant that his entitlement amount on the education grant was USD10,607.80 and did not include payment for the above-mentioned fees.

7. On 25 September 2020, HQCSS informed the Applicant that, after contacting the university, it had modified its decision. The portion of the "campus fee" that qualified as a "capital assessment fee" (USD115.00 per semester) therefore was reimbursed to him in accordance with sec. 2.2 of ST/AI/2018/1/Rev.1.

Consideration

8. As the parties agree on the basic facts, the issue of the present case is merely whether, from a legal perspective, the relevant fees are admissible for education grant under secs. 3.1 and 3.2 of ST/AI/2018/1/Rev.1.

9. To determine this, it is necessary to understand and decide what the content and meaning of the key provision is, namely, sec. 3.1(a), which provides that, in addition to some other admissible expenses, "the education grant is computed on the basis of … (a) [m]andatory enrolment-related fees, which are required for the enrolment of a child in an educational institution". It is further stated that "[s]uch fees include but are not limited to admission, application, registration, enrolment, matriculation, orientation and assessment or examination fees". Under sec. 3.2, if an expense is not covered by any of the categories listed in sec. 3.1, it is by default inadmissible.

10. The Applicant, in essence, submits that all the fees that he claimed were mandatory enrolment-related fees as per sec. 3.1(a) and therefore also admissible for the purpose of education grant.

11. The Respondent contends that this is not the case, arguing that:

a. HQCSS "lawfully excluded the contested fees from the calculation of the Applicant's entitlement", because they are not "enrolment-related fees" under sec. 3.1(a);

b. When "read in its ordinary sense", ST/AI/2018/1/Rev.1 "does not support the Applicant's view that all fees mandated by [the university] are

admissible". In "its ordinary sense, an enrolment-related fee is an expense realized prior to the commencement of an academic program in relation to an educational admission process". This does not include fees for "infrastructure, books, computers, or any other non-course related expenses that are incurred after the commencement of an academic program" such as those claimed by the Applicant;

c. The grammatical structure of sec. 3.1(a) "does not contain a 'catch-all provision' that provides for the reimbursement of all fees mandated by an educational institution. The "adjective 'mandatory' in the phrase '[m]andatory enrolment-related fees' is a classifying adjective, which classifies the sub-type of enrolment fee that is admissible, i.e., 'mandatory' as opposed to 'optional'". It does "not expand the category of admissible enrolment-related expenses to include all fees mandated by an educational institution, or otherwise identified as 'mandatory'";

d. The legislative history of the education grant scheme "shows the intent of the General Assembly to limit, rather than to expand the categories of admissible expenses". Previously, the education grant scheme "provided for the admissible expenses of tuition, enrolment-related fees, books, daily transportation to school and other expenses (including capital assessment fees)". In 2015, the International Civil Service Commission, however, "proposed to the General Assembly the removal of books, daily transportation, school and other expenses from the categories of admissible expenses". Following the approval of the General Assembly and the revision of Appendix B to the Staff Rules, the Organization issued ST/AI/2018/1/Rev.1, which "narrowed the categories of admissible expenses to those specifically enumerated in Section 3.1". None of the contested fees fall within those categories.

12. The Tribunal notes that the Appeals Tribunal has consistently held that when interpreting a legal provision, the point of departure is the "literal terms of the norm",

which means that "[w]hen the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading, without further investigation" (see *Scott* 2012-UNAT-225, para. 28, as affirmed in, for instance, *De Aguirre* 2016-UNAT-705, *Timothy* 2018-UNAT-847 and *Ozturk* 2018-UNAT-892, as well as also stated in *Sidell* 2013-UNAT-348 (para. 23), *Scheepers* et al. 2015-UNAT-556 (para. 31), *Al-Mussader* 2017-UNAT-771 (para. 28), *Faye* 2017-UNAT-801 (para. 23), *Rockcliffe* 2017-UNAT-807 (para. 28), *Mohamed* 2020-UNAT-985 (para. 31)). This principle of interpretation is occasionally also referred as the plain meaning rule.

13. The Tribunal notes that a literal reading of sec. 3.1(a) plainly shows that only two statutory conditions apply for a fee to be covered by the provision, namely that (a) the fee concerns an eligible child's enrollment in an educational institution and (b) the fee's payment is obligatory for this purpose. Section 3.1(a) raises no further question or uncertainty thereabout. Under the principle of the hierarchy of norms, no guidelines or policies that ranks lower than ST/AI/2018/1/Rev.1 may change this position (see, for instance, *Villamoran* 2011/UNDT/126, para. 29). In this regard, the Tribunal notes that, by their very nature, recommendations of International Civil Service Commission to the General Assembly, which includes matters related to the education grant regime, are not statutory acts (see *Obino* 2014-UNAT-405, para. 20) and therefore cannot prevail over ST/AI/2018/1/Rev.1.

14. The Respondent, nevertheless, argues that only expenses "realized" (in another place, he uses the word "incurred") before the academic course has commenced are admissible and that infrastructure expenses, books, computers, and other non-course related expenses are not covered by sec. 3.1(a).

15. The Tribunal notes that it is not clear what the Respondent means by "realizing" or "incurring" an expense, since no stipulation is made in sec. 3.1(a) regarding the timing of when an educational institution should claim the payment of a fee or when this fee is to be paid by the student. The Respondent instead argues that

enrollment is essentially a one-time event, which occurs after the student is admitted to an educational course and/or program.

16. The Tribunal disagrees. The plain meaning of enrollment, or being enrolled, in an educational course and/or program is that it simply indicates that a student is registered thereto. This registration status begins with her/his admission to the course and/or program and only ends at its completion, unless the student is expelled therefrom in the meantime, for instance, for not paying all associated fees. In line herewith, sec. 5 of ST/AI/2018/1/Rev.1 (on reimbursement of capital assessment fees) also refers or the child's "enrollment or continued enrollment". Under sec. 3.1(a), it therefore does not matter when an enrollment-related fee is claimed by the educational institution or paid for by the student insofar as its non-payment could impact her/his registration status.

17. Also, no distinction is made in sec. 3.1(a) that serves to exclude fees for infrastructure expenses, books, computers or other non-course related expenses from admissibility. The second sentence lists some examples of admissible fees, but it is explicitly provided that this is a non-exhaustive list ("include but are not limited to"), and no limitations are otherwise stated regarding the character or nature of the fees that are admissible.

18. The Appeals Tribunal has held "where the law does not distinguish, neither should we distinguish" with reference to the general legal principle of *non distinguit, nec nos distinguere debemus* (see, for instance, *Faust* 2016-UNAT-695, para. 34). The Tribunal therefore cannot make distinctions if these do not have a proper foundation in the relevant legal framework.

19. If the scope of understanding of what the mandatory enrollment-related fees are under sec. 3.1(a) were to be limited in accordance with the Respondent's submissions, this should therefore have been reflected in the relevant legal framework. This is, however, not the case. Under the plain meaning rule, if the Respondent, namely the Secretary-General, wants the situation to be regulated as

contended by his Counsel, this should therefore also clearly and unambiguously follow from the relevant legal framework, in particular ST/AI/2018/1/Rev.1, which the Secretary-General has promulgated himself.

20. The Tribunal, however, agrees with the Respondent that an enrollment-related fee must be mandatory in order to be covered by sec. 3.1(a), which means that payment of the fee is not optional for the student. Consequently, for an enrollment-related fee to fall under the scope of sec. 3.1(a), its payment must be required for the student to complete the course and/or program.

21. In the present case, in the Chief of HQCSS's email of 25 September 2020, he "acknowledge[d]" after having contacted the relevant university that the fees claimed by the Applicant were "mandatory expenses for every full-time student". The reason for rejecting the Applicant's claims for certain fees was instead that they were "attributed to health care, athletics, student support" or, assumedly, some other inadmissible purposes under ST/AI/2018/1/Rev.1. As stated above, pursuant to sec. 3.1(a) or otherwhere in ST/AI/2018/1/Rev.1, the admissibility for education grant is, however, not excluded for any specific objective(s). In any event, in the lack of further statutory guidance, the Tribunal does not find that it would be unreasonable to declare a fee that aims to cover expenses for any of the stated purposes as admissible under sec. 3.1(a).

22. The Tribunal further notes that the Chief of HQCSS's understanding that the fees were mandatory for the Applicant to pay for his child's enrollment in the undergraduate program at the university is affirmed by the Under-Secretary-General for Management Strategy, Policy and Compliance in her 27 October 2020 response to the Applicant's management evaluation request. This is nowhere denied by the Respondent in any of his submissions before the Tribunal. Rather, in the Respondent's reply, he refers to an official form submitted by the Applicant, which was certified by the university and in which all the relevant fees were listed as "mandatory expenses charged by the institution".

23. Consequently, since "the campus fee" (except the capital assessment fee component), "the school fee", "the computer fee" and "the new school fee" were required for the enrollment of the Applicant's child at the university, it was unlawful when the Chief of HQCSS declared them inadmissible for the purpose of education grant under sec. 3.1(a).

24. Finally, the Tribunal notes that since all the relevant fees have been found to be admissible as mandatory enrollment-related fees, it is not necessary to examine the parties' submissions on whether they would also fall under the meaning of "tuition" in sec. 3.1(b) of ST/AI/2018/1/Rev.1, which is also an admissible expense for computing education grant. The Tribunal, however, notes that in the lack of an authoritative definition of what tuition constitutes, the determination is essentially left to the individual educational institution. Depending on this institution's labeling of a payment as tuition or not, similar expenses might be declared either admissible or inadmissible in accordance with secs. 3.1(b) and 3.2. Such discrepancies may lead to arbitrary and unfair results.

Conclusion

25. In light of the foregoing, the Tribunal DECIDES that:

a. The application is granted;

b. The Applicant's payments for the academic year 2019/20 of "campus fee" (except the capital assessment fee component), "school fee", "computer fee" and "new school fee" will be considered admissible for the purpose of education grant and the Administration shall recalculate and pay the additional educational grant entitlements to the Applicant; and

c. If the above payment is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of

payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)
Judge Joelle Adda
Dated this 20th day of September 2021

Entered in the Register on this 20th day of September 2021

(Signed)
Nerea Suero Fontecha, Registrar, New York