Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Maximilian Girod-Laine

Counsel for the Respondent:
Jenny Kim, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a Senior Auditor at the P-5 level, working with the United Nations Interim Force in Lebanon ("UNIFIL"), based in Naqoura.[1] By an application filed on 7 March 2022, he challenges a decision to recover the entire education grant advance for three of his dependent children for the 2020-2021 academic year.[2]

2. The Respondent filed a reply on 7 April 2022, in which it is argued that the contested decision was legal, reasonable and procedurally fair.

3. On 20 September 2022, the Applicant filed a rejoinder to the Respondent's reply.

4. The Tribunal held a hearing on the merits on 13-15 December 2022 at which the evidence of three witnesses was taken.

5. The parties filed their closing submissions on 18 January 2023.

Facts

6. The Applicant is a dual national of Sierra Leone and, since 2010, also of the United States of America ("USA").[3] For the purposes of education grant, i.e. the country where he takes home leave, the Applicant is a national of USA.[4]

7. The Applicant started receiving education grant from the Organization since 2009.[5] At the time of the impugned decision, the Applicant received education grant advances for three of his children.[6]

8. Upon the outbreak of Covid-19 pandemic, UNIFIL instituted alternative

[1] Application, annex 3.
[2] Application, section 1, para. 1.
[3] Application, para. 2. Applicant's testimony, 13 December 2020.
[4] Reply, para. 9; reply annex 1; and application, annex 17.
[5] Applicant's testimony, 13 December 2022, MS Teams transcript at 0:1953-55.
[6] Application, section II, para. 3.

working arrangements ("AWA") in March 2020.[7] Accordingly, effective 15 July 2020 until 3 May 2021, the Applicant requested for AWA and he telecommuted from USA.[8]

9. UNIFIL suspended AWA effective 3 August 2020. However, the Applicant requested and was granted flexible working arrangement ("FWA") to continue telecommuting from USA to run from 15 January 2021 until 3 May 2021.[9]

10. While the Applicant was telecommuting from USA, three of his dependent children attended an American boarding school for the entirety of the 2020-2021 academic year, from 13 August 2020 until 30 April 2021.[10]

11. By his own admission,[11] and confirmed by the FWA requests that he signed, the Applicant was aware that section 5(c) of ST/IC/2019/15 (Flexible working arrangements), states that if staff members telecommute from their home country for more than two thirds of the academic year, the education grant will be prorated in accordance with section 6.1(a) of ST/AI/2018/1/Rev. 1 (Education grant and related benefits).

12. Realizing that he may stay long on FWA, coupled by his knowledge of the policies governing proration of education grant, on 7 December 2020, the Applicant contacted his supervisor at OIOS, his parent department, regarding the implications of his telecommuting agreement outside the duty station.[12] He states, "I wanted to know really how the proration is being calculated because I did not understand by reviewing the policies".[13] He adds, "I wanted to know the amount so I can make a decision as to whether I'm willing to lose that amount or whether I should take action and go back to my duty station".[14].

[7] Application, para. 5.
[8] Reply, annexes 2, 3, 4, and 5.
[9] Reply, annex 5.
[10] Application, MEU annexes, 5.
[11] Application, section II, para. 9.
[12] Application, annex 11; Applicant's testimony, 13 December 2022.
[13] Applicant's testimony, 13 December 2022, MS. Teams transcript, at 0:39:36-43.
[14] *Ibid.*, at 0:40:28-36.

13. The supervisor, Ms. LF, testified that the Applicant had sought information about the percentage subject to proration and recovery for the eventuality of him remaining on FWA. Upon consultations that she undertook, OIOS was, however, not in a position to tell exactly what would be recovered, wherefore the Applicant was directed to the Human Resources.[15] In an email of 12 January 2021, Ms. LF wrote to the Applicant:

> the current policy allows for FWA of 6 months (3 February 2021). However, there is provision for an extension of 3 additional months (until 3 May 2021) for a total of 9 months FWA. After 9 months, there will be an impact on your entitlements, although no-one can say exactly what that will look like at this point. The EO also confirmed that there will be some proration of your education grant entitlement so you may wish to discuss this in more detail with your HR Partner.[16]

14. The Applicant asserts that he accordingly called Ms. GA, his Human Resources Partner from the Human Resources Operations, Headquarters Client Support Service ("HRO/ HQCSS"), either in January or February 2021. He maintains that Ms. GA informed him that only the USD5,000 lump-sum boarding assistance under section 4 of ST/AI/2018/1/Rev.1would be recovered with respect to each of his three daughters, i.e., that is, USD15,000 in total, were the Applicant to remain in USA for more than two thirds of the academic year, whereas his education grant would not be subject to recovery. Ms. GA denies having talked to the Applicant during the period of January to February 2021 and maintains that her first contact with the Applicant regarding the matter was after he had submitted his education grant claim, which was after the end of the school academic year and when he had already overstayed his FWA for the entire period of the school year.[17]

15. On 7 April 2021, the Applicant submitted education grant claim of his three children for the 2020-2021 academic year.[18] On 12 and 13 April 2021, there were email exchanges between him and Ms. GA on the delineation of the tuition and boarding

[15] Ms. LF's testimony, 15 December 2022, MS. Teams transcript, at 0:16:32.160 and at 0:17:40.340.
[16] Application, annex 12; Ms. LF's testimony, 15 December 2022.
[17] Ms. GA's testimony, 14 December 2022.
[18] Application, MEU annexes, 5, at p. 4.

expenses regarding one of the children and a possible recovery of a portion of the advance resulting from the change of the school. No mention, however, was made, by either party, about the Applicant's FWA or recovery of the entirety of the education grant.[19]

16. On 6 May 2021, the Applicant contacted Ms. GA inquiring about the status of his claim. On the same day, the Ms. GA replied that:

> We are still awaiting policy advice on staff members who were on FWA during COVID. According to the policy issued earlier, if sm [staff member] spent at least 2/3rd of the schoolyear on FWA and residing with their children, boarding expenses will have to be pro-rated or no boarding expenses at all if sm [staff member] stayed for the whole period of the schoolyear. Your EO informed us that you were on FWA from Sept 2020 through the present, which will make you not eligible for boarding expenses for SY2020-2021. We are still awaiting Policy confirmation on this as we have a number of cases that fall under this situation.[20]

17. Exchanges with Ms. GA on the subject of boarding expenses continued in May 2021, when the Applicant submitted an amended P-41 form.[21]

18. On 25 May 2021, a broadcast was sent to all United Nations Secretariat informing, in bold font:

> Please note that if after 15 September 2020 you worked remotely from your home country on a Flexible Work Arrangement (FWA) outside your official duty station, this may affect your EG entitlement if the period of this work covered more than 2/3 of the academic year. Please contact your HR Partner in HROPS and provide details of the dates and duration of your FWA arrangements while in your home country.[22]

19. On 8 June 2021, the Applicant returned to his duty station.[23]

[19] Applicant's rejoinder, annex 14.
[20] *Ibid.,* annex 6, at p.19.
[21] Applicant's rejoinder, annex 15.
[22] Document submitted by Ms. GA.
[23] Reply, annex 6.

20. The Applicant inquired about the status of his claim on 14 June and 2 July 2021. On 2 July 2021 Ms. GA informed that, because the school did not provide a breakdown of tuition and boarding expenses, the matter of proration was referred to Policy for their advice, and eventually replied:

> it was decided by Policy that only the boarding expenses will be pro-rated and not the whole [education grant] entitlement.[24]

21. During the hearing, Ms. GA admitted that the above information was erroneous as she had based her explanation on facts of a different case. During a meeting of her Unit the matter was clarified, which prompted the review of the Applicant's education grant entitlement. [25]

22. On 30 July 2021, Ms. GA contacted the Applicant by intra-office Microsoft Teams chat, stating that the HQCSS did not have his records of USA naturalization in his official status file, and requested for a copy of his naturalization records or the United States passport.[26]

23. On 9 August 2021, Ms. GA wrote to the Applicant informing that:

> As per information provided to us by OIOS EO, you were on FWA for the period beginning 4 Aug 2020 through 3 May 2021. You were practically telecommuting from your home country (Virginia, Maryland) for the entire period of the schoolyear (i.e. 13 Aug 2020 through 30 April 2021). In view of this, you are not entitled to international benefits as per provisions of SGB/2019/3 (Section 3.12) and ST/IC/2019/15 (section 5 (c) … The amount to be recovered is the amount of EG advance you received for your 3 children for SY2020-2021 approximately $79638 (contested decision).[27]

24. On 26 August 2021, the Applicant met with the HRO/HQCSS staff to inquire about the reason for the change in the Policy. Relevant legal provisions governing education grant were discussed. The HRO/HQCSS position was that since the

[24] Application, MEU annexes, 7, at p. 20.
[25] Ms. GA's testimony, 14 December 2022.
[26] Application, para. 15; application annex 3.
[27] Application, annex 1 (contested decision).

Applicant had spent the entire period of the school year on FWA, the entire education grant advanced to him would be recovered.[28]

25. On 15 September 2021, the HRO/HQCSS notified the Applicant that the first recovery of the education grant advance would be processed from his September 2021 payroll.[29]

26. On 8 October 2021, the Applicant requested management evaluation challenging the contested decision.[30] On 6 December 2021, the Management Evaluation Unit ("MEU") decided to uphold it.[31]

Submissions

Applicant's submissions

27. The Applicant advances his case based on three grounds, namely, ambiguity of the applicable rules, estoppel and *force majeure.* In support of any of the three grounds, he stresses that at all times he had acted in good faith.

28. Regarding the first ground, the Applicant argues that the Organization had no right to recover the education grant advance since he was not in the circumstances described in section 6.1(a) of ST/AI/2018/1/Rev.1, which deals with proration of education grant.[32] Moreover, he implies that paragraph 5(c) of ST/IC/2019/15 contradicts staff rule 3.9(b)(i), in that the latter does not deny staff member's eligibility for education grant because of a temporary stay in his or her home country.[33] He prays that in case of ambiguity, the Tribunal should apply the rule that an ambiguous term of a contract is to be construed against the interests of the party which proposed or drafted the contract or clause (the *contra proferentem* principle), as affirmed in *Tolstopiatov.*[34]

[28] Ms. GA's testimony, 14 December 2022.
[29] Application, MEU annexes 10.
[30] Application, annex 3.
[31] *Ibid.*
[32] Applicant's rejoinder paras. 14-17.
[33] Applicant's closing submission, paras. 17-19.
[34] *Tolstopiatov* UNDT/2010/147, para. 66.

29. The Applicant seeks to rely on *Cranfield,*[35] in that the Administration should be estopped from invoking a rule where the staff member reasonably and detrimentally relies on incorrect information provided by it, and where the staff member did not contribute to the error. He also relies on *Wang,*[36] where the staff member had accepted an appointment in his home country based upon oral assurances that the education grant would still be paid. The Administration in that case acknowledged the error and paid for two years of education grant.[37]

30. The Applicant argues that he knew that continuing to telecommute from the USA for more than two thirds of the academic year could affect his education grant entitlement and contacted the HRO/HQCSS seeking full information on that count, as staff are expected to do.[38]

31. Based on the information he received from HRO/HQCSS, that only the lump-sum boarding assistance for his three daughters, totaling USD15,000, would be subject to recovery were he to remain in the USA for the rest of the academic year, he reasonably decided to continue telecommuting from the USA. Had HRO/HQCSS informed him that he would forfeit the entire education grant and have the full advance recovered should he remain in the USA, he would have returned to work at his duty station.[39] He also could have used his leave balance of 80 days to circumvent the two thirds of the school year rule.[40]

32. By the time HRO/HQCSS informed him that it would recover the entire education grant advance, it was too late for him to mitigate the detrimental effect of his reliance on its advice, the 2020-2021 academic year was over.

33. Estoppel would serve the interests of justice in the unique circumstances presented. The Applicant bears sole responsibility for the education and welfare of his

[35] *Cranfield* 2013-UNAT-367, para. 49.
[36] *Wang* 2011-UNAT-140.
[37] Applicant's rejoinder filed on 20 September 2022, para. 18.
[38] Application, para. 24.
[39] *Ibid*., para. 25.
[40] Applicant's closing submission para 3.

four children. He was separated from two of those children for nearly half a year due to Covid-19 pandemic-related border closures and travel restrictions. He managed to reunite his children in the USA just before the start of the 2020-21 academic year and hurried to enroll them all in school there, recalling that the Lebanese school where his two youngest children had studied the previous year remained closed due to the pandemic. Relying on the information provided by HRO/HQCSS, he made the calculated decision that it would be in the best interest of his family that he remained in the USA if it only entailed forgoing the lump-sum boarding assistance, on the understanding that he remained eligible for all other education grant components. But forfeiting the entire education grant, and having the entire advance subject to recovery, would affect his ability to meet his family's financial commitments and likely affect his children's education arrangements for the next academic year.

34. On the prong of *force majeure*, the Applicant submits that should the Tribunal for some reason reach the conclusion that the Applicant was nevertheless not entitled to the education grant, he wishes to stress the fact that the decision to enroll his children in USA schools and for him to telecommute from the USA resulted from a *force majeure.* The Covid-19 pandemic, an exceptional supervening event, had forced the shutdown of schools in his duty station. Beside the serious travel restrictions, it was therefore, impossible for him to return to his duty station, as his children are under his sole care. Especially his youngest son could not enroll into boarding school in the USA, forcing the Applicant to remain in his place of home leave to care for him on a daily basis. Without the Covid-19 pandemic and its consequences, the Applicant would never have found himself in the position to have to go on FWA. It was clearly a case of *force majeure*, since the alternative would have been to deprive his youngest son of an academic education.[41]

35. On the point of acting in good faith, the Applicant avers that he had put Sierra Leone as his proper country of nationality in the education grant form in 2008 and used the pre-filled form ever since. He, however, never concealed the fact that his residence

[41] Applicant's rejoinder, filed on 20 September 2022, paras. 8 and 19.

and elected country of home leave since 2009 has been the USA. He submits documents in support of the above.

36. The Applicant submits that he suffered material damage amounting to USD83,699.20 comprising the education grant and the boarding allowance. He also suffered consequential damage, as, after he had been informed by Ms. GA of the recovery pertaining only to boarding expenses, he purchased two vehicles so as to be able to visit and fetch his children while on FWA in the USA. Later, he had to sell these vehicles urgently to a considerable loss so as to be able to pay for the fees of the boarding schools since the advance payments for the prorated education grant had been recovered from his salary from September 2021 to February 2022. That additional material damage amounts to USD26,643. [42]

37. In view of the above, the Applicant requests the Tribunal by way of remedies to:

a. Rescind the contested decision and limit the recovery of the education grant advance for the 2020-2021 academic year to the lumpsum boarding assistance, totaling to USD15,000, in accordance with the information which HRO/HQCSS provided to him;
b. Award him material damage corresponding to the incidental expenses he incurred through the decision;
c. Apply 10% interest rate on the sum of the above; and
d. Order for the payment of legal fees in the amount of USD5,000.

Respondent's submissions

38. Staff rule 3.9(b)(i) clearly requires that staff members reside at a duty station outside their home country to be eligible for education grants. Since the Applicant telecommuted from his home country of USA, he did not reside outside his home country and was not eligible for the education grant. Pursuant to paragraph 5(c) of

[42] Applicant's rejoinder, para. 24, application, annex 19 and 20.

ST/IC/2019/15, the Administration lawfully prorated, at one hundred percent, the Applicant's entitlement to education grant.

39. The Respondent admits that the Administration made an error in its email of 2 July 2021 to the Applicant.[43] However, one month later, on 9 August 2021, the Human Resources realized its error and promptly corrected it.[44]

40. While the Administration provided the Applicant with erroneous information on 2 July 2021, the Applicant could not have relied on that information to reach his decision to remain in his home country for more than two-thirds of the academic year. By the time the Applicant received the erroneous information, he had stayed in his home country the whole academic year, and he was no longer eligible for the education grant.

41. The Respondent denies the Applicant's averment that the Administration provided erroneous information over the phone in January 2021. The Applicant has not carried his burden to prove this claim by clear and convincing evidence. In any case, even if such a call did occur, which it did not, the call would not have created an entitlement to the education grant. The Appeals Tribunal has held that no legitimate expectation arises unless the Administration has made a written and express promise to the staff member.[45] No such written promise was made to the Applicant here. Further, it would have been unreasonable for the Applicant to rely on a phone call providing information contrary to the clear letter of the law and every FWA form he had signed.

42. Second, the Applicant has waived any entitlement he may have had to the remedy of estoppel because he does not come with clean hands. The Applicant indicated on his education grant request that his home country was Sierra Leone, instead of USA.[46] While the Applicant is a citizen of both Sierra Leone and the USA,

[43] Reply, para. 18.
[44] *Ibid.,* para. 17 and annex 2.
[45] *Igbinedion* 2014-UNAT-411, para. 26.
[46] Application, MEU annexes, 5.

his home country for the purposes of education grant is his country of home leave, the USA.[47] The Applicant contributed to the Administration's error in this regard.[48] In *Kortes*,[49] the Appeals Tribunal held that an applicant who contributed to an error by noting her appointment date and retirement date in different date formats did not come with clean hands.

43. Third, granting education grant to the Applicant would be inherently inequitable to other staff members who serve in their home country and are not entitled to education grants. Absent extraordinary circumstances, the principles of fairness, legal certainty and efficiency require the consistent application of the staff rules. There are no extraordinary circumstances in this case.

44. In light of the foregoing, the Respondent submits that the Applicant is not entitled to any remedy.

45. In addition, the Applicant has not produced evidence in support for his claim for compensation. As such, the Applicant is not entitled to monetary or other compensation. Finally, art. 10.5(b) of the Dispute Tribunal's Statute does not grant the Dispute Tribunal with the power to grant legal costs.[50]

Considerations

46. The legal framework governing the education grant in the relevant area reads as follows: Staff rule 3.9.b.(i) provides that to be eligible to education grants, staff members must *reside and serve* at a duty station outside their home country:

> b. Subject to conditions established by the Secretary-General, a staff member who holds a fixed term or a continuing appointment shall be entitled to an education grant in respect of each child, provided that:

[47] Reply, annex 1.
[48] Application, MEU annexes, 8.
[49] *Kortes* 2019-UNAT-925, paras. 37-38.
[50] Reply, para. 32.

> (i) The staff member is regarded as an international recruit under staff rule 4.5 and resides and serves at a duty station which is outside his or her home country.

ST/SGB/2019/3 ("Flexible working arrangements") provides at section 3.12:

> […] The payment of any benefits and entitlements that require the physical presence of staff members at their official duty station (for instance danger pay) shall be suspended for the period that staff members are telecommuting from outside of their official duty station.

Paragraph 5(c) of ST/IC/2019/15 provides that:

> 5. When staff members are authorized to telecommute outside their official duty station and in accordance with section 3.12 of Secretary-General's bulletin ST/SGB/2019/3, the benefits and entitlements that require physical presence at the official duty station shall be suspended. Consequently, the payment and accrual of such entitlements shall be adjusted, including but not limited to:
>
> […] (c) If staff members telecommute from their home country for more than two thirds of the academic year, education grant and special education grant will be prorated in accordance with section 6.1 (a) of ST/AI/2018/1/Rev.1 and section 8 of ST/AI/2018/2, respectively.

Section 6.1(a) of ST/AI/2018/1/Rev. 1, reads:

> The amount payable to a staff member for the education grant, the reimbursement of capital assessment fees and boarding assistance shall be prorated according to any of the following conditions, which are not mutually exclusive and may be combined:
>
> (a) Where the period of attendance or boarding at an educational institution covers less than two thirds of the academic year, the amount of the grant and related benefits shall be prorated on the basis of the period of attendance or boarding, as applicable, compared to the full academic year. (internal reference omitted). In the case of post-secondary studies where attendance is determined by semester, any educational expenses corresponding to the semester in which a child is not in full-time attendance shall be considered non-admissible and shall not be included in the computation of the education grant;[…].

47. In response to the Applicant's critique of the governing instruments, the Tribunal concedes that the matter regulated in ST/IC/2019/15 paragraph 5(c), in accordance with ST/SGB/2009/4 (Procedures for the promulgation of administrative

issuances), belongs in, and should have been covered by, ST/AI/2018/1/Rev. 1, section 6.1, which lists the instances of proration of the education grant, rather than in ST/IC/2019/15 which is an information circular. Moreover, reference to ST/AI/2018/1/Rev. 1 is confusing as it suggests that ST/AI/2018/1/Rev. 1 controls or authorizes the application of the two-thirds of the school year rule to staff members staying in their home country on flexible working arrangements, which is not the case, as the list in ST/AI/2018/1/Rev. 1 section 6.1 is constructed as *numerus clausus* and does not concern itself with flexible working arrangements at all. *De jure* ST/IC/2019/15 is not an act implementing ST/AI/2018/1/Rev. 1 but a model adherence contract, where reference to ST/AI/2018/1/Rev. 1 section 6.1 might only serve as indication of the method of proration, and not as its proper legal basis.

48. So understood, ST/IC/2019/15 paragraph 5(c) does not, however, contradict staff rule 3.9(b)(i). Staff rule 3.9(b) authorizes the Secretary-General to decide conditions for the education grant and the Applicant accepted the conditions specified in ST/IC/2019/15, paragraph 5(c) as contractual modality for education grant during flexible work arrangements. Staff rule 3.9(b) clearly requires that to be eligible for education grant, a staff member must "reside and serve" outside his or her home country; in this regard, ST/IC/2019/15 paragraph 5(c) provides a reasonable and fair concession for staff members on flexible working arrangement, more favorably than it would result from ST/SGB/2019/3, section 3.12, which plainly foresees suspension of entitlements that require the physical presence at the duty station. The Tribunal, therefore, does not find basis for applying the *contra proferentem* rule. Moreover, notwithstanding the vague reference to ST/AI/2018/1/Rev.1, ST/IC/2019/15 paragraph 5(c) cannot possibly allow construing eligibility for education grant for a staff member remaining in his or her home country for the whole duration of the school year.

49. The above condition was not waived or amended at the time of the events in question, however, as transpires from the documents and testimonies heard, there was a degree of uncertainty, including on the part of the Applicant's manager and his Human Resources Partner, regarding the extent to which ST/IC/2019/15 would be

applied in the context of the Covid-19 crisis. An error on the part of the Administration in supplying incorrect information being a given, the central question for the Applicant's case is whether he reasonably and detrimentally relied on it. In this regard, the Tribunal will examine the following issues: whether the erroneous information was conveyed at a time relevant for the Applicant's decisions and, thus, whether there was "reliance"; if so, whether the Applicant's reliance on the information had detrimental effects; whether the Applicant contributed to the administrative error or otherwise "did not come with clean hands"; finally, whether the application should be granted because of *force majeure*.

Whether the erroneous information was relied upon by the Applicant in his decision to remain on FWA in the USA.

50. The Applicant's case is that the erroneous information was provided to him in January or February 2021, well before the elapse of the two-thirds of the school year, in a call with Ms. GA. The Tribunal does not consider that the standard of proof required of the Applicant is clear and convincing evidence, the latter being applicable to proving a serious misconduct on the part of a staff member, and not for proving an action of the administration. The standard of proof required for the issue at hand is preponderance of evidence. Neither would a "written promise" be necessary if the Applicant could establish the relevant fact through other means. The Tribunal, however, does not find it proven that the Applicant communicated with Ms. GA in January or February 2021.

51. The Applicant cannot precisely recall the mode of the alleged communication, except that it was a call. He states that with a probability of 50% he may have called Ms. GA on MS. Teams; 25% on her phone and 25% someone else could have given him another number so as to reach her.[51] The Tribunal ordered examination of Ms. GA's MS. Teams calls records in the relevant period by the IT, as a result of which no call involving the Applicant, either received or placed, has been found. Ms. GA

[51] Applicant testimony, 13 December 2022, MS. Teams transcript at 0:43:53.780 to 0: 44:7. 860.

testified that she does not possess a work mobile phone, which is confirmed by the Respondent. At the time, Ms. GA, as confirmed by the Respondent, was working from home. She maintains that she exclusively used MS Teams to conduct business and denied having ever used her private phone for this purpose.[52] Noting that the Applicant had used a temporary phone number when in the USA and cannot, therefore, presently retrieve calls placed from that number[53], the Tribunal finds it nevertheless faintly probable that he would have called Ms. GA on a private landline or mobile number, the source of which he does not even indicate, as opposed to emailing her, as in their earlier and later exchanges, or using the MS. Teams, which was a common method of communication.

52. The Tribunal notes, moreover, that no reference to the alleged call can be found anywhere in the exchanges between the Applicant and the HRO/HQCSS. The Applicant allegedly would have learnt of a waiver of the applicable education grant rule, yet, he did not seek to have this information confirmed by email, as it would have been expected given the significance of the information. Neither did he invoke the alleged conversation when he was notified of the recovery. The first ever mention about it appears in the management evaluation request. These surrounding circumstances render the averred call improbable.

53. Finally, emails sent by Ms. GA on 6 May 2021 and 2 July 2021 convey, respectively, her anticipation of a new FWA policy, and her understanding of the outcome of it. The tenor of these communications belies the supposition that Ms. GA would have confirmed the content of the new policy already in January or February 2021.

54. The Tribunal finds that the preceding correspondences do not assert any modification of the conditions of ST/IC/2019/15 paragraph 5(c). Notwithstanding that it is regrettable that the Applicant could not receive an unambiguous and correct information on the extent of proration, these representations, including Ms. LF's email

[52] Ms. GA's testimony, 14 December 2022.
[53] Applicant's submission filed on 5 January 2023 and Applicant's annex 21.

of 12 January 2021, required seeking further clarifications. They do not suffice to establish a legitimate expectation that the two-thirds of a school year benchmark has been waved.

55. Based on the aforesaid, the Tribunal finds that there was no reliance on incorrect information supplied by the administration in the Applicant's decision to remain in the USA on FWA. Rather, the Applicant accepted the risk of staying on FWA for the duration of the whole school year, without having basis to assume that only the boarding expenses would be recovered.

Whether the erroneous information was detrimentally relied upon by the Applicant in his disposal of assets and caused consequential damage.

56. Regarding the claim for compensation of a consequential damage, the Applicant documents that on 28 and 29 July 2021 he authorised two wire transfers totaling over USD50,000.[54] He testified that it was for the purchase of two cars. He further testified that he had been forced to sell the cars in order to meet his obligations toward the educational institution of his children. He documents that in mid-February 2022 a motor company issued a cheque for USD25,000 to the order of the said educational institution, for "Bah tuition".

57. The Tribunal accepts that the 2 July 2021 information received from Ms. GAF of the recovery pertaining only to boarding expenses could have been regarded as reliable: it came from the competent office (indeed the Applicant as well as all staff were directed to their Human Resources Partners); it was issued in the context of an ongoing discussion on the forthcoming new policy; it was in a written form; it copied the relevant legal instrument; and it indicated that it was coming from "Policy". The Tribunal is prepared to accept that it might have informed the Applicant's financial decisions (notably, the time of the purchase would indicate that it was only the

[54] Application, annex 19.

communication of 2 July 2021 on which the Applicant placed reliance, and not any earlier one).

58. Absent, however, documents confirming the specifics of the purchase and the sale, the Tribunal is not prepared to rely on the Applicant's word alone, especially given certain inconsistencies in his submissions (for example, the Applicant maintains that he had bought the cars to visit and fetch his children when on FWA, whereas the wire transfers are dated a month after the Applicant's return to the Mission; there are, moreover, contradictory statements regarding the motives for his stay in the USA, as discussed below). However, even assuming, *arguendo*, that the documents reflect the value of the purchase and sale as averred, the Tribunal has no basis to hold the Respondent responsible for the depreciation of the cars seven months after their acquisition. Clearly, the Applicant did not seek to rid of the cars instantly after the notification of the recovery and there may have been many factors that contributed to the loss of their value.

59. This claim, is, therefore, rejected for the lack of proof.

Whether the Applicant contributed to the error

60. The Tribunal is satisfied that the Applicant never concealed the fact that his residence and elected country of home leave since 2009 has been the USA. That information had been registered on 1 July 2009 and remained in the Umoja system.[55] The Applicant also specifically mentioned to HRO/HQCSS that his country of home leave is the USA in his initial request for approval of the education grant for the academic year 2020-2021 sent on 8 July 2020.[56] In his four FWA applications he indicated that he would be telecommuting from the USA.[57] That OIOS did not notify HRO/HQCSS simultaneously of the FWA of the Applicant and Ms. GA did not check the relevant Umoja entries herself,[58] is not the Applicant's responsibility. However, on

[55] Application, annex 17.
[56] Application, annex 18.
[57] Applicant's rejoinder, filed on 20 September 2022, para. 11; reply, annexes 2, 3, 4 and 5.
[58] Ms. GA's testimony, 14 December 2022.

6 May 2021, Ms. GA was already informed of the Applicant's FWA through OiOS. In summing up, the Applicant did not contribute to the error.

Whether the application should be granted on account of force majeure.

61. The Tribunal considers that the disruptive effects of Covid-19 pandemic; closure of schools, separation of families, travel restrictions and necessity to change the way of conducting business, affected families, employees and employers around the globe, who all found themselves under *force majeure*. To meet some of the challenges, the Organization instituted, among other measures, alternative working arrangements and extended flexible working arrangements and staff were expected to operate within this framework. With this respect, the Applicant's situation was not unique.

62. As concerns circumstances particular to the Applicant, the Tribunal does not question that his family situation was complex. However, the Applicant's submissions on this score are contradictory. On the one hand, the Applicant posits that it was "impossible for him to return to his duty station" as he had to remain in the USA to take care of his youngest son, and returning to his duty station would have deprived his youngest son of access to education due to the closure of his school in Lebanon. On the other hand, he maintains that relying on the information provided by HRO/HQCSS, he made the "calculated decision" to remain in the USA on FWA, whereas he could have returned to work or used his accumulated annual leave instead. Altogether, the Tribunal is not satisfied that the Applicant's return to the duty station was prevented by *force majeure.*

JUDGMENT

63. The application is dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 27th day of February 2023

Entered in the Register on this 27th day of February 2023

(Signed)
Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi