



**Before:** Judge Sean Wallace

**Registry:** Nairobi

**Registrar:** René M. Vargas M., Officer-in-Charge

WYNN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Jérôme Blanchard, LPAS, UNOG

## **Introduction**

1. The Applicant, a Legal Officer in the Office of Human Resources, Department of Management Strategy, Policy and Compliance, filed an application on 4 July 2023 to contest the decisions:

- a. To exclude mandatory fees from her education grant advance for the 2022-2023 academic year; and
- b. To recover USD1,364.52 that had been previously advanced for her son's 2021-2022 academic year.

2. The Respondent filed a reply on 3 August 2023 requesting the Tribunal to reject the application in its entirety.

3. At a case management discussion held on 19 March 2024, the parties agreed that there was no need of an oral hearing in this matter.

## **Facts**

4. On 24 August 2021, the Applicant's dependent son enrolled in the Virginia Commonwealth University ("VCU") in the School of Art. The Applicant receives an education grant ("EG") for this child.

5. On 5 October 2022, the Applicant submitted her 2021-2022 EG claim along with her request for an advance under the EG scheme for the 2022-2023 academic year. The Applicant's request for the advance included enrolment-related fees.

6. On 7 October 2022, a Human Resources Assistant with the Department of Operational Support ("HRA/DOS") informed the Applicant that the enrolment-related fees were not admissible as per ST/AI/2018/1/Rev.1/Amend.1 (Education grant and related benefits).

7. On 12 October 2022, the HRA/DOS informed the Applicant that she was waiting for confirmation whether the “Arts Program fee” is an admissible fee under sec. 3.2 of ST/AI/2018/1/Rev.1/Amend.1.

8. On 9 November 2022, the Applicant received two payments in the total amount of USD10,041.36 (USD1,166.16 + USD8,875.20) as an advance for the 2022-2023 school year.

9. On 10 November 2022, the HRA/DOS informed the Applicant that the Organization would recover USD1,364.52 for the advance that she had received for the 2021-2022 academic year. The Organization recovered this amount from the Applicant’s November 2022 salary.

10. On 6 December 2022, the Applicant requested management evaluation of the decisions to exclude enrolment fees from the 2022-2023 academic year and the recovery of USD1,364.52 previously advanced for her son’s 2021-2022 academic year.

11. On 18 January 2023, the Management Evaluation Unit issued its decision and upheld the contested decisions.

### **Consideration**

12. The Applicant argues that while the Secretary-General may promulgate and amend administrative instructions, his discretion in doing so is not completely unfettered. She says that the 2021 Amendment to ST/AI/2018/1/Rev.1 was “illegal, irrational, arbitrary, capricious, and perverse”.

13. In analysing this claim, it is important to place the amendment in context to assess the merits of this claim. As the Appeals Tribunal has note, “[t]he report of the [International Civil Service Commission (“ICSC”)], which investigated this reimbursement regime for a number of international organisations[,] can assist in interpreting what the General Assembly decided” (*Duepmann* 2022-UNAT-1221, para. 45). However, that document is not determinative in itself. *Id.*

14. In 2015, as part of its annual report, ICSC issued the results of a multi-year review of the common system compensation package. This review included a detailed assessment of the education grant reimbursement mechanism (see, A/70/30, Report of the International Civil Service Commission for the year 2015).

15. The ICSC report reviewed the input from various stakeholders. All spoke of the importance of the education grant scheme in attracting staff and maintaining the competitiveness of the United Nations system as an employer. They also lauded the effort to simplify and streamline the education grant system.

16. A representative from the Human Resources Network (“HRN”) of the United Nations System Chief Executives Board for Coordination stated that “any proposed changes should focus on simplification” and, “therefore welcomed the proposed scheme, which was focused on a global approach and would be easier to administer”. *Id.*, para. 307. The HRN representative also cautioned against any “lowering of effective reimbursement rates, thus rendering the revised education grant scheme unfavourable in comparison with the provisions of the comparator civil service. The representative stated that such a change in tertiary education coverage would not be support by the organizations”. *Id.*, para. 313.

17. A staff representative of the Federation of International Civil Servants’ Associations (“FICSA”) stated that the education provided to the children of staff should be well-rounded and include extracurricular activities. While the sliding scale model had attractive features in terms of simplicity and ease of administration, the proposed scheme only addressed some education costs, since items of expense that occurred routinely, such as transportation, books, exam fees, music lessons, sports opportunities and educational field trips, were now excluded from the list of admissible expenses. *Id.* para. 315.

18. The representative from the Coordinating Committee of International Staff Unions and Associations of the United Nations System (“CCISUA”) said that “[w]ith reference to the sliding scale structure, it was felt that the proposed reimbursement rates would not compensate for the loss resulting from the elimination of other items admissible for reimbursement”. *Id.*, para. 316.

19. A representative of the United Nations International Civil Servants’ Federation (“UNISERV”) then spoke in support of the points made by the FICSA and CCISUA representatives and observed that “there was a risk, if too many cuts were to be made, that organizations could no longer recruit for positions”. *Id.*, para. 317.

20. Faced with these positions, ICSC also “reiterated the importance of the education grant scheme in the overall package, recognizing it as a key element in the attraction and retention of staff. *Id.* para. 323. The Commission also welcomed the proposed scheme as “easy to administer [i]n contrast to the existing scheme, which was criticized for being difficult to understand”. *Id.*, para. 324. Regarding admissible expenses, “[t]he Commission generally did not support the proposed inclusion of additional costs relating to extracurricular activities, such as music or sport, under the provisions of the education grant scheme”. *Id.*, para. 337.

21. As a result, the Commission recommended to the General Assembly, *inter alia*, that “admissible expenses be tuition (including mother tongue language tuition) and enrolment-related fees, as well as assistance with boarding expenses”. *Id.*, para. 356(c).

22. The General Assembly then adopted the Commission’s recommendation nearly word-for-word, deciding “that admissible expenses should comprise tuition (including mother tongue tuition) and enrolment-related fees, as well as assistance with boarding expenses”. See General Assembly resolution 70/244 (United Nations common system: report of the International Civil Service Commission), para. 27.

23. As the Appeals Tribunal has observed, “[a]lthough not themselves determining the matters now in dispute, the recommendations nevertheless assist in interpreting the very general words and phrases of General Assembly resolution 70/244. It seems clear that the General Assembly sought to distinguish between core schooling costs (described very generally as tuition) and optional extra costs”. *Duepmann*, para. 56.

24. The Secretary-General then implemented that policy decision by adopting ST/AI/2018/1 on 1 January 2018 (“original AI”). This administrative instruction defined the admissible expenses under the education grant scheme as including: “Mandatory enrolment-related fees, which are required for the enrolment of a child in an educational institution. Such fees include but are not limited to admission, application, registration, enrolment, matriculation, orientation and assessment or examination fees”. *Id.*, para. 3.1(a).

25. In September 2018, ST/AI/2018/1 was revised with new language unrelated to the above-related provision (“revised AI”). Then, in August 2021, the revised AI was amended to re-write that provision. Paragraph 3.1(a) now reads as follows concerning admissible expenses:

Enrolment-related fees, which are administrative fees directly related to the application and admission to the educational institution for a given year certified by the educational institution. Such fees may include admission, application, registration, enrolment, matriculation and orientation fees. Assessment or examination fees charged by the academic institution or by an examination body that are required to determine admission to an academic programme or level of study are also admissible once (no retake examination fees are admissible) (ST/AI/2018/Rev.1/Amend.1, para. 2)

26. The 2021 amendment also changed section 3.2 to provide that:

Expenses that are not enrolment-related fees, tuition or capital assessment fees as defined in sections 2.4 and 3.1 above are non-admissible, even if mandated by the academic institution. Non-admissible expenses include, but are not limited to, fees charged

for the provision of non-academic services (including health, catering, transportation, sports, extracurricular services and activities, field trips, etc.); general or miscellaneous fees; charges for resources (rental or purchase of equipment of any kind, including but not limited to laptops, computers and tablets, books, materials, supplies, uniforms, etc); and mandatory or optional contributions, donations, deposits, late fees or memberships.

27. It is the 2021 amendment that the Applicant challenges in this case. The parties have been inexact in referring to the applicable administrative instruction from the outset. This judgment will endeavour to clarify the various versions as the “original AI”, the “revised AI”, and the “amended AI”.

28. It is noteworthy that the 2021 amendment was not in a Secretary-General’s bulletin, whereby “the full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified.” See, staff regulation 12.3.

29. Instead, the amendment is in an administrative instruction, which is only meant to “prescribe instructions and procedures for the implementation of the Financial Regulations and Rules, the Staff Regulations and Rules or the Secretary-General’s bulletins”. See, ST/SGB/2009/4 (Procedures for the promulgation of administrative issuances), para. 4.1.

30. As the Applicant acknowledges, the Secretary-General may promulgate and amend administrative instructions, but that discretion is not unfettered. The exercise of discretion must not be unfair, unreasonable, illegal, irrational, procedurally irregular, biased, capricious, arbitrary, unproportional, absurd or perverse. See, *Sanwidi*, 2010-UNAT-084. In addition, the reasoning behind the administrative decision “must be sufficiently clear, precise, and intelligible [and] a generic reasoning befitting every case is not enough and renders the decision unlawful”. *Othman*, 2021-UNAT-1124, para. 30.

31. As the Appeals Tribunal has observed, “[t]he operational documents created to assist decision-makers following this rule change must also conform to Resolution 70/244 and the relevant Staff Regulations and Rules”. *Duepmann* 2022-UNAT-1221, para. 45.

32. On the one hand, it is axiomatic that the Secretary-General may not set policy in contravention of the General Assembly’s policy determinations. In this case, for example, it is clear that the Secretary-General could not promulgate an administrative issuance that broadens admissible expenses to include “additional costs relating to extracurricular activities, such as music or sport”. As noted above, such expenses were considered and rejected by ICSC in its recommendations, which were ultimately adopted by the General Assembly.

33. On the other hand, the Secretary-General may not promulgate an administrative issuance that narrows admissible expenses from those approved by the General Assembly. Yet that is precisely what the amended AI does by redefining “enrolment-related fees” as being “directly related to the application and admission” to the institution.

34. In previous variations of ST/AI/2018/1, “admission fees” and “application fees” were just two of a non-exclusive list of fees that were expressly included as admissible. The amended AI sets them to be the exclusive filter through which all other fees must pass in order to be considered admissible enrolment-related fees.

35. Indeed, the absurdity of this amendment is demonstrated by the addition of “may” to the list of examples. Thus, the amended AI provides that enrolment-related fees (as redefined) “may include ... enrolment ... fees”. Clearly, the General Assembly directed that admissible enrolment-related fees **must** include enrolment fees.

36. This case demonstrates that this is not a simple game of word salad, where rearranging the words does not change their meaning. As the Applicant argues, the amendment did not clarify the meaning of enrolment-related fees, “it completely



eviscerated it” and resulted in the exclusion of thousands of dollars in mandatory fees charged by the university in order to enrol the Applicant’s son. In its request for comments on the amendment when it was proposed, the Administration gave two reasons for the amendment, one being that it “provides clarification”. However, what clarity exists in a provision that says “enrolment-related fees” may (and presumably, may not) include enrolment fees?

37. The Administration also said that “the purpose of this amendment is to align the language of the administrative instruction with the language of the resolution on education grant approved by the General Assembly”. This cannot be true since the language in the original AI and the revised AI tracked the General Assembly resolution nearly verbatim and thus aligned precisely with the resolution.

38. Indeed, it is obvious that if the General Assembly had meant to limit admissible expenses to only application and admission-related fees, it could have said so. Instead, it adopted the broader language of “enrolment-related fees” from the ICSC report, which is devoid of any discussion about “application and admission fees”.

39. It is also important to recognize the distinction between “admission” and “enrolment”. “Admission” is a one-time activity whereby a student is accepted into an educational institution or program. In contrast, “enrolment” is an ongoing activity whereby an admitted student signs up to take individual classes during the course of their studies.<sup>1</sup>

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<sup>1</sup> The University of Auckland website makes this distinction clearly:

“What is the difference between admission and enrolment?

There are 2 stages to starting study at the University of Auckland: admission and enrolment.

- **Admission** refers to applying to study in a programme.
- **Enrolment** refers to enrolling into a course inside this programme.

You must first apply for admission to study into a programme. When your application has been approved, you can enrol into courses inside this programme”.

([https://uoa.custhelp.com/app/answers/detail/a\\_id/96/~/-/difference-between-admission-and-enrolment](https://uoa.custhelp.com/app/answers/detail/a_id/96/~/-/difference-between-admission-and-enrolment))

40. As noted above, ICSC discussions did not address application or admission. The discussions about admissible expenses were only about whether to include the cost of extracurricular activities. The Commission explicitly did not support “inclusion of additional costs relating to extracurricular activities, such as music and sport, under the provision of the education grant scheme”. Its use of the term “enrolment-related fees” reflects that intention to exclude the costs of extracurricular activities. But there is no evidence that either ICSC or the General Assembly used the term to exclude everything but the costs of application and admission.

41. The other aspect that was discussed by the stakeholders and the Commission in the ICSC report was to adopt a system that was simple, streamlined, and easy to administer. See, A/70/30, paras. 307, 315, 324, and 469. As a result, it recommended, and the General Assembly adopted, a system covering just tuition, enrolment-related fees, and boarding expenses, and excluding extracurricular activity costs. However, the amended AI substituted a complex system for determining which expenses are admissible.

42. Under this system, the education institution completes an in-depth form (P.41), which asks it to itemize admission fees, registration fees, tuition, examination/diploma fees, other mandatory expenses and optional expenses.

43. What happens next is in doubt because the Respondent has taken conflicting positions. According to the Management Evaluation letter, “when settling EG claims, the Administration states that it does not rely on what has been certified by the universities in terms of tuition and fees”. But before this Tribunal, the Respondent says it “relies on the educational institutions to complete the form accurately”.

44. However, it is clear that in this case the Administration analysed each of the 17 mandatory fees charged to the staff member to determine whether they passed the screen of the amended AI. At the management evaluation stage, the Management Evaluation Unit (“MEU”) consulted the school website “in order to ascertain the nature and purpose of the fees” and then analysed each fee (one of which was for as little

as USD9.00). None of this is the simple, easily administered system envisioned by ICSC in its recommendation and adopted by the General Assembly.

45. In sum, by restrictively redefining enrolment-related fees, the 2021 amended AI did not conform to General Assembly resolution 70/244. As such, its promulgation was an abuse of the Administration's discretion and its application in reviewing the Applicant's education grant for her son was unlawful.

46. In addition, the Applicant argues that her excluded fees should have been considered admissible as part of tuition, citing *Duepmann supra*. Specifically, she argues that "the Art Program, Library and Technology fees all relate to the core activity of teaching curriculum" and notes that, for the first semester of the 2022-2023 academic year, her son "attended school completely remotely", which would not have been possible without the school's technology initiatives.

47. According to the verification of MEU on the university's website, the Arts Program fee "is charged to all undergraduate school of the Arts majors per semester, whether the student is enrolled in Arts courses.<sup>2</sup> The revenues are allocated to the individual departments for the costs of materials, services and equipment". The Appeals Tribunal has previously found that "fees for materials and services provided for curricular activities (as opposed to co-curricular or extra-curricular ones) are tuition-related". *Duepmann*, para. 73.

48. Similarly, the Technology fee "supports university wide technological initiatives; full-time students pay a flat rate and part-time students pay a per-credit-hour rate". The Appeals Tribunal has said: "[w]e cannot detect error on the part of the UNDT in its assessment that Technology Fees are a part of tuition fees and are, thereby, reimbursable". *Duepmann*, para. 66. See also, *Awad* 2022-UNAT-1279, paras. 41

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<sup>2</sup> There seems to be no dispute that the Applicant's son was enrolled in Arts courses during the period in question. However, even if he had not been, the Appeals Tribunal has considered it "unlikely that a very fine granular analysis could have been intended in such situations when deciding that all 'tuition' costs levied by a school would be admissible". *Duepmann* para. 54.

and 44. This seems even more true in the COVID era or remote learning that during the 2017-2018 and 2018-2019 academic years examined in *Duepmann*.

49. The Library fee “is charged to all undergraduate, graduate and professional students in all programs ... Fee revenues are used to sustain library spaces, services, personnel and operations that advance student success across both campuses and online”. In *Duepmann*, the Respondent conceded that “Library fees generally constitute an integral part of the resources needed for teaching and learning and that is why they are considered part of tuition”. *Id.*, para. 42.

50. Thus, the Applicant is correct that these fees are admissible as tuition, in addition to being enrolment related. Thus, the decision to deny reimbursement for these fees is unlawful.

51. The Applicant claims to have suffered damages as a result of the unlawful decision. Specifically, she says that “[d]ue to the Respondent’s failure to pay, [she] was forced to make a full withdrawal of funds from a retirement account ... to cover the shortfall for the 2021-22 and 2022-23 academic years as well as the 2023-24 academic year”. She also claims moral harm in the form of financial stress, anxiety, and depression.

52. With regard to compensation for economic harm, clearly the denial of admissible fees for the 2022-2023 academic year and the recovery of USD1,364.52 from the advance for the 2021-2022 academic year are recoverable, along with interest at the prevailing rate calculated at the US prime rate.

53. In order to pay the fees herself, the Applicant had to withdraw funds from a retirement account, which resulted in an additional tax liability. That amount is recoverable as well, although the exact amount of additional taxes is unclear on the existing record.

54. Regarding moral harm for stress, anxiety, and depression, the Applicant recounts that the contested decision occurred at a time when she was undergoing a variety of very serious stressors which were unrelated to the contested decision. Having reviewed the entire record, the Tribunal finds that she has failed to establish an adequate nexus between the contested decision and her alleged damages to be awarded damages for moral harm.

### **Conclusion**

55. In view of the foregoing, the Tribunal DECIDES:

- a. To rescind the decisions to:
  - i. Recover USD1,364.52 from the Applicant's 2021-2022 EG advance; and
  - ii. Exclude mandatory fees from the Applicant's EG advance calculation for the 2022-2023 academic year.
- b. To order the Respondent to:
  - i. Reimburse USD1,364.52 to the Applicant. This amount shall bear interest at the United States of America prime rate with effect from 1 December 2022 until the date of issuance of this Judgment;
  - ii. Recalculate the Applicant's EG claims for the 2021-2022 and 2022-2023 academic years to include in them the excluded fees, and to settle these EG claims accordingly. The difference between the EG amount that the Applicant received and the EG amount that she should have received shall bear interest at the United States of America prime rate with effect from 1 December 2022 until the date of issuance of this Judgment; and

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iii. Reimburse the Applicant for additional taxes that she incurred as a result of having to withdraw funds from her retirement account to pay for the expenses that the Respondent improperly excluded from her EG calculation.

*(Signed)*

Judge Sean Wallace

Dated this 7<sup>th</sup> day of May 2024

Entered in the Register on this 7<sup>th</sup> day of May 2024

*(Signed)*

René M. Vargas M., Officer-in-Charge, Nairobi