



Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Jeffrey C. Dahl

Counsel for Respondent:

Esther Saabel, UNOG

Introduction

1. The Applicant, a Drug Control Officer, United Nations Office on Drug Control (“UNODC”), United Nations Office at Vienna (“UNOV”), contests the decision of the Human Resources Management Services (“HRMS”) to not allow Education Grant (“EG”) and Special Education Grant (“SEG”) to be paid in combination.

2. For the reasons set out below, the application is rejected in its entirety.

Facts

3. On 8 September 2022, in response to an email from the Applicant requesting clarification about SEG, HRMS informed the Applicant that EG and SEG are subject to the same single maximum limit and are not to be combined.

4. On 7 November 2022, the Applicant requested management evaluation of the decision above.

5. On 9 December 2022, the Management Evaluation Unit (“MEU”) decided that the email dated 8 September 2022 did not constitute an administrative decision under staff rule 11.2(a) and dismissed the Applicant’s request as not-receivable.

6. On 13 February 2023, HRMS instructed the Applicant to “re-submit the EG advance for 2023-2024 once the acceptance and costs are confirmed by the school”, and informed him that they could only process the request after the 2022-2023 advance was settled. The email further informed the Applicant that the policy on SEG entitlement had been addressed and clarified to him by e-mail dated 8 September 2022.

7. On 7 March 2023, the Applicant filed the instant application contesting the decision contained in the email dated 8 September 2022.

8. On 10 March 2023, the application was served on the Respondent who, on 5 April 2023, filed a motion to have receivability determined as a preliminary matter.

9. The Tribunal asked the Applicant to respond to the above motion, which he did on 17 April 2023.

10. By Order No. 46 (GVA/2023) of 3 May 2023, the Tribunal determined that the matter of receivability in this case is not a clear-cut issue and, therefore, did not warrant a determination as a preliminary matter. Accordingly, the Respondent's motion was rejected, and he was instructed to file his reply on the merits.

11. On 9 May 2023, the Respondent filed his reply.

12. By notification dated 7 June 2023, the Tribunal invited the parties to attend a Case Management Discussion ("CMD"), and instructed the Applicant to file his rejoinder, if any, by 14 June 2023.

13. On 14 June 2023, the Applicant filed his rejoinder, and the parties attended a CMD, held virtually via Microsoft Teams.

14. By Order No. 61 (GVA/2023) of 19 June 2023, the Tribunal scheduled a hearing on the merits, which took place on 4 July 2023.

15. By Order No. 71 (GVA/2023) of 5 July 2023, the Tribunal instructed the parties to file their respective closing submissions, which they did on 17 July 2023.

16. On 18 July 2023, the Applicant filed a motion for confidentiality requesting anonymization of his name in all published decisions to protect the privacy of his son.

Consideration

Motion for confidentiality

17. On 18 July 2023, the Applicant filed a motion for confidentiality to protect the privacy of his son, who is a child requiring special education in this case.

18. The Statute and Rules of Procedure of the Dispute Tribunal provide, in its relevant parts, as follows:

Statute - Article 11

...

6. The judgements of the Dispute Tribunal shall be published, while protecting personal data, and made generally available at the Registry of the Dispute Tribunal.

Rules of Procedure - Article 26 Publication of judgements

1. The Registrars shall arrange for publication of the judgements of the Dispute Tribunal on the website of the Dispute Tribunal after they are delivered.

2. The judgements of the Dispute Tribunal shall protect personal data and shall be available at the Registry of the Dispute Tribunal.

19. With respect to publicity, the Appeals Tribunal has held that “the names of litigants are routinely included in judgments of the internal justice system of the United Nations in the interests of transparency and, indeed, accountability” (*Lee* 2014-UNAT-481, para. 34), and that “personal embarrassment and discomfort are not sufficient grounds to grant confidentiality” (*Buff* 2016-UNAT-639, para. 21).

20. The Appeals Tribunal has also established that the principle of publicity can only be departed from where the applicant shows “greater need than any other litigant for confidentiality” (*Pirnea* 2014-UNAT-456, para. 20).

21. In other words, the internal justice system is governed by the principles of transparency, publicity and accountability. Any request to deviate from those principles needs to be grounded on exceptional and well-reasoned circumstances (*Buff*, para. 23).

22. In this case, the Applicant submits that confidentiality is necessary to protect the privacy of his son, who is only six years old and whose disability and special needs have been somewhat discussed and identified in the proceedings. The publicity of the judgment with the Applicant's name could be traced to his son. This may adversely impact his privacy rights.

23. Considering that the request for confidentiality concerns a child's privacy rights, the Tribunal is satisfied that the Applicant meets the requirements for an exceptional circumstance and, thus, grants the motion for confidentiality.

Whether the application is receivable

24. The Respondent argues that the application is not receivable because there is no final administrative decision for the Tribunal to review. In his view, the email of 8 September 2022, which is being considered as the contested administrative decision:

- a. Contains mere discussions between the Applicant and his HR representative; and
- b. Is not a decision taken in a precise individual case and does not produce direct legal consequences.

25. The Applicant argues that the 8 September 2022 email "expresses a clear, irrevocable decision by the Organization to make its position clear that the EG and the SEG are subject to the same single maximum limit". He claims that in that email, the Administration interpreted the applicable rules and clarified that any further action by the Applicant, including a new application for SEG for the upcoming academic year of 2023-2024, would not create a different result for him.

26. Finally, the Applicant argues that the email is the exercising of an administrative task to advise the Applicant that regardless of whatever grant applications he makes, the total of the EG and SEG is subject to a single combined limit, and that he is only entitled to SEG at the exclusion of the "regular" EG.

27. The Appeals Tribunal has consistently held that an appealable administrative decision is a unilateral decision taken in a precise individual case that produces direct legal consequences affecting a staff member's terms and conditions of appointment (*Simon Handy* 2020-UNAT-1044, para. 26; United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V). It has also been held that for a decision to produce direct legal consequences, it must be final. (*Ngokeng* 2014-UNAT-460, para. 31; *Olowo Okello* 2019-UNAT-967, para. 37).

28. The Appeals Tribunal has in addition held that:

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. (*Olowo-Okello*, para. 32)

29. In the Tribunal's view, the Respondent's email of 8 September 2022 expresses a clear and irrevocable decision that the EG and SEG are subject to the same single maximum limit rather than two separate limits that can be stacked. The email provided absolute certainty that the Respondent will not be open to reconsidering his position.

30. That email indeed became a point of reference on the issue, as is clear in a second email exchange dated 13 February 2023, which refers to it as follows:

The policy on Special education grant entitlement has been addressed and clarified in September 2022. E-mail correspondence dated 8th September 2022 refers.

31. As the Applicant submitted, any further action on his part, including a formal request for EG and SEG, would not produce a different result.

32. The 8 September 2022 email decisively communicated all relevant facts to the Applicant in terms of *Egor Ovcharenko et al., Daniel Edward Kutner et al.* 2022-UNAT-1262, para. 39, thereby bringing finality to the Respondent's position.

33. The application is therefore receivable.

Whether the Applicant is entitled to combined EG and SEG

34. The Applicant maintains that EG and SEG are two separate benefits that can be stacked together. He asserts that the stated purpose of the SEG is to provide a child with a disability with a program designed to meet his/her needs so that the child "may attain the highest level of functional ability", pursuant to ST/SGB/2023/1 (Staff Regulations and Staff Rules, including provisional Staff Rules, of the United Nations), Appendix B (Education grant entitlements), para (d).

35. The Applicant further submits that in duty stations like Vienna, where the basic regular education costs are calibrated just under the maximum grant, providing such special needs can only be achieved by adding the two grants together. He points to the fact that the "regular" aspect of the education combined with the cost of the special education costs will exceed the maximum of a single grant by at least EUR32,500 in the upcoming academic year of 2023-2024 and, at least, EUR22,000 in the following year.

36. The issue in this case is, therefore, whether EG and SEG consist of two independent benefits that can be granted together.

Applicable legal framework

37. By its resolution 70/244 adopted on 23 December 2015, the General Assembly ("GA") revised the education grant scheme following the Report of the International Civil Service Commission ("ICSC") for the year 2015 (A/70/30). Staff Regulations and Rules, and the Administrative Instruction concerning education grant entitlements were consequently revised.

38. The revised legal framework applicable at the time of the contested decision provides as follows:

Rule 3.9 (ST/SGB/2018/1/Rev.2) (Staff Regulations and Staff Rules of the United Nations)

Education grant

...

Amount of grant

(e) The amount to which a staff member may be entitled under the grant is set out in appendix B to the present Rules.

...

Special education grant for a child with a disability

(i) A special education grant for a child with a disability shall be available to staff members in all categories, whether serving in their home country or not, provided that they hold a fixed-term or a continuing appointment. The amount to which a staff member is entitled under the grant is set out in appendix B to the present Rules, under conditions established by the Secretary-General.

Appendix B (to ST/SGB/2018/1/Rev.2) (Education grant entitlements)

(i) Admissible expenses shall include tuition, tuition in the mother tongue and enrolment-related fees. Non-reimbursable capital assessment fees shall be reimbursed outside the education grant scheme, under conditions established by the Secretary-General. Admissible expenses actually incurred shall be reimbursed at the rates indicated in the sliding scale below.

Education grant entitlements in effect as of the school year in progress on 1 January 2022	
<i>Claim amount bracket (United States dollars)</i>	<i>Reimbursement rate (percentage)</i>
0 – 13 224	86
13 225 – 19 836	81
19 837 – 26 448	76
26 449 – 33 030	71
33 061 – 39 672	66
39 673 – 46 284	61
46 285 and above	-

...

Special education grant

(iv) Under conditions established by the Secretary-General, admissible expenses for a child with a disability shall include those educational expenses required to provide an educational programme designed to meet the needs of the child so that he or she may attain the highest level of functional ability. The amount of the grant for each child with a disability shall be 100 per cent of the admissible expenses actually incurred, subject to a maximum reimbursement equal to the upper limit of the top bracket of the sliding scale in paragraph (i) above.

ST/AI/2018/2/Amend.1 (Special education grant and related benefit for children with a disability)

...

6.1 The admissible educational expenses actually incurred for each child with a disability who is unable to attend a regular educational institution, or who attends on a full-time basis a regular educational institution that provides the necessary special arrangements, will be reimbursed at 100 per cent, subject to the following:

(a) The overall maximum amount of the grant shall be equal to the upper limit of the top bracket of the global sliding scale applicable to the education grant scheme, as determined by the General Assembly. The Office of Human Resources will inform staff members about the latest global sliding scales when approved by the Assembly;

(b) If the child is boarding for the purpose of attending an educational institution, the amount equivalent to the boarding lump sum of the education grant scheme and related benefits, as determined by the General Assembly, shall be added to the overall maximum amount mentioned in section 6.1 (a) above. The Office of Human Resources will inform staff members about the boarding lump sum amounts approved by the Assembly.

6.2 When a child with a disability attends on a full-time basis a regular education institution and no special arrangements are made at that institution for the child concerned:

(a) The admissible educational expenses actually incurred at the regular education institution shall be reimbursed under the regular education grant scheme governed by the provisions of administrative instructions ST/AI/2018/1/Rev.1, ST/AI/2018/1/Rev.1/Amend.1 and ST/AI/2018/1/Rev.1/Amend.2;

(b) Admissible educational expenses for each child with a disability actually incurred for special teaching and training outside the regular educational institution and expenses incurred for boarding pursuant to section 5.1 (a) above shall be reimbursed under the special education grant scheme governed by the provisions of the present instruction and at the 100 per cent rate.

The combined total of the two amounts shall not exceed:

(a) The upper limit of the top bracket of the global sliding scale, when no boarding is applicable; or

(b) The upper limit of the top bracket of the global sliding scale plus the amount equivalent to the boarding lump sum of the education grant scheme and related benefits, when boarding is applicable.

Report of the ISCS for the year 2015 (A/70/30)

Special education grant for children with a disability

352. The Commission took note of the proposals to maintain the list of admissible expenses, the full reimbursement of the total expenses up to a ceiling amount, the eligibility for boarding assistance and the education grant travel for special education cases. Under the revised scheme for the education grant, with the exception of boarding assistance to eligible staff in the field, only tuition and enrolment-related fees would be reimbursable. It was acknowledged, however, that additional items were critical to special education and that there were compelling reasons to treat such items as admissible. Moreover, the Commission considered that owing to the challenges faced by children with a disability in receiving education, the full reimbursement principle and the eligibility for boarding assistance and education grant travel should be maintained in the special education grant scheme.

353. Further, a new ceiling would need to be introduced for the special education grant, given that the proposed scheme had eliminated the 15 separate country/currency zones for the education grant. Commission members agreed to a suggestion that the upper limit of the top bracket of the global sliding scale applicable to the education grant be used as a global ceiling for the special education grant.

General Assembly resolution 70/244

35. *Also decides* that the current scheme of the special education grant for children with disabilities shall continue to apply after the introduction of the revised regular education grant scheme, subject to the overall global ceiling equal to the upper limit of the sliding scale plus the amount equivalent to the boarding lump sum under the regular education grant scheme;

36. *Further decides* that the maximum admissible expenses for the special education grant should be synchronized with those of the education grant, so as to set the maximum at an amount equal to the upper limit of the top bracket of the applicable global sliding scale[.]

Possibility of combining EG and SEG

32. Pursuant to sec. 6.1(a) of ST/AI/2018/2/Amend.1, the overall maximum amount of SEG shall be equal to the upper limit of the top bracket of the global sliding scale applicable to the education grant scheme.

33. Appendix B, para. (d) to the Staff Rules similarly provides that the amount of the grant for each child with a disability shall be 100 per cent of the admissible expenses actually incurred, subject to a maximum reimbursement equal to the upper limit of the top bracket of the sliding scale.

34. Regarding a child with disability attending a regular educational institution without any special arrangements for the child, sec. 6.2 provides that the “combined total” of the amount paid under the regular EG scheme and under the SEG scheme for additional expenses for special teaching and training outside the regular educational institution shall not exceed the upper limit of the top bracket of the global sliding scale.

35. As argued by the Applicant, the Tribunal agrees that his request for SEG falls under the provision of sec. 6.1, rather than sec. 6.2, because his child will, on a full-time basis, attend a regular educational institution that provides the necessary special arrangements. This does not however mean that the different wording between these two sections provides for the possibility of “stacking” the two grants, as the Applicant suggests.

36. By indicating in sec. 6.2 that “the combined total of the two grants [shall] not exceed the maximum of the global sliding scale”, the law simply refers to the fact that in the case of a child who is attending a regular education institution *and* receiving special education outside of that institution, the staff member will receive two separate grants, namely EG and SEG, and that the combined total of both shall not exceed the maximum limit, even though that staff member is receiving two grants.

37. In the context of sec. 6.1, however, there is only one grant being given to the staff member, which is SEG. The difference between EG and SEG is in the percentages of reimbursement that eligible staff members are entitled to receive. Paragraph (a) of sec. 6.1 is very clear in establishing the overall maximum amount of the grant in this scenario and does not need to refer to a “combined total”, as sec.6.2, in order to be clearer.

38. In reality, the legislation provides an additional financial benefit to staff members whose children may require special education under the SEG scheme. This is clear from the fact that admissible expenses in the EG scheme are reimbursed at the rates indicated in the global sliding scale, which varies from 61 to 86 per cent, whereas SEG is reimbursed at 100 per cent of the admissible expenses. That means that staff members eligible to SEG are indeed entitled to a bigger grant than staff members who are only eligible to EG.

39. This difference in reimbursement percentage addresses the Applicant’s position: the SEG was created to support staff members whose children with disability require a bigger financial assistance.

40. There is therefore no ambiguity in the relevant legal framework or in the Organization’s interpretation of the law.

41. The Tribunal therefore finds that the SEG is subject to the same maximum limit as the regular education grant, and that the two grants cannot be combined in a manner that exceeds the legal maximum limit.

The historical position of the ICSC and the GA

42. Contrary to the Applicant’s assertion, the aforementioned excerpts do not support the position that the ICSC envisioned that EG and SEG should be combined in a manner that exceeds the legal maximum limit. By providing that “the upper limit of the top bracket of the global sliding scale applicable to the education grant be used as a global ceiling for the special education grant”, the last sentence of para. 353 of Report of the ICSC for the year 2015 quoted above supports the position that the two grants are separate.

43. In the Tribunal’s view, the fact that tuition and enrolment-related fees are included as part of the admissible expenses for SEG implies that SEG cannot be considered separately in addition to EG. Were this to be the case, tuition and enrolment-related fees would be reimbursed twice, an irregularity that would doubly benefit some staff members, including the Applicant, for the same reimbursable items.

44. Para. 35 of General Assembly resolution 70/244 similarly provides that SEG is subject to the “upper limit of the sliding scale” referred to as “the *overall* global ceiling”. The assertion that the General Assembly envisioned two separate schemes with an equal limit is therefore without basis.

45. Furthermore, the Applicant argues that the fact that the GA refers to “synchronizing” the admissible expenses of each grant supports the position that the two grants are separate.

46. In agreement with the Respondent, the Tribunal determines that a decision that the maximum admissible expenses for SEG should be “synchronized” with those of EG (para. 36, General Assembly resolution 70/244) would not serve any purpose if SEG was amenable to being paid in addition to EG as part of a separate scheme.

47. Importantly, the relevant regulatory framework is clear that SEG and regular EG are part of one general scheme subject to the same upper limit and that the maximum limit cannot be exceeded.

Applicability of the exception under staff rule 12.3(b)

48. The Applicant asks that his case be treated as an exception under staff rule 12.3(b), which provides:

[E]xceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any Staff Regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

49. It is clear from the above law that the decision to treat the Applicant's case as an exception is a matter of administrative discretion and not of judicial mandate. There is, therefore, no room for judicial intervention regarding the Applicant's request that he be treated exceptionally in terms of staff rule 12.3(b).

Whether the contested decision is discriminatory

50. Finally, the Applicant contends that the interpretation conveyed in the contested decision is discriminatory against staff members whose children have disability, and especially those based at duty stations where regular education fees are high, such as Vienna.

51. This argument is noteworthy, but it is not enough to render the contested decision unlawful. Any issues with the law of the Organization cannot be remedied through the process of judicial review, which is limited in scope.

52. In other words, the Tribunal is not mandated to review the Organization's legislative decisions, which is what the Applicant's argument calls for.

53. A plain reading of the relevant legal provisions indicates that the EG and the SEG are subject to the same single maximum limit rather than two separate limits that can be stacked. The contested decision is therefore lawful.

Conclusion

54. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Margaret Tibulya

Dated this 21st day of September 2023

Entered in the Register on this 21st day of September 2023

(Signed)

René M. Vargas M., Registrar, Geneva