UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2022-UNAT-1253

Cecile Berthaud

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Kanwaldeep Sandhu Judge John Raymond Murphy
Case No.:	2021-1592
Date of Decision:	1 July 2022
Date of Publication:	12 August 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Robbie Leighton, OSLA
Counsel for Respondent:	Patricia C. Aragonés

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal or UNAT) has before it an appeal by Ms. Berthaud (the Appellant), a former staff member (retired) of the United Nations Development Programme (UNDP). Ms. Berthaud had contested the decision to pay her repatriation grant at the single rather than dependency rate before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), which issued Judgment No. UNDT/2021/063 (Impugned Judgment) dismissing her application finding the decision was lawful.

2. For the reasons set out below, we uphold the appeal and remand the case to the UNDT.

Facts and Procedure

3. The UNDT established the facts as follows:

> … On 5 August 2016, the Applicant separated from the service of UNDP upon reaching early retirement age. Since her husband was at the time serving with the World Food Programme ("WFP"), she remained in Rome, where she had been on secondment with the International Fund for Agricultural Development ("IFAD") from 2011 to 2015.
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> … Between December 2015 and November 2016, i.e., prior and after the Applicant's separation from service, the Applicant had several email exchanges with a colleague in the Global Shared Services Unit ("GSSU"), UNDP, concerning her separation entitlements, namely repatriation grant, relocation lump-sum and travel grant. The exchanges focused in particular on the Applicant's understanding of being entitled to be paid repatriation grant at the dependency rate, whereas her husband would receive it at the single rate.
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> … By email of 10 November 2016, the Applicant's GSSU colleague *inter alia* clarified to her that she and her husband would be paid a repatriation grant only if both were paid at the single rate.
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> … By email of 14 Nov 2016 to her GSSU colleague, the Applicant acknowledged that UNDP's and the UN Secretariat's legal texts on repatriation grant were confusing, and she suggested to revisit the matter at the actual time of her relocation.
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> … Consequently, in agreement with UNDP, the Applicant deferred until her husband's separation:
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> > a. The determination of the rate to be applied for the calculation of her repatriation grant and its payment; and
> >
> > b. The payment of her relocation lump-sum (paid in lieu of shipment).

… By email of 17 April 2019 to her GSSU colleague, the Applicant *inter alia* advised UNDP that her husband would retire in July of that year and that WFP would be contacting UNDP regarding her husband's entitlements. The Applicant also requested that UNDP confirm that her repatriation grant would be paid at the dependency rate.

… On the same day, the Applicant's GSSU colleague emailed her twice recalling his November 2016 clarification (see para. 4 above) and underlining *inter alia* that he needed to discuss the matter with WFP. In particular, referring to the Applicant and her husband, the Applicant's GSSU colleague clearly indicated that "There is only one of you who can get dependency rate for the full period and the other will only get the balance. This is why I need to talk with [WFP] on what is being paid. Your husband then would only be able to get the balance, if you [are] paid at dependency rate".

… By email of 23 April 2019, a Human Resources Assistant ("HR Assistant") at WFP informed UNDP that the Applicant's husband would be paid repatriation grant at the single rate.

… By email of 24 April 2019 to WFP and to the Applicant, the Applicant's GSSU colleague *inter alia* confirmed that:

> a. UNDP would pay the Applicant's repatriation grant at the single rate as well as USD5'000 as her relocation lump-sum; and
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> b. There was no travel entitlement due by UNDP.

… On 31 May 2019, the WFP HR Assistant and the Applicant's GSSU colleague exchanged emails on the implications of paying either the Applicant's or her husband's repatriation grant at the dependency rate. A consensus emerged on the fact that i) either of them claiming repatriation grant at the dependency rate would leave the other without such entitlement, and ii) each of them claiming the repatriation grant at the single rate was the most financially advantageous option.

… By email of 18 June 2019, the Applicant's GSSU colleague provided her with a calculation of the two options available for the payment of her repatriation grant.

… By email of 23 June 2019 to her GSSU colleague, the Applicant conveyed her disagreement with UNDP's interpretation of the rules related to the payment of repatriation grant.

… By email of 28 June 2019, a Human Resources Specialist ("HR Specialist") within GSSU informed the Applicant that she had received her case for review. She also *inter alia* advised the Applicant that UNDP had been in touch with WFP "to coordinate the entitlements" and reiterated that the most beneficial option was for the Applicant and her husband to claim repatriation grant at the single rate. Finally, the HR Specialist informed the Applicant that as WFP had confirmed repatriation grant payment at the single rate for the Applicant's husband, UNDP would proceed to pay her repatriation grant also at the single rate.

> … The Applicant replied to the HR Specialist on the same day. Noting that lengthy exchanges on the matter had taken place and that her reading of the rules was different, the Applicant requested to be informed to "whom [she] should write to next in UNDP to claim a review of [her] claim to dependency rate according to the UN rule".
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> … The HR Specialist responded to the Applicant by email of 3 July 2019 informing her that:
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> > a. Pursuant to UNDP rules, UNDP staff members cannot be paid repatriation grant at the dependency rate if their UN spouse receives said grant at the single rate; and
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> > b. As discussions about her case were ongoing with UNDP Policy colleagues, she suggested to proceed with payment of her repatriation grant at the single rate subject to processing adjustments, if any, later on if needed.
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> … By email of 4 July 2019, the Applicant acknowledged the HR Specialist's reply and confirmed that she would await the outcome of consultations between UNDP and WFP.
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> … By email of 15 August 2019, the HR Specialist assured the Applicant that the policy question she had raised was still under consideration and that she hoped to have "final clarification" by the following week.
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> … By email of 22 August 2019, the HR Specialist confirmed to the Applicant that payment of her repatriation grant was at the single rate, as she did not have a child recognized as a dependent at the time of her separation from service or of her actual repatriation. The HR Specialist concluded that there would be no adjustment made to the repatriation grant amount already paid to the Applicant.
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> … By email of 23 August 2019 to the HR Specialist, the Applicant expressed her disagreement with the decision and requested confirmation of whether it was final so that she could appeal it in due course.
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> … By email of 28 August 2019, the HR Specialist reiterated to the Applicant that UNDP was not able to pay her repatriation grant at the dependency rate.
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> … On 18 October 2019, the Applicant filed a request for management evaluation contesting the decision not to pay her repatriation grant at the dependency rate.
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> … By letter dated 2 December 2019, the Assistant Administrator and Director, Bureau for Management Services, UNDP, informed the Applicant that there was no basis for amending the contested decision.

Impugned Judgment

4. The UNDT held the decision to pay Ms. Berthaud her repatriation grant at the single rate was lawful and in accordance with the UNDP Policy as well as Annex IV to the Staff Regulations and Rules of the United Nations (Annex IV). The UNDT noted that both

UNDP and WFP are part of the UN Common System, the benefits and entitlements of which are established by the International Civil Service Commission, and the UNDP Policy with respect to preventing duplicate payment of the repatriation grant applies to staff members with spouses in other UN Common System organizations, not just to spouses in UNDP alone. Pursuant to para. 17.d) of the UNDP Policy cited above, WFP's payment of the repatriation grant at the single rate to Ms. Berthaud's husband required UNDP to also pay Ms. Berthaud at the single rate. If in general the said rule provides for a choice to the staff member to separate and a reckoning for the second (within the same UNDP), this beneficiaries' order does not preclude UNDP from considering the entitlement already received by the spouse (by his/her different employer, of course following its applicable rules) if separated before the staff member concerned. The rule seeks to avoid double payments to staff members within the UN Common System. The UNDT further held that consequently in applying its policy to Ms. Berthaud, the UNDP could only pay her repatriation grant at the dependency rate if her husband was paid the single rate for only the period of qualifying service after the date of her separation (which would have only been three years and therefore not qualified him for payment of any grant) or if her husband was paid the single rate for his entire qualifying period of service, minus the amount of grant paid to Ms. Berthaud. As a result, WFP's decision to pay Ms. Berthaud's husband repatriation grant at the single rate for his entire period of qualifying service precluded UNDP from paying the Applicant at the dependency rate under the UNDP Policy, which imposes that if one spouse is paid the single rate for his/her entire period of qualifying service, then the other spouse can also only be paid the single rate for his/her entire period of qualifying service.

Procedure before the Appeals Tribunal

5. On 30 July 2021, Ms. Berthaud filed the instant appeal.

6. On 1 October 2021, the Secretary-General filed his answer.

Submissions

Ms. Berthaud's Appeal

7. Ms. Berthaud's requests the UNDT Judgment on the merits be overturned and that the UNAT order payment of Ms. Berthaud's repatriation grant at the dependency rate with interest. The UNDT erred in fact and law by finding that UNDP and WFP agreed that one

spouse receiving repatriation grant at the dependency rate would leave the other without such entitlements. The UNDT records their conclusion that the human resources units of UNDP and WFP reached a consensus regarding Ms. Berthaud and her husband's repatriation grant. Such statement demonstrates a complete misunderstanding of the difference between the two Organisation's rules regarding repatriation grant where spouses are both staff members. Under UNDP rules, where spouses are both staff, they will both receive the grant at the single rate. If there are dependent children, as in this case, the first staff member separating has a choice whether to claim repatriation grant at the dependency rate. Should they claim at the dependency rate, this modifies the entitlement of the second spouse to separate such that they receive only the balance. This can be contrasted with the rule elsewhere in the UN Common System. WFP follows the Administrative Instructions of the Food and Agriculture Organization (FAO). FAO's rule regarding repatriation grant where spouses are both staff members is different from UNDP's. It provides that:

> 9.624
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> When both husband and wife are staff members and both are eligible to receive a repatriation grant, their individual entitlements shall be governed by the following provisions:
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> a. when neither the husband nor the wife has dependent children, each shall be entitled to payment of a repatriation grant at the lower rate calculated in accordance with Staff Regulation 301.16.2;
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> b. when dependent children are recognized, and one parent receives dependency benefits in respect of such children, payment of a repatriation grant at the higher rate may be claimed; the other parent may claim payment of a repatriation grant at the lower rate;
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> c. the higher rate of repatriation grant shall not be paid in respect of a spouse who was previously a staff member and received a repatriation grant upon separation, nor shall it be paid more than once in respect of the same dependent children.

8. Thus, under WFP's rules only one spouse may receive the benefit at the dependency rate. The other will receive the benefit at the single rate for the full period of service. Because UNDP's and WFP's rules are different in this regard, it is inconceivable that there might have been consensus that "either of them claiming repatriation grant at the dependency rate would leave the other without such entitlement" as this does not conform to WFP's clear rule. The lack of consensus is shown by the e-mail exchange between Ms. Berthaud's husband, Mr. Vial, and WFP's Human Resources Assistant, Ms. P, on 19 June 2019:

> Mr. Vidal asks "Based on message below, UNDP seems to understand that if my wife gets dependency rate, WFP would not pay me anything for the repatriation grant, i.e. not even single rate."
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> To which Ms. P replies: "Dear Denis Of course you will get the repatriation grant at single rate paid by WFP".

9. The conclusion of the UNDT is inexplicable and represents a fundamental error of fact and law going to the heart of the case and leading to a manifestly unreasonable decision.

10. The UNDT erred in fact leading to a manifestly unreasonable decision and error in law by concluding Ms. Berthaud's husband separated prior to her. The UNDT appears to accept that the UNDP's rule "provides for a choice to the staff member to separate and a reckoning for the second" i.e., a choice as to whether to take the entitlement at the dependency rate or not for the first to separate and a reckoning for the second to separate. This is described by the UNDT as the "beneficiaries' order" which they find allows "UNDP to consider the entitlements already received by the spouse [...] if separated before the staff member concerned". The UNDT's wording is clear that UNDP can consider entitlements received by the other staff member "if separated before the staff member concerned". In the instant case, Ms. Berthaud was the "staff member concerned". Ms. Berthaud would simply indicate that her husband separated some years after her. Thus, by the interpretation presented by the UNDT, his entitlement could have been modified, had he worked for UNDP. Since he did not separate before Ms. Berthaud, her award could not be so modified. The "beneficiaries' order" as described by the UNDT means Ms. Berthaud should have been afforded a choice under UNDP's rule as to whether to receive the entitlement at the dependency rate or otherwise.

11. The UNDT erred in law by mischaracterizing the argument presented by Ms. Berthaud and failed to exercise jurisdiction by not addressing such. The UNDT states Ms. Berthaud argued that the Secretariat rule applied to her repatriation grant entitlement. Such argument appears nowhere in Ms. Berthaud's pleadings. She instead argued that the UNDP Administrative Instruction was inconsistent with the Staff Rule establishing the entitlement and therefore offended against the hierarchy of norms. The Staff Rule specifically provides that where spouses are staff members, "each" will receive the entitlement. Payment to "each" indicates that both spouses will be paid. However, under UNDP's rule, one staff member will be entirely disentitled by the choice of the other. This shows an inconsistency between the UNDP's rule and the Staff Rule. Rather than addressing the use of the word "each" in the Staff

Rule, the UNDT instead endowed UNDP with complete autonomy to promulgate terms and conditions for the entitlement that do not correspond to the Staff Rule. The UNDT's application of l*ex specialis* diverges from this Tribunal's consistent findings regarding the hierarchy of norms. The UNDT did not properly consider the meaning of the word "each" as appearing in the Staff Rule and the discord that exists between UNDP's Administrative Instruction and the Staff Rule. This discord between UNDP's rule and the Staff Rule is also demonstrated by the fact that UNDP's rule differed from that applied everywhere else in the UN Common System. Ms. Berthaud does not argue that the Secretariat's rules should apply to UNDP but instead the fact that UNDP interpret payment to "each" differently from the rest of the UN Common System shows discord between their subordinate rule and the Staff Rule. The UNDT recast this argument as being simply that the Secretariat's rule should apply to Ms. Berthaud. This is an error in law and failure to exercise jurisdiction.

12. The UNDT erred in fact and law resulting in a manifestly unreasonable decision by finding that the UNDP's rule was to avoid duplication of payments. The UNDT concluded that UNDP's rule regarding UN spouses' repatriation grant was to avoid duplication of payments. The first clue that this is not the case is that the UNDP's rule differs from that applied everywhere else in the UN Common System. Thus, if the UNDT's finding were accurate the rules of all other organisations would result in duplication of payments. The second clue that this is not the case comes from the fact that under UNDP's rule UN spouses with no children both receive repatriation grant at the single rate, when UN spouses with dependent children both receive repatriation grant at the single rate. The UNDT would presumably not disagree that repatriation of staff with dependents has a cost associated with it. Thus, the payment of a greater entitlement where dependent children exist does not create duplicate payment. Again, the UNDT mischaracterized Ms. Berthaud's argument that no duplication of payment existed in WFP and the Secretariat's rules. Instead of addressing the argument presented, the UNDT claimed the argument was one of fairness and therefore beyond the remit of the UNDT. The UNDT repeatedly justifies its finding on the basis of a need to avoid duplication of payments and thus this error in fact and law has directed the decision making resulting in a manifestly unreasonable decision. The UNDT erred in fact and in law in finding that payment of Ms. Berthaud repatriation grant at the dependency rate and her husband at the single rate would duplicate payment. The UNDT relied on this finding in making a further error in law that UNDP were permitted to reconcile entitlements of spouses employed with different organisations.

13. The UNDT erred in law in finding that UNDP's rule allowed them to reconcile payments made to staff members not employed by UNDP but within the United Nations system. Ms. Berthaud's argument in this regard is relatively simple. Given the respective employment situations of Ms. Berthaud and her husband, her entitlements should have been governed by UNDP's rules, and those of her husband by WFP's rules. The UNDT have erred in law by effectively applying UNDP's more restrictive rule to both. The UNDT found that UNDP's Administrative Instruction on repatriation grant applied to staff members outside UNDP by stating that it was "not limited to UNDP staff members as it seeks to reconcile payments made to staff members within the United Nations system, irrespectively of the fact that the spouse is a UNDP staff member too or not". This finding is in clear contradiction to the notion that different organisations have authority to promulgate their own rules which notion the UNDT supports elsewhere in the same judgment. This ability to reconcile payments made to staff members employed outside UNDP does not exist in the strict wording of the UNDP rule. That rule indicates that "the first parent to be separated may claim payment of the grant at the rate for a staff member with a spouse or dependent child". As the first staff member to separate, UNDP's rule provided her with a choice. The strict wording of the UNDP's rule allows only for modification of the entitlement of the second spouse to separate. Ms. Berthaud does not consider there is any ambiguity in this provision but were there to be the UNDT should have resolved it in Ms. Berthaud's favor on the basis of the doctrine of *contra proferentem*. Had Ms. Berthaud's spouse been a UNDP staff member, Ms. Berthaud would have been offered the choice and her husband's entitlement modified according to that choice. Without justification, because Ms. Berthaud's husband was not employed by UNDP, they decided not to apply the UNDP's rule to Ms. Berthaud and not to afford her such choice. The UNDT's conclusion that the UNDP's rule allows for a reconciliation between entitlements of staff employed in different organisations is not present in the plain reading of the rule. To create such a policy of general application, it would be necessary for such to be contained in a promulgated rule. The UNDT, rather than interpreting the promulgated rule that existed, have read into it provisions that do not exist which authorise UNDP to derogate from the plain wording of their rule when spouses are employed by entities with differing rules. This is how the UNDT justifies withdrawing the choice that accrued to Ms. Berthaud under UNDP's rules exclusively on the basis that her husband's entitlements are governed by different rules. In so doing the UNDT gave precedence to UNDP's rule regarding repatriation grant for UN spouses over and contrary to WFP's rule regarding repatriation grant for UN spouses. While UNDP may be able to promulgate rules

governing the employment of their own staff, to consider that their rules interpreting repatriation grant benefits take precedence over the entitlements of staff employed elsewhere in the UN Common System has no basis in law. Only by concluding that UNDP's rule applied to non-UNDP staff was the UNDT able to conclude that this power to reconcile entitlements of non-UNDP staff members could be added to the clear wording of the UNDP rule. The UNDT's conclusion is still more confusing since they acknowledge that different organisations may promulgate different rules while concurrently finding UNDP's rules take precedence over other such rules. This error in law is also grounded in the earlier error that UNDP's rule prevents duplication of payment when no duplication exists in the rules of WFP, the Secretariat or other parts of the UN system.

The Secretary-General's Answer

14. The Secretary-General requests the UNAT to dismiss the appeal in its entirety. The UNDT correctly found the decision lawful. Staff Regulation 9.4 and Staff Rule 3.19, and Annex IV, together with the UNDP Repatriation Policy, govern the current case. Staff Rule 3.19(g) outlines payment of the repatriation grant to UN spouses, providing: "When both spouses are staff members and each is entitled to payment of a repatriation grant on separation of service, the amount of the grant paid to each shall be calculated in accordance with terms and conditions established by the Secretary-General". Annex IV provides, in relevant part, that eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station and establishes two rates of payment: a dependency rate for a staff member with a "spouse or dependent child at time of separation" or a single rate for a staff member "with neither a spouse nor dependent child at time of separation". The Repatriation Policy, issued pursuant to the UNDP Administrator's authority under Staff Rule 3.19(g), establishes the terms and conditions of payment of the repatriation grant to UNDP staff members with UN spouses. Section 17(d) of the Repatriation Policy (Section 17(d)) provides that if both UN spouses are entitled to the repatriation grant, the grant is normally paid to each according to his/her length of qualifying service (Option 1). If there are dependent children, the first spouse to separate may claim payment at the dependency rate. In such case, there are two additional options. The first spouse to separate can be paid at the dependency rate, in which case the second spouse to separate is paid at the single rate only for the period of his/her qualifying service after the separation of the first spouse (Option 2); or, the first spouse to separate can be paid at the dependency rate, in which case the second spouse to separate is paid at the single rate for his/her whole period of qualifying service, less the

amount of repatriation grant paid to the first spouse to separate (Option 3). Per the *Sanwidi*[1] standard of review, the UNDT reviewed the legality of the decision by considering the above framework and facts of this case. The UNDT found that, under Section 17(d), the UNDP had an obligation to reconcile payments made to UN spouses when one spouse claims payment of the repatriation grant at the dependency rate, in order to avoid duplicative payments for any overlap in qualifying periods. The UNDT found that the UNDP was not precluded from considering the repatriation grant paid to her non-UNDP spouse and adjusting her payment. When considering the applicable payment options under Section 17(d) in light of its purpose of avoiding any duplicative payments, the UNDT further concluded that "if one spouse is paid the single rate for his/her entire period of qualifying service, then the other spouse can also only be paid the single rate for his/her entire period of qualifying service". The UNDT correctly concluded that the WFP's payment to Ms. Berthaud's husband for his entire qualifying period at the single rate required the UNDP to pay Ms. Berthaud hers at the single rate as well.

15. Ms. Berthaud failed to identify any errors warranting reversal. Repatriation grant is an entitlement subject to discretion of the Secretary-General. The provisions do not indicate that a first spouse shall claim but may claim the entitlement. The UNDP's obligation under Section 17(d) to consider payments made to non-UNDP but UN Common System staff is also self-evident. Section 17(d) is titled "Both spouses are UN staff members". It notably does not say "Both spouses are UNDP staff members". Achieving Section 17(d)'s purpose of preventing duplicative payments to a family unit necessitates consideration of the payment made to both UN spouses, irrespective of the entity within the UN Common System for whom he/she works. This applicability regardless of where the other UN Common System spouse is employed is clearly borne out of the policy's purpose. Ms. Berthaud's reliance on *Valimaki-Erk*,[2] for the proposition that the UNDP's authority to reconcile payments as it did, involves a "policy of general applicability" that requires issuance of a promulgated rule. The policy at issue in *Valimaki-Erk* had not been reflected in any administrative issuance. In the present case, the Repatriation Policy had been promulgated and its purpose and application is self-evident.

16. The UNDT did not err when finding that under Section 17(d) of the Repatriation Policy Ms. Berthaud's payment could be adjusted even though she was the first spouse to separate and was entitled to claim payment at the dependency rate. The UNDT's findings did not involve any

[1] *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084.
[2] *Valimaki-Erk v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-276.

"derogation" of Section 17(d) nor any error in the application of the "beneficiaries' order". As noted above, avoiding duplicative payments necessitates consideration of payments made to UN spouses and, by logical extension, their reasonable adjustment in accordance with the purpose of the Repatriation Policy – including, as in the present case, to the amount payable to Ms. Berthaud even as the first spouse to separate. Thus, the UNDT correctly concluded that the UNDP was obligated to consider the WFP's payment to her husband in determining whether she was entitled to the dependency rate and to adjust her rate accordingly. The UNDT did not conclude that her husband had separated from service before she had. The uncontested fact is that her husband's repatriation grant was determined and paid before hers. Ms. Berthaud's reliance on the doctrine of *contra proferentem* ("interpretation against the draftsperson") is inapposite. *Couquet*[3] establishes the proposition that where the Staff Rule is clear and unambiguous and there is no conflict between the Staff Rule and the administrative issuance in question, there is "no cause" to invoke the *maxim contra proferentem*. Ms. Berthaud's claim that she should have been given a choice is disingenuous. On 18 June 2019, the UNDP presented her with two options and asked her to "[p]lease confirm which option [she] would like to choose". To the extent that the WFP's decision, reconfirmed ten days later, to pay her husband at the single rate reduced her available options from two to one, does not mean that she was not afforded a choice. Ms. Berthaud has failed to explain how these alleged errors led to a manifestly unreasonable result warranting reversal of the Judgment.

17. The UNDT did not err in finding consensus between the UNDP and the WFP. Even if the UNDT's finding of consensus was an error (which it was not), it has no bearing on the lawfulness of the contested decision. Assuming *arguendo*, an error in the explanations given by the UNDP or the WFP in their respective exchanges with Ms. Berthaud and her husband, leading them to have an expectation that Ms. Berthaud would receive the repatriation grant at the dependency rate, the UNAT has recognized the Administration's right to rectify its own error. The WFP was in agreement that payment of repatriation grant to Ms. Berthaud and her husband must avoid any overlap between their respective qualifying periods. After the WFP's payment to Ms. Berthaud's husband, Option 1 was the only option left available to which Ms. Berthaud was entitled and was the best financial outcome for both her and her husband.

[3] *Couquet v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-574, para. 39.

18. Lastly, the UNDT did not fail to properly exercise its jurisdiction. Ms. Berthaud argues that the UNDT erred in its application of *lex specialis* because the UNDT "diverged" from the UNAT's jurisprudence on the hierarchy of norms when it considered the legality of the Repatriation Policy. As noted above, there is no conflict between Staff Rule 3.19(g) and the Repatriation Policy and the two sets of provisions can be read together coherently. Thus, there was no error by the UNDT in its application of *lex specialis*. The Tribunals are not competent to review the choice of policy decisions as reflected in the legal framework, and the UNDT correctly found that Ms. Berthaud's policy-related claims were irrelevant to the issue before it and fell outside of its remit.

Considerations

19. The questions for determination are whether: i) Ms. Berthaud was entitled to a repatriation grant at the dependency rate rather than at the single rate, and ii) the UNDT erred in law and in fact in interpreting the relevant provisions to exclude her from eligibility at the dependency rate.

20. Payment of repatriation grant to UNDP staff members is governed by Staff Regulation 9.4, Staff Rule 3.19, Annex IV, and the UNDP Repatriation Policy. Staff Rule 3.19(g) outlines payment of the repatriation grant to UN spouses, providing: "When both spouses are staff members and each is entitled to payment of a repatriation grant on separation of service, the amount of the grant paid to each shall be calculated in accordance with terms and conditions established by the Secretary-General".

21. Annex IV provides, in relevant part, that eligible staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station and establishes two rates of payment: a dependency rate for a staff member with a "spouse or dependent child at time of separation" or a single rate for a staff member "with neither a spouse nor dependent child at time of separation".

22. The Repatriation Policy, issued pursuant to the UNDP Administrator's authority under Staff Rule 3.19(g), establishes the terms and conditions of payment of the repatriation grant to UNDP staff members with UN spouses, as follows:

> UNDP Repatriation Policy
>
> Eligibility

3. The repatriation grant is payable to internationally recruited staff members governed by the UN Staff Regulations and Staff Rules who belong to both of the following groups:

a) Those whom UNDP has an obligation to repatriate following completion of a minimum of five years of qualifying service as defined in paragraph "Qualifying Service" below; and

b) Those who reside outside the home country and country of nationality while serving at the last duty station.

4. No repatriation grant is paid to:

a) A staff member who has not completed a minimum of five years of qualifying service as defined in paragraph "Qualifying Service" below

b.....

Qualifying service

6. Qualifying service for purposes of the repatriation grant upon separation from service is defined as follows:

a) When a staff member serves a minimum of five years of continuous service and residence away from the home country and the country of nationality or from a country where the staff member has acquired permanent resident status b) During periods of special leave, qualifying service remains continuous. However, service credits for purposes of computation of the repatriation grant shall not accrue during periods of special leave with partial pay (SLWPP) or without pay (SLWOP) of one full month or longer. Periods of less than 30 calendar days do not affect the ordinary rate of accrual of service time for the repatriation grant.

c) Service is considered to be broken by separation from service as defined in UN Staff Rule 9.1. If re-employed under UN Staff Rule 4.17, a new period of qualifying service will begin upon the staff member's re-employment.

d) Continuous service is not interrupted by assignment to the home country or country of nationality or country of permanent residence; however, in such cases qualifying service credits towards the repatriation grant shall be counted as follows:

i) The qualifying service credits are reduced by twice the number of completed years and months of non-qualifying service within the home country, or the country of nationality, or country of permanent residence ii) Following reassignment to a duty station outside the home country or the country of nationality or country of permanent residence, qualifying service credits towards the repatriation grant shall be restored at twice the normal rate until such time as the service credits reduced in paragraph i) above have been restored. Thereafter, qualifying service credits shall accrue at the normal rate until the maximum of 12 years is reached; and iii) Upon separation, the staff member is entitled to payment of the grant on the basis of the balance of qualifying service at that time;

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> **Payment**
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> 17. The modalities for the payment of the repatriation grant are as follows:
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> *Calculation*
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> a) The amount of the grant is established in relation to the staff member's length of service with UNDP or another organization of the UN common system. It is calculated for international professional staff members, based on their gross salary, less staff assessment.
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> ....
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> *Rate*
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> b) The repatriation grant is calculated at the rates specified according to the schedule provided in Annex IV of the Staff Regulations.
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> c) The repatriation grant is paid at the rate for a staff member with a spouse or
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> dependent child, if the staff member, at the time of separation, has a spouse (regardless of whether the spouse is a dependent) or a child recognized as
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> dependent, regardless of where they are located.
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> *Both spouses are UN staff members*
>
> d) If both spouses are staff members and both are entitled to the repatriation grant, on separation, the grant is normally paid to each according to his/her length of qualifying service at the rate for a staff member with neither a spouse nor a dependent child at the time of separation. If there are dependent children, the first parent to be separated may claim payment of the grant at the rate for a staff member with a spouse or dependent child. In this case, the second parent to be separated may claim the repatriation grant either at the rate for a staff member with neither a spouse nor a dependent child at the time of separation for the period of service subsequent to the separation of the spouse or, if he/she is eligible, at the rate for a staff member with a spouse or dependent child for the whole period of qualifying service, less the amount of the repatriation grant paid to the first parent.

23. At first, we recall the principles of interpretation set out by the Appeals Tribunal in the case of *Scott*:[4]

> The first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the literal terms of the norm. When 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.

[4] *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

> Otherwise, the will of the statute or norm under consideration would be ignored under the pretext of consulting its spirit. If the text is not specifically inconsistent with other rules set out in the same context or higher norms in hierarchy, it must be respected, whatever technical opinion the interpreter may have to the contrary, or else the interpreter would become the author.

24. The UNDP's Repatriation Policy contains the following, *inter alia*, provisions. First, for the staff member to qualify for the repatriation grant upon separation from service, he/she should have served a minimum of five years of continuous service and residence away from the home country and the country of nationality or from a country where the staff member has acquired permanent resident status. Second, the repatriation grant is paid at the rate for a staff member with a dependent child, if the staff member, at the time of separation, has a child recognized as dependent, regardless of where this child is located.

25. Finally, when both spouses are staff members and both entitled to the repatriation grant and there exist dependent children, the first spouse to separate from service is entitled to claim payment of the repatriation grant at the dependency rate. In this case, per the plain language of the relevant provision, there are two options open to the second spouse to separate; either he/she may lay claim to a repatriation grant for the period of service subsequent to the separation of the first spouse, i.e., to the balance, at the single rate; or, if he/she is eligible to a dependency rate, claim that rate for the whole period of qualifying service, minus the amount of the grant paid to the first spouse.

26. Further, as demonstrated plainly in the wording of the above relevant sentence of the ultimate paragraph of Section 17(d) of the applicable Policy, when the first spouse to separate exercises his/her choice made under the first option, and the second spouse has completed a minimum of five years of qualifying service per Sections 3(a) and 6(a) of the UNDP Repatriation Policy, then the latter is entitled to the repatriation grant for the balance of the remaining service period subsequent to the separation of the first spouse irrespective of whether that period amounts to or exceeds five years of continuous service. The relevant provision does not expressly state, nor does it even repeat the language of the first sentence of Section 17(d) of the UNDP Repatriation Policy to that effect, namely that for the payment of the grant to the second spouse a "qualifying service" of a minimum service period of five years is required for that subsequent service.

27. At any rate, the purpose of the law is that only one spouse should get paid at the dependency rate for any overlapping period of qualifying service, with the other spouse receiving the balance at the single rate for his/her service period subsequent to the first spouse's separation without the latter being entirely disentitled by the choice of the first in case the ensued balance in service is less than five years.

28. Obviously, that teleology of the law is furthered when the aggregate service period of the second spouse is taken into account for the assessment of his/her eligibility, per Sections 3(a) and 6(a) of the UNDP Repatriation Policy, to the repatriation grant on his/her own right, while for the calculation of the specific amount of the grant to be paid only the balance of the service time is considered. That adopted sense of the words of the ultimate sentence of Section 17(d) of the UNDP Repatriation Policy best harmonises with the context and promotes in the fullest manner the policy and objective of the legislation.

29. The correctness of this linguistic interpretative approach and its alignment with the teleology of Section 17(d) of the UNDP Repatriation Policy is also borne out, in the view of the Appeals Tribunal, by the fact that where the legislator purported the exclusion or reduction of the qualifying service credits, he set it forth expressly in the relevant provisions as he did in subsections (b)-(d) of Section 6 of that Policy. Thus, by applying the general principle of interpretation *ubi lex non distinguit, nec nos distinguere debemus,* i.e., where the law does not distinguish, neither should we distinguish, the second spouse to separate is entitled to the repatriation grant for the balance of the remaining service period subsequent to the separation of the first spouse even if his/her subsequent service is less than the minimum five years of continuous service.

30. In the present case, upon reviewing the lawfulness of the contested administrative decision, the UNDT considered whether the Repatriation Policy was issued in accordance with the Staff Regulations and Rules and concluded that it was. It found that Staff Rule 3.19(g) sets the authority for the establishment of specific terms for the calculation of the repatriation grant payable to UN spouses and that the UNDP Administrator had the discretionary authority to issue the Repatriation Policy pursuant thereto. Then, the UNDT analysed Section 17(d) of the Repatriation Policy and determined that it was consistent with the Staff Regulations and Rules,

which was to be read as *lex specialis* with respect to Staff Rule 3.19(g), as it provided the specificity that Staff Rule 3.19(g) had mandated.[5]

31. Further, the UNDT considered the UNDP's application of the Repatriation Policy to the facts and circumstances of the present case. In this context, the UNDT found that, under Section 17(d), the UNDP had an obligation to reconcile payments made to UN spouses when one spouse claims payment of the repatriation grant at the dependency rate, in order to avoid duplicative payments for any overlap in qualifying periods.

32. Following that, the UNDT found that the UNDP was not precluded from considering the repatriation grant paid to Ms. Berthaud's non-UNDP spouse and adjusting her payment. When considering the applicable payment options under Section 17(d) in light of its purpose of avoiding any duplicative payments, the UNDT further concluded that "if one spouse is paid the single rate for his/her entire period of qualifying service, then the other spouse can also only be paid the single rate for his/her entire period of qualifying service."[6]

33. Specifically, the UNDT opined that:[7]

> … pursuant to para. 17.d) of the UNDP Policy cited above, WFP's payment of the repatriation grant at the single rate to the Applicant's husband required UNDP to also pay the Applicant at the single rate.
>
> … Indeed, if in general the said rule provides for a choice to the staff member to separate and a reckoning for the second (within the same UNDP), this beneficiaries' order does not preclude UNDP to consider the entitlement already received by the spouse (by his/her different employer, of course following its applicable rules) if separated before the staff member concerned. As already mentioned, the rule seeks to avoid double payments to staff members within the UN Common System.
>
> … Consequently, in applying its policy to the Applicant, UNDP could only pay her repatriation grant at the dependency rate if her husband was paid the single rate for only the period of qualifying service after the date of her separation (which would have only been three years and therefore not qualified him for payment of any grant) or if her husband was paid the single rate for his entire qualifying period of service, minus the amount of grant paid to the Applicant.

[5] Impugned Judgment, para. 47.
[6] Ibid., para. 44.
[7] Ibid., paras. 41-43.

34. Based on these findings, the UNDT concluded that the WFP's payment to Ms. Berthaud's husband for his entire qualifying period at the single rate required the UNDP to pay Ms. Berthaud hers at the single rate as well.

35. The Appeals Tribunal's first finding is that the UNDT was correct in its holding that Section 17(d) of the Repatriation Policy is not in conflict with Staff Rule 3.19 (g) and, thus, the two sets of provisions fall to be read together coherently.

36. We also find correct the UNDT's reasoning at para. 39 of its Judgment that the application of the above provision of Section 17(d) is not limited to UNDP staff members as it seeks to reconcile payments made to staff members within the United Nations system, irrespectively of the fact that the spouse is a UNDP staff member too or not, avoiding in any case to duplicate the payment of the same entitlement; and that actually, both UNDP and WFP are part of the UN Common System, the benefits and entitlements of which are established by the International Civil Service Commission, and the UNDP Policy with respect to preventing duplicate payment of the repatriation grant applies to staff members with spouses in other UN Common System organizations, not just to spouses in UNDP alone.

37. Further, as correctly advanced by the Secretary-General, the provision of Section 17(d) expressly addresses payments to UN spouses and calls for a reduction in the amount payable to the second spouse to separate in view of the amount paid to the first spouse to separate for any overlapping periods. Therefore, the UNDT did not err in its finding that the UNDP was not precluded from considering the entitlement already received by Ms. Berthaud's spouse by his different employer, i.e., the WFP, following its applicable rules, because he had received such entitlements before her, and making the adjustments to her repatriation grant in light of this payment, even though Ms. Berthaud was the first spouse to separate.

38. That said, however, the Appeals Tribunal finds that the UNDT's conclusions that the UNDP Policy imposes that if one spouse is paid the single rate for his/her entire period of qualifying service, then the other spouse can also only be paid the single rate for his/her entire period of qualifying service, and that the WFP's decision to pay Ms. Berthaud's husband repatriation grant at the single rate for his entire period of qualifying service precluded UNDP from paying Ms. Berthaud at the dependency rate under the UNDP Policy, are legally not correct.

39. Further, we do not share the UNDT's interpretative approach that, in applying its policy to Ms. Berthaud, UNDP could only pay her repatriation grant at the dependency rate if her husband was paid the single rate for only the period of qualifying service after the date of her separation, which would have only been three years and therefore did not qualify him for payment of any grant.

40. The wording of Section 17(d) of the UNDP Policy is plain in both respects. Where the words of the law are clear, there is no obscurity, there is no ambiguity and there is no scope for the Tribunal to innovate or take upon itself the task of amending or altering the statutory provisions. It is well known that in a given case the Tribunal can iron out the fabric, but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. In that situation the judges should not proclaim that they are playing the role of a lawmaker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased.

41. Specifically, under the legal framework envisaged by Section 17(d) of the UNDP Repatriation Policy, as its true construction was established above, when both spouses are staff members and both entitled to the repatriation grant and there exist dependent children, as it is in the present case, then it is the first spouse to separate from service who is afforded a choice to claim payment of the repatriation grant at the dependency rate. It is not the second spouse to separate from service who is conferred such a right to make a choice nor the Administration, as this is not an issue that is subject to the discretionary authority of the Administration. This, however, does not mean that the amount of grant payment to the first spouse to separate, who made such a choice, will eventually be at the dependency rate, because, as noted above, in the calculation of it the Administration will factor in the entitlement possibly already received by the second spouse.

42. In the case at hand, it is common cause that Ms. Berthaud, the first spouse to separate, made her choice under Section 17(d) of the UNDP Repatriation Policy by claiming her repatriation grant at the dependency rate, while her spouse, a WFP's staff member, who separated afterwards, received payment of the repatriation grant at the single rate. It is also not contested that Ms. Berthaud's husband had an aggregate qualifying service exceeding the minimum five years. The UNDP accorded the repatriation grant to Ms. Berthaud at the single

rate on the basis of the first option, "of the three set forth in Section 17(d) of the Repatriation Policy", on the ground that payment to both at the single rate was the most advantageous option, since "option number 2, in Section 17(d) was unavailable to the Appellant", namely Ms. Berthaud, because "her husband only had three of the required five years of qualifying service after her separation, and therefore he was ineligible for repatriation grant under Annex IV to the Staff Regulations and Rules", and option number 3 under the same Section 17(d), meant that she would receive zero payment because the entire period of Ms. Berthaud husband's qualifying service was covered by her dependency rate payment.

43. However, under the specific circumstances, this is an erroneous legal approach by the Administration in many respects, as erroneous are the UNDT's pertinent holdings, cited to and discussed above, which found it to be lawful. Arguably, Ms. Berthaud clearly made her choice to a repatriation grant at the dependency rate to which she was entitled. Thus, as explained and to repeat, given that her husband had completed an aggregate service exceeding the minimum of five years of qualifying service per Sections 3(a) and 6(a) of the UNDP Repatriation Policy, he was entitled to the repatriation grant for the balance of the remaining service period subsequent to the separation of Ms. Berthaud, notwithstanding that it had been less than five years of continuous service, i.e., only three years.

44. On appeal, Ms. Berthaud requests the Appeals Tribunal to order payment of her repatriation grant at the dependency rate with interest. Nevertheless, this issue cannot be determined solely as a question of law without the proper factual findings which make possible the calculation of the exact amount of repatriation grant to which Ms. Berthaud is entitled. This is much more so, in view of the principle of the prohibition of *reformatio in pejus* which limits the authority of the Appeals Tribunal–and the same goes for the first instance Tribunal that is seized of an application for judicial review against an administrative decision- to take any decision that is more unfavourable to Ms. Berthaud within the scope of the appeal initiated by the latter, unless there is an appeal or cross-appeal launched by the Administration in the specific case, which is not the case here.

45. Notably, per the construction of the applicable Section 17(d) of the UNDP Repatriation Policy by this Tribunal, in the calculation of Ms. Berthaud's entitlement, her husband's entitlements should also be taken into consideration. Thus, Ms. Berthaud's claim requires factual findings in order to ascertain whether it is meritorious or otherwise, namely whether the repatriation grant to which she is eventually entitled, following the application of

Section 17(d) of the UNDP Repatriation Policy, as interpreted by this Tribunal, is more financially advantageous than that accorded to her with the contested administrative decision. This renders the determination of that issue a matter more properly for determination by the UNDT. This respects the two-tier system of judicial review, where the first stage must be completed before issues may be addressed on appeal, as provided for in the Statutes of the two Tribunals. Therefore, we are remanding these discrete issues to the UNDT, pursuant to Article 2 (4)(b) of our Statute.

Judgment

46. The appeal is upheld and Judgment No. UNDT /2021/063 is hereby vacated. The discrete issues of (i) the exact amount of the repatriation grant to which Ms. Berthaud is entitled, per Section 17(d) of the UNDP Repatriation Policy, as interpreted by this Tribunal, and (ii) whether her claim to that entitlement is eventually more financially advantageous than that accorded to her with the contested administrative decision are hereby remanded to the UNDT for consideration.

Original and Authoritative Version: English

Decision dated this 1st day of July 2022 in New York, United States.

(Signed)	*(Signed)*	*(Signed)*
Judge Raikos, Presiding	Judge Sandhu	Judge Murphy

Judgment published and entered into the Registry on this 12th day of August 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar