



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2024-UNAT-1437

Ibrahim Bah
(Appellant)

v.

Secretary-General of the United Nations
(Respondent)

JUDGMENT

Before:	Judge Katharine Mary Savage, Presiding Judge Nassib G. Ziadé Judge Graeme Colgan
Case No.:	2023-1799
Date of Decision:	22 March 2024
Date of Publication:	8 May 2024
Registrar:	Juliet E. Johnson

Counsel for Appellant: Maximilian Girod-Laine

Counsel for Respondent: Amanda Stoltz

JUDGE KATHARINE MARY SAVAGE, PRESIDING.

1. Mr. Ibrahim Bah, a staff member of the United Nations Interim Force in Lebanon (UNIFIL), based in Naqoura, contested a decision to recover the entire education grant advance for three of his dependent children for the 2020-2021 academic year.
2. By Judgment No. UNDT/2023/011, the United Nations Dispute Tribunal (UNDT) dismissed the application (impugned Judgment).¹
3. Mr. Bah lodged an appeal of the impugned Judgment with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT).
4. For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure²

5. Mr. Bah is a Senior Auditor at the P-5 level.³ He is a national of Sierra Leone and since 2010 is also a national of the United States of America.⁴ At the relevant time for purposes of this matter, the country where Mr. Bah would take home leave was the United States. For purposes of the education grant, he was therefore a national of the United States.
6. In 2009, Mr. Bah started receiving education grant from the Organization.⁵ At the time of the contested decision, he was receiving education grant advances for three of his children.
7. In March 2020, after the outbreak of the Covid-19 pandemic, UNIFIL instituted alternative working arrangements (AWA) in response to the pandemic.⁶ Accordingly, effective 15 July 2020, Mr. Bah requested AWA and telecommuted from the United States. By so doing, Mr. Bah worked remotely outside of his duty station, which was in Lebanon.⁷

¹ *Bah v. Secretary-General of the United Nations*, UNDT's Judgment dated 27 February 2023.

² Summarized from the impugned Judgment as relevant to the appeal.

³ Appeal brief, para. 1; answer brief, para. 2.

⁴ Impugned Judgment, para. 6.

⁵ *Ibid.*, para. 7.

⁶ *Ibid.*, para. 8.

⁷ *Ibid.*; appeal brief, para. 4; answer brief, para. 6.

8. Effective 3 August 2020, UNIFIL suspended AWA.⁸ However, Mr. Bah requested and was granted, effective 3 or 4 August 2020, flexible working arrangement (FWA) in order to allow him to continue telecommuting from the United States. His FWA was thereafter extended until 3 May 2021.⁹

9. While Mr. Bah was telecommuting from the United States, three of his dependent children attended a boarding school in the United States for the entire 2020-2021 academic year, from 13 August 2020 until 30 April 2021.¹⁰

10. On 7 December 2020, considering that he might stay on FWA for an extended period, Mr. Bah contacted his supervisor at the Office of Internal Oversight Services (OIOS), his parent department, regarding the implications of his telecommuting agreement outside of his duty station.¹¹ In particular, he enquired “how the proration [was] being calculated because [he] did not understand by reviewing the policies”, so that he could “make a decision as to whether [he was] willing to lose that amount or whether [he] should take action and go back to [his] duty station”.

11. In an e-mail of 12 January 2021, having consulted regarding the matter, Mr. Bah’s supervisor concluded that OIOS was not in a position to inform him what would be recovered and directed him to Human Resources.¹² Mr. Bah’s supervisor wrote to him:

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

12. On 7 April 2021, Mr. Bah submitted an education grant claim for his three children for the 2020-2021 academic year.¹³ On 12 and 13 April 2021, he and his Human Resources Partner (HRP)

⁸ Impugned Judgment, para. 9.

⁹ *Ibid.*; appeal brief, para. 4; answer brief, para. 6. According to the Secretary-General, Mr. Bah’s FWA was later further extended until 7 June 2021 (answer brief, footnote 5).

¹⁰ Impugned Judgment, para. 10. He was aware that pursuant to Section 5(c) of Information Circular ST/IC/2019/15 (Flexible working arrangements), if staff members telecommuted from their home country for more than two thirds of the academic year, the education grant would be prorated in accordance with Section 6.1(a) of Administrative Instruction ST/AI/2018/1/Rev.1 (Education grant and related benefits).

¹¹ Impugned Judgment, para. 12.

¹² *Ibid.*, para. 13.

¹³ *Ibid.*, para. 15.

from the Human Resources Operations (HRO), Headquarters Client Support Service (HQCSS), exchanged e-mails on the tuition and boarding expenses regarding one of the children and a possible recovery of a portion of the advance resulting from a change in the school. No mention, however, was made by either party of Mr. Bah's FWA or the recovery of the entire education grant.

13. On 6 May 2021, Mr. Bah contacted the HRP, inquiring about the status of his claim.¹⁴ On the same day, the HRP replied that:¹⁵

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

14. In May 2021, as the exchanges with the HRP on the subject of boarding expenses continued, Mr. Bah submitted an amended P-41 form (Certificate of Attendance and Costs and Receipt for Payments).¹⁶

15. On 25 May 2021, a broadcast was sent to all United Nations Secretariat staff, informing, in bold font:¹⁷

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

16. On 8 June 2021, Mr. Bah returned to his duty station in Naqoura, Lebanon.¹⁸

¹⁴ *Ibid.*, para. 16.

¹⁵ The HRP referred to awaiting confirmation from the Human Resources Services Division (HRSD) Policy and to advice issued earlier by HRSD Policy (OIOS Help helpdesk broadcast of 9 October 2020, Annex 6 to the appeal).

¹⁶ Impugned Judgment, para. 17.

¹⁷ *Ibid.*, para. 18.

¹⁸ *Ibid.*, para. 19.

17. On 14 June and 2 July 2021, Mr. Bah inquired about the status of his claim.¹⁹ On 2 July 2021, the HRP informed him that, because the school did not provide a breakdown of tuition and boarding expenses, the matter of proration was referred to HRSD Policy for their advice, and eventually replied: “it was decided by [HRSD] Policy that only the boarding expenses will be prorated and not the whole [education grant] entitlement”.

18. On 30 July 2021, the HRP contacted Mr. Bah by intra-office Microsoft Teams chat, stating that the HQCSS did not have his records of United States naturalization in his official status file, and requested a copy of his naturalization records or his United States passport.²⁰

19. On 9 August 2021, the HRP informed Mr. Bah of the contested decision.²¹ The HRP wrote:

As per information provided to us by OIOS EO [Executive Office], you were on FWA for the period beginning 4 Aug 2020 through 3 May 2021. You were practically telecommuting from your home country (Virginia, Maryland) for the entire period of the schoolyear (*i.e.* 13 Aug 2020 through 30 April 2021). In view of this, you are not entitled to international benefits as per provisions of SGB/2019/3 (Section 3.12) and ST/IC/2019/15 ([S]ection [5(c)] [...]) The amount to be recovered is the amount of EG [education grant] advance you received for your 3 children for SY2020- 2021 approximately \$79[,]638.

20. On 26 August 2021, Mr. Bah met with the HRO staff to inquire about the reason for the change in policy.²² Relevant legal provisions governing the education grant were discussed. The HRO’s position was that since he had spent the entire period of the academic year on FWA, the entire education grant advanced to him would be recovered.

21. On 15 September 2021, the HRO notified Mr. Bah that the first recovery of the education grant advance would be processed from his September 2021 payroll.²³

22. On 8 October 2021, Mr. Bah requested management evaluation of the contested decision.²⁴ On 6 December 2021, the Management Evaluation Unit (MEU) upheld the decision.

23. On 7 March 2022, Mr. Bah sought the review of the contested decision before the UNDT.²⁵

¹⁹ *Ibid.*, para. 20.

²⁰ *Ibid.*, para. 22.

²¹ *Ibid.*, para. 23.

²² *Ibid.*, para. 24.

²³ *Ibid.*, para. 25.

²⁴ *Ibid.*, para. 26.

²⁵ *Ibid.*, para. 1.

Policy provisions applicable at the relevant time

24. Staff Regulation 3.2:²⁶

(a) The Secretary-General shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country whose dependent child is in full-time attendance at a school, university or similar educational institution of a type that will, in the opinion of the Secretary-General, facilitate the child's reassimilation in the staff member's recognized home country. The grant shall be payable in respect of the child up to the end of the school year in which the child completes four years of post-secondary studies or attains a first post-secondary degree, whichever comes first, subject to the upper age limit of 25 years. Admissible expenses actually incurred shall be reimbursed based on a sliding scale, subject to a maximum grant as approved by the General Assembly. (...);

...

25. Staff Rule 3.9 (Education grant):²⁷

...

Eligibility

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

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

(ii) The child is in full-time attendance at a school, university or similar educational institution.

...

26. Secretary-General's Bulletin ST/SGB/2019/3 (Flexible working arrangements):

...

Section 2 (Guiding Principles)

2.1. Flexible working arrangements may be authorized subject to the following guiding principles:

...

(h) The use of flexible working arrangements requires careful planning and preparation on the part of all concerned. The relevant administrative office, with overall guidance from the Office of Human Resources, shall provide assistance to managers and staff, as required.

...

Section 3 (Flexible working arrangements options)

²⁶ ST/SGB/2018/1/Rev.1.

²⁷ *Ibid.*

Working away from the office (telecommuting)

...

3.10. In cases where there are compelling personal circumstances, consideration may be given to allowing staff members to telecommute from outside the staff member's official duty station for an appropriate duration not exceeding six months. Managers may, in exceptional circumstances, consider an extension of the authorization to remotely telecommute for an additional period not exceeding three months. Remote telecommuting does not constitute a change of official duty station within the meaning of staff rule 4.8 (a).

...

3.12. The staff member shall not be entitled to any additional benefits or entitlements as a result of such telecommuting arrangements outside of the staff member's official duty station. The payment of any benefits and entitlements that require the physical presence of staff members at their official duty station (for instance danger pay), shall be suspended for the period that staff members are telecommuting from outside of their official duty station.

...

27. Administrative Instruction ST/AI/2018/1/Rev.1 (Education grant and related benefits):

...

Section 2 (Eligibility)

...

Education grant and reimbursement of capital assessment fees

2.2 A staff member is eligible to receive the education grant and be reimbursed for capital assessment fees when the staff member meets all of the following conditions:

...

(c) Serves outside the recognized home country in accordance with staff regulation 3.2 and staff rule 3.9;

...

Boarding assistance

2.5 A staff member is eligible to receive boarding assistance, including in relation to a child attending a school that charges no fees or a nominal fee, when all of the following conditions are met:

(a) The requirements of section 2.2 are met;

...

Section 6 (Prorating of amount of the education grant and related benefits)

6.1 The amount payable to a staff member for the education grant, the reimbursement of capital assessment fees and boarding assistance shall be prorated according to (...) conditions, which are not mutually exclusive and may be combined (...).

28. Information Circular ST/IC/2019/15 (Flexible working arrangements):

...

5. When staff members are authorized to telecommute outside their official duty station and in accordance with section 3.12 of Secretary-General's bulletin ST/SGB/2019/3, the benefits and entitlements that require physical presence at the official duty station shall be suspended. Consequently, the payment and accrual of such entitlements shall be adjusted, including but not limited to:

...

(c) If staff members telecommute from their home country for more than two thirds of the academic year, education grant and special education grant will be prorated in accordance with section 6.1 (a) of ST/AI/2018/1/Rev.1 and section 8 of ST/AI/2018/2, respectively.

29. Section B.8 of the terms of the agreement between a staff member and the entity, laid out in the form titled "Request for and agreement on working away from the office and the official duty station", set out in Annex to ST/IC/2019/15, provides that the payment of any benefits and entitlements that require the physical presence of the staff member at his or her official duty station "shall be suspended or adjusted" for the period of telecommuting in accordance with paragraph 5 of this Information Circular.

The impugned Judgment

30. By Judgment No. UNDT/2023/011 dated 27 February 2023, the UNDT dismissed Mr. Bah's application. In doing so, the UNDT cited Staff Rule 3.9(b)(i) governing the education grant and found that ST/IC/2019/15 on flexible working arrangements, at paragraph 5(c), did not contradict that Staff Rule.²⁸ The UNDT found that the conditions of eligibility to the education grant were not waived or amended at the time of the events in question; however, it accepted that there was a degree of uncertainty, including on the part of Mr. Bah's manager and his HRP, regarding the extent to which ST/IC/2019/15 would be applied in the context of the Covid-19 pandemic. The UNDT found that the Administration had committed an error by supplying incorrect information.

31. However, the UNDT declined to establish as proven Mr. Bah's contention that he had communicated with the HRP in January or February 2021.²⁹ It took account of the fact that Mr. Bah could not precisely recall the mode of the alleged communication, except that it had been a call and that no call involving Mr. Bah was found in the HRP's MS Teams call records in the relevant period. The HRP does not possess a work mobile phone, never used her private phone for

²⁸ *Ibid.*, paras. 48-49.

²⁹ *Ibid.*, paras. 50-53.

this purpose and no reference to the alleged call is found anywhere in the exchanges between him and the HRO. The first ever mention of it appears in the management evaluation request and the tenor of the HRP's e-mails sent on 6 May 2021 and 2 July 2021 belies the supposition that she would have confirmed the content of the new policy already in January or February 2021.

32. The UNDT held that the representations made in the correspondence, including his supervisor's e-mail of 12 January 2021, had required further clarifications.³⁰ They did not establish a legitimate expectation that the benchmark of two thirds of an academic year had been waived. There was no reliance on incorrect information in Mr. Bah's decision to remain in the United States on FWA. Rather, he accepted the risk of staying on FWA for the duration of the academic year, without having a basis to assume that only the reimbursement of boarding expenses would be recovered.

33. The UNDT considered whether the erroneous information caused consequential damage and rejected the claim of compensation due to its lack of proof.³¹ It noted that on 6 May 2021, the HRP had already been informed of Mr. Bah's FWA through OIOS and he had not contributed to the error.³² The UNDT found that the information received on 2 July 2021 from the HRP regarding the recovery of only boarding expenses could have been regarded as reliable and might have informed Mr. Bah's financial decisions. However, while Mr. Bah purchased two cars on the basis of what he contemplated his financial position to be, he did not seek to sell the cars instantly after the notification of the recovery and there may have been many factors that contributed to the loss of their value. Therefore, even assuming, *arguendo*, that the documents reflect the value of the purchase and sale as averred, there is no basis to hold the Secretary-General responsible for the depreciation of the cars seven months after their acquisition.³³

34. The UNDT was not satisfied that Mr. Bah's return to the duty station had been prevented by *force majeure*,³⁴ since his situation was not unique. While his family situation was complex, it was found that his submissions were contradictory. On the one hand, he contended that it was "impossible for him to return to his duty station" as he had to remain in the United States to take care of his youngest son, and returning to his duty station would have deprived his youngest son of

³⁰ *Ibid.*, paras. 54-55.

³¹ *Ibid.*, paras. 56-59.

³² *Ibid.*, para. 60.

³³ The UNDT noted that Mr. Bah had provided evidence of his wire transfers authorized on 28 and 29 July 2021, totaling over USD 50,000, for the purchase of two cars and the receipt, several months later, of a cheque for USD 25,000 from a motor company for the sale of the cars in mid-February 2022.

³⁴ *Ibid.*, paras. 61-62.

access to education due to the closure of his school in Lebanon. On the other hand, Mr. Bah maintained that relying on the information provided by HRO, he made the “calculated decision” to remain in the United States on FWA, whereas he could have returned to work or used his accumulated annual leave instead.

Procedure before the Appeals Tribunal

35. On 28 April 2023, Mr. Bah filed an appeal of the impugned Judgment with the Appeals Tribunal, to which the Secretary-General filed an answer on 14 July 2023.

Submissions

Mr. Bah’s Appeal

36. Mr. Bah requests the Appeals Tribunal to rescind the contested decision, order the reimbursement of the recovered education grant in the amount of USD 83,699.20 and 10 per cent interest, order the payment of compensation for the consequential damage suffered in the amount of USD 26,643, award costs of USD 15,000 against the Secretary-General and award compensation for moral harm in the amount of USD 5,000.

37. He argues that the UNDT erred on the facts and committed errors of law. Regarding questions of fact, Mr. Bah contends that, while the discussion over the phone between himself and his HRP did occur, it is ultimately irrelevant. At the time, the HRO was not in a position to inform him of the impact that the FWA might have on his education grant entitlements;³⁵ and that because of the 2 July 2021 decision, the parties safely assumed that only the boarding assistance might be prorated. Mr. Bah contended that that decision should be considered binding. In January 2021, when the HRP did not know whether the education grant would be prorated under the FWA, almost two thirds of the academic year had already passed and he could not have been expected to return to Lebanon, given the uncertainty.

38. Mr. Bah submits that the finding of the UNDT was inconsistent in that he had no basis for believing that only boarding expenses would be covered, as it determined, in paragraph 57 of the impugned Judgment, that the information received from the HRP related only to boarding expenses. He relied on the information provided on 2 July 2021 as he purchased two cars on 28 and 29 July 2021, being one week before he was informed of the reversal of the decision. He

³⁵ Mr. Bah refers to a 12 April 2021 e-mail from the HRP (Annex 3 to the appeal).

was then forced, due to the sudden hardship he faced, to sell his cars below their market value and he did so soon after the notification of recovery. Depreciation is not the issue. He would receive no salary from September 2021 and the remaining tuition fees were due at the beginning of February 2022.

39. Mr. Bah asserts that the UNDT failed to consider that the uniqueness of the situation is not a requirement for *force majeure*. The UNDT was incorrect in concluding that *force majeure* did not apply because he had conceded that he could have returned to his duty station. He could have used his accrued annual leave to return to the United States soon after the termination of his FWA. Finally, there is no indication that the new policy was to be applied retroactively for the entire academic year of 2020-2021 that had already ended in April 2021.

40. Regarding errors on questions of law, Mr. Bah cites Staff Rule 3.9(b)(i) and argues that the UNDT failed to determine that he served and had his permanent residence outside of his home country. His stay in the United States was due to *force majeure* and was temporary. According to Section 6.1(a) of ST/AI/2018/1/Rev.1, the education grant is only prorated if the children attend their school less than two thirds of the academic year. His children attended their boarding school the entire academic year; therefore Section 6.1(a) does not apply. There is no mention that staff members are not entitled to the education grant if the two-thirds benchmark is reached.

41. Mr. Bah contends that he is eligible for reimbursement of the boarding expenses. They were necessary for attendance at the children's boarding school, as certified. As such, they were an admissible expense under Section 3.1(b) of ST/AI/2018/1/Rev.1. He is also eligible for boarding assistance, a benefit in the form of a lump-sum payment intended to provide financial support to cover boarding expenses.

42. Mr. Bah submits that the UNDT's reasoning for rejecting the principle of *contra proferentem* is contradictory.³⁶ The UNDT conceded that the relevant legal provisions were "confusing" but failed to clarify how it could dismiss the apparently "vague reference" to ST/AI/2018/1/Rev.1, Section 1.

43. He further asserts that estoppel should be applied because he relied, in good faith, on the information provided by the Administration. As regards *force majeure*, he had no other choice

³⁶ *Contra proferentem* is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording.

than to stay in the United States on FWA as schools remained closed in Lebanon and his youngest son was too young for boarding without his presence in the same country; therefore, to relocate to Lebanon without his youngest son was not an option. Moreover, the new policy, established in July 2021, cannot be applied retroactively to the academic year 2020-2021, as is supported by the Tribunals' case law.³⁷ The rule of proration would be nonsensical if the staff member forfeits the entire education grant.

44. In addition, Mr. Bah maintains that he suffered consequential damage of USD 26,643, being the difference between the purchase price and the resale price of the two cars. An interest rate of 10 per cent should be applied due to the high inflation rate.

The Secretary-General's Answer

45. The Secretary-General requests that the Appeals Tribunal uphold the impugned Judgment and dismiss the appeal in its entirety on the basis that the UNDT correctly concluded that the contested decision was lawful and that Mr. Bah had no entitlement to the education grant. Neither ST/IC/2019/15 nor any other part of the applicable legal framework could support such an expansive interpretation as to allow him to receive the education grant when he telecommuted from his home country for the whole duration of the academic year.

46. The Secretary-General submits that the UNDT correctly concluded that Mr. Bah had not reasonably and detrimentally relied on the incorrect information provided by the Administration. He had no reasonable basis upon which to assume that the requirements set out in the applicable legal framework had been or would be waived. The 2 July 2021 and 6 May 2021 communications post-dated the end of the academic year and were therefore not capable of influencing his decision to remain in the United States on FWA for the full duration of the academic year. However, somewhat perplexingly, the UNDT then considered his claims for compensation of damage. It is axiomatic that if the information provided by the Administration did not give rise to a reasonable expectation in question, it was not capable of reasonably influencing his financial decisions and no compensation for damage would arise.

47. The Secretary-General contends that the UNDT correctly concluded that the application should not be granted on account of *force majeure* when Mr. Bah maintained that remaining in

³⁷ Mr. Bah cites *Wang v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-140, and *Younis v. Secretary-General of the United Nations*, Judgment No. 2021/UNDT/088, para. 13.

the United States on FWA was a “calculated decision” and his return to his duty station was not prevented by *force majeure*. Cases of *force majeure* have been recognized in circumstances when a reasonably unforeseeable and irresistible event objectively prevents the required action.

48. The Secretary-General argues that Mr. Bah has failed to demonstrate any errors by the UNDT or any error of fact that resulted in a manifestly unreasonable decision. Contrary to his assertions, there was an existing policy and no “new policy” was adopted or retroactively applied in July 2021. He did not use the opportunity to seek specific advice at the relevant time.

49. Mr. Bah has also not demonstrated that the UNDT erred in law. The legal framework does refer to the concept of permanent residence. His education grant entitlements were prorated at 100 per cent. Section 3.1(b) of ST/AI/2018/1/Rev.1 relates to admissible tuition and enrolment-related expenses and is not relevant when determining eligibility for boarding assistance. There was no other possible interpretation of the legal framework than what the UNDT applied.

50. The Secretary-General contends that in *Wang*,³⁸ the UNAT found that a staff member who had specifically enquired about his eligibility for an education grant and who had received precise, written and clear assurances from the Administration that he would continue to be eligible before he took up a new post had a reasonable expectation that the entitlement would be granted and was entitled to compensation. Mr. Bah did not reasonably rely on the incorrect information. In *Younis*,³⁹ the UNDT declined to expand the scope of ST/AI/2018/1/Rev.1 by introducing additional circumstances under which the education grant benefit could be prorated for staff members who would not otherwise have been eligible for the education grant in the first place. In the present case, however, the legal basis for prorating Mr. Bah’s education grant entitlement was contained in ST/IC/2019/15 and his signed FWA agreement.

Considerations

Preliminary issues

51. Following the circulation of the impugned Judgment to the parties, in the public version on the UNDT website, Mr. Bah’s name was redacted, apparently on instruction of the UNDT that it be anonymized. The Secretary-General submits that he was not provided with any opportunity by the UNDT to make submissions regarding the anonymization of the

³⁸ *Wang Judgment, op. cit.*

³⁹ *Younis Judgment, op. cit.*

impugned Judgment before it was issued and that Mr. Bah's name should not be anonymized in the Judgment of this Tribunal in the interests of transparency and accountability. We find that given as much, to the extent that an order of anonymity was made by the UNDT, this did not occur after having had regard to the submissions of both parties. The rule that anonymity granted by the UNDT remains in effect on appeal does not therefore apply in this case.⁴⁰ Since Mr. Bah did not seek anonymization on appeal and the publicly available UNAT Order No. 534 (2023) was not anonymized, there is no application for anonymization before this Tribunal nor any basis advanced on which to justify an order that this Judgment be anonymized.

52. We turn to Mr. Bah's request that an oral hearing of this appeal be held on grounds that it could aid this Tribunal in its determination of the matter and would allow for a clarification of the facts and the law. Under Article 8(3) of the Appeals Tribunal's Statute (Statute) and Article 18(1) of the Appeals Tribunal's Rules of Procedure, the Appeals Tribunal may grant an oral hearing if it would "assist in the expeditious and fair disposal of the case". The Secretary-General filed no submissions regarding this request.

53. Oral hearings have been refused by this Tribunal where the factual and legal issues arising from the appeal have already been clearly defined by the parties and an oral hearing would not "assist in the expeditious and fair disposal of the case".⁴¹ An appeal is not a rehearing of the matter but an opportunity for the parties to address narrow issues, including errors of law, fact and jurisdiction. The factual and legal issues in this appeal have been clearly defined by the parties and we are not persuaded that an oral hearing would assist in the expeditious and fair disposal of the case. For these reasons the request for an oral hearing is denied.

Merits of the appeal

54. As has previously been made clear by this Tribunal, a Staff Rule may not conflict with the Staff Regulation under which it is adopted, nor may an administrative issuance, such as a Secretary-General's bulletin, administrative instruction or information circular, conflict with

⁴⁰ The Appeals Tribunal's Practice Direction No. 1, para. 32, provides that a "person who has been granted anonymity by the UNDT or the neutral first instance process of an entity accepting UNAT's jurisdiction need not request it at UNAT as such order will remain in effect, unless there is a challenge to such anonymity on appeal and UNAT has given its judgment on the issue".

⁴¹ *Krioutchkov v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-712, para. 12. See also *Mustapha Guenfoudi v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1364, paras. 61-62, and *Anshasi v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2017-UNAT-790, para. 15.

the applicable Staff Regulation or Rule which it implements.⁴² This gives effect to a hierarchy of norms that exists in relation to the status and effect of these different administrative instruments and provisions and aids the process of their interpretation, where appropriate.

55. Within this hierarchy of norms, Staff Regulation 3.2(a) provides that the Secretary-General “shall establish terms and conditions under which an education grant shall be available to a staff member residing and serving outside his or her recognized home country”. Staff Rule 3.9(b) accords with this Regulation, providing that an international recruit in “a fixed-term or a continuing appointment” who “resides and serves at a duty station which is outside his or her home country” is entitled to receive an education grant in respect of his or her children “in full-time attendance at a school, university or similar educational institution”.⁴³

56. In terms of Section 3.10 of ST/SGB/2019/3, telecommuting may be permitted from outside the staff member’s official duty station, in cases where “compelling personal circumstances” exist, for an appropriate duration not exceeding six months, which may be extended for an additional period not exceeding three months. This on the basis that remote telecommuting does not constitute a change of official duty station and that authorization for telecommuting arrangements may be given with guidance from the Office of Human Resources.⁴⁴

57. Section 3.12 of ST/SGB/2019/3 states that “the payment of any benefits and entitlements that require the physical presence of staff members at their official duty station (...) shall be suspended for the period that staff members are telecommuting from outside of their official duty station”. This is repeated in paragraph 5 of ST/IC/2019/15, which in similar terms states that when authorized to telecommute outside of the official duty station, the benefits and entitlements that require physical presence at the official duty station “shall be suspended”.

58. In issue is the interpretation to be given to paragraph 5(c) of ST/IC/2019/15, in terms of which, if a staff member telecommutes from his or her home country “for more than two thirds of the academic year, education grant and special education grant will be prorated in accordance with section 6.1 (a) of ST/AI/2018/1/Rev.1 and section 8 of [Administrative Instruction] ST/AI/2018/2 [Special education grant and related benefit for children with a disability], respectively”. In terms of Section 6.1(a) of ST/AI/2018/1/Rev.1, the “amount payable to a staff member for the education

⁴² *Ozturk v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-892, paras. 29-35.

⁴³ The eligibility of a staff member to receive an education grant is repeated in Section 2 of ST/AI/2018/1/Rev.1.

⁴⁴ Section 2.1(h) of ST/SGB/2019/3.

grant, the reimbursement of capital assessment fees and boarding assistance shall be prorated” according to conditions, where the period of attendance or boarding at an educational institution covers less than two thirds of the academic year. Section B.8 of the applicable standard terms of the telecommuting agreement laid out in the Annex to ST/IC/2019/15, provides further clarification that the payment of any benefits and entitlements that require the physical presence of the staff member at his or her official duty station “shall be suspended or adjusted” for the period that the staff member is telecommuting from outside his or her official duty station.

59. Mr. Bah contends that the UNDT erred on a question of fact when it found on a preponderance of evidence that he had not proved that he was provided with erroneous information in January or February 2021, before two thirds of the school year had passed, in a call with the HRP. In *Nguyen*,⁴⁵ it was stated that where a staff member claims to have acted upon a misrepresentation to his or her prejudice, such a claim is akin to one of estoppel, with the burden resting on the staff member to produce evidence that the misrepresentation was made and acted upon to his or her prejudice. We are satisfied that there is no evidence of such misrepresentation having been made on the facts of this matter when, at best for Mr. Bah, it was not clear how the applicable provisions would be interpreted in light of the Covid-19 pandemic and the decision taken by the staff member to work away from his or her duty station. It follows that it is not open to Mr. Bah to rely on a defence that the Administration be estopped from relying on the applicable provisions in its interpretation of the circumstances under which the education grant would be paid.

60. Equally, given the jurisprudence of this Tribunal that for a legitimate expectation to arise, information must usually have been conveyed in writing, and with no evidence of such written information having been conveyed to Mr. Bah, it is not open to him to rely on his holding a legitimate expectation that payment of the education grant be made.⁴⁶

61. As to the proposition that the doctrine of *contra proferentem* should be applied against the Administration in this matter, we accept the findings of the UNDT in this regard and find that the doctrine does not find application to favour Mr. Bah on the facts of this matter. This is so in that an interpretation of the relevant instruments indicates that the payment of the

⁴⁵ *Van Khanh Nguyen v. Secretary-General of the International Seabed Authority*, Judgment No. 2023-UNAT-1347, paras. 147-148.

⁴⁶ *Marius Mihail Russo-Got v. Secretary-General of the United Nations*, Judgment No. 2021-UNAT-1090, para. 30. See also *Abdeljalil v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2019-UNAT-960, para. 40.

educational grant required the physical presence of the staff member at their official duty station, with such payment to be suspended or adjusted for the period that the staff member was telecommuting from outside the official duty station.

62. We are satisfied that the UNDT properly had regard to the evidence before it in arriving at the factual finding that Mr. Bah had not met the burden required to show the existence of the misrepresentation alleged and his reliance on such misrepresentation to his prejudice. Mr. Bah could not recall whether the call was made on MS Teams or to the HRP's private phone when his common method of communication with the HRP was e-mail or MS Teams. No reference to the call was found in e-mail exchanges between Mr. Bah and the HRP, nor was a record of such a call found in HRP's MS Teams records. The HRP was working from home at the time and her evidence was that she exclusively used MS Teams to conduct business and never used her private phone for work purposes. Mr. Bah used a temporary phone number when in the United States, as a result of which it was not possible to retrieve calls placed from that number. When Mr. Bah was informed that the education grant was to be recovered, he made no reference to the call with the HRP, with the first mention of it being in his request for management evaluation. E-mails sent by the HRP on 6 May 2021 and 2 July 2021 conveyed her anticipation of a new FWA policy, which led the UNDT to find that "the tenor of these communications belies the supposition that [the HRP] would have confirmed the content of the new policy already in January or February 2021" and that it was improbable that the call alleged by Mr. Bah had taken place. We are satisfied that Mr. Bah failed to meet the burden which rested on him and that in finding as much, the UNDT did not err.

63. In relation to Mr. Bah's submission that his application should have been granted by the UNDT on account of *force majeure*, given the Covid-19 pandemic, we are also satisfied that the UNDT did not err in rejecting such submission. In *Yakovlev*,⁴⁷ it was found that *force majeure* applies to events which are considered unpredictable and uncontrollable, rendering the performance of obligations impossible, usually due to causes that are outside individual control, and that could not be avoided in good faith and through the exercise of due care. We are not satisfied that a reliance on *force majeure* is available to Mr. Bah in the circumstances of this matter, given his calculated decision to remain in the United States for an extended period.

⁴⁷ *Yakovlev v. Secretary-General of the United Nations*, Judgment No. UNDT/2014/040 (not appealed), para. 19.

64. The UNDT recognized that Mr. Bah’s family situation was complex but noted that on the one hand he claimed that it was impossible for him to return to his duty station as he had to remain in the United States to take care of his youngest son and that returning to his duty station would have deprived his youngest son of access to education due to the closure of his school in Lebanon. Yet, on the other hand, Mr. Bah maintained that relying on the information provided by the HRO, he had made the “calculated decision” to remain in the United States on FWA, whereas he could have returned to work or used his accumulated annual leave instead. The UNDT cannot be faulted for finding that in light of these contradictory reasons and having regard to the facts before it, Mr. Bah’s return to his duty station was not prevented by *force majeure*.

65. Since no evidence proved that the Administration had waived the two-thirds benchmark or modified the conditions in paragraph 5(c) of ST/IC/2019/15 or that incorrect information had been supplied by the Administration to Mr. Bah, we are satisfied further that the UNDT did not err in finding that Mr. Bah had failed to establish a legitimate expectation to the payment he sought. We accept and share the concern of the UNDT that it was “regrettable” that Mr. Bah was not provided with “unambiguous and correct information on the extent of proration” by the Administration. However, what is clear from the facts is that, with the position unclear, Mr. Bah took the risk of deciding to remain in the United States on FWA.

66. Furthermore, we find that the UNDT correctly interpreted paragraph 5(c) of ST/IC/2019/15 as providing a reasonable and fair concession for staff members on FWA, one more favourable than Section 3.12 of ST/SGB/2019/3.

67. Interpretation is the process of attributing meaning to the words used in a document or provision. The starting point is to consider the words used in a document, including their grammar and syntax, having regard to their context in the document as a whole and the purpose of the provision and the circumstances in which it came into existence. Where more than one meaning of a provision is possible, each possibility must be weighed in light of all these factors, with a sensible meaning to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.⁴⁸

⁴⁸ See also *Andrey Chernov v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1320, para. 64 (internal citation omitted).

68. Having regard to the words used in paragraph 5(c) of ST/IC/2019/15, considered in their context of the Information Circular, as well as Staff Regulation 3.2, Staff Rule 3.9 and ST/SGB/2019/3, the purpose of the provision and the circumstances in which it was adopted, we find that the UNDT correctly concluded that the provision did not permit an interpretation that a staff member may remain eligible for the education grant where he or she remains in his or her home country for the whole duration of the school year. To find differently would be to contravene a proper interpretation of the nature and purpose of the education grant, which is to provide eligible internationally recruited staff members serving outside their home country with financial support to cover part of the cost of educating a child in full-time attendance at an educational institution.

69. This matter is distinguishable on the facts from *Wang*,⁴⁹ in which the staff member specifically inquired about and was advised on his eligibility for an education grant on two occasions prior to taking up his post. In that matter, Mr. Wang was found to hold an expectation that the assurance given with regard to the education grant would be honored, as a result of which he was entitled to receive such grant. It is also distinguishable from the decision in *Castelli*,⁵⁰ in which a staff member was found to have acted in good faith and was therefore entitled to compensation for the damage suffered as a result of the Administration's error.

70. Given the finding that Mr. Bah had not reasonably and detrimentally relied on incorrect information provided by the Administration, the UNDT correctly found there to be no basis on which to hold the Secretary-General responsible for any pecuniary damages sustained by him, including the depreciation of the cars purchased by Mr. Bah, their subsequent sale or other financial decisions made by him. Although Mr. Bah sought an award of moral damages before the UNDT, his claim in this respect was not considered by the UNDT, with that failure not an issue on appeal before this Tribunal.

71. Since we are satisfied that the UNDT committed no errors of either fact or law in arriving at the decision it did, nor failed to exercise or exceeded its jurisdiction or competence, the appeal cannot succeed. There is therefore no basis on which to justify an award of costs against the Secretary-General, as sought by Mr. Bah. There is no evidence of an abuse of process

⁴⁹ *Wang* Judgment, *op. cit.*, paras. 63-69.

⁵⁰ *Castelli v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-037, para. 26.

or violation of any code of conduct by counsel which would justify an award of costs under Article 9(2) of the Statute of this Tribunal.⁵¹

Judgment

72. Mr. Bah's appeal is dismissed, and Judgment No. UNDT/2023/011 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 22nd day of March 2024 in New York, United States.

(Signed)

Judge Savage, Presiding

(Signed)

Judge Ziadé

(Signed)

Judge Colgan

Judgment published and entered into the Register on this 8th day of May 2024 in New York, United States.

(Signed)

Juliet E. Johnson, Registrar

⁵¹ See, for example, *Afm Badrul Alam v. Secretary-General of the United Nations*, Judgment No. 2023-UNAT-1315, para. 33.